

HOSPITALITYLAWYER.COM PRESENTS:

**THE** **HOSPITALITY LAW**  
**CONFERENCE**

FOCUSING ON LEGAL, SAFETY & SECURITY SOLUTIONS

FEBRUARY 10th - 12th, 2014

**DECIPHERING GOVERNMENT  
REGULATIONS (ACA, ADA, WARN  
ACT)  
AND THEIR IMPACT ON  
MANAGEMENT  
AGREEMENTS**

Kara M. Maciel, Epstein Becker Green

Dan Salemi, Franczek Radelet P.C.



## **Dan Salemi – Partner**

- represents clients in all areas of employee benefits, executive compensation, and plan investments
- significant experience negotiating employment agreements on behalf of employers and executives
- advises clients on issues related to the management and investment of benefit plan assets



## **KARA M. MACIEL – Member**

- Chair of the firm's Hospitality Employment and Labor Law Outreach (HELLO) Subpractice Group
- Represents employers in representation and unfair labor practice proceedings
- Counsels and defends employers in all aspects of the employment relationship and compliance with employment laws

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# KARA M. MACIEL

MEMBER OF FIRM AT EPSTEIN BECKER GREEN

- **Counsels and defends hotel owners and operators in all aspects of the employment relationship and compliance with employment laws, including discrimination, harassment, and retaliation claims; employee handbooks; and employment and severance agreements**
- **Defends hotel chains in class actions alleging wage and hour issues such as tip pooling and service charge distributions**
- **Counsels and defends hotel owners and operators in lawsuits alleging discrimination from accessibility barriers by guests under Title III of the ADA**

# DAN SALEMI

PARTNER AT FRANECZK RADELET

- Counsels employers (including those in the hotel and hospitality industry) on all issues related to health, retirement, fringe benefit and executive compensation arrangements
- Counsels employers and health plans on Affordable Care Act compliance
- Advises unionized employers on employee benefits issues that arise in collective bargaining and with respect to multiemployer (union) plans
- Represents employers and benefit plans in benefits and fiduciary-related litigation and disputes

# AGENDA

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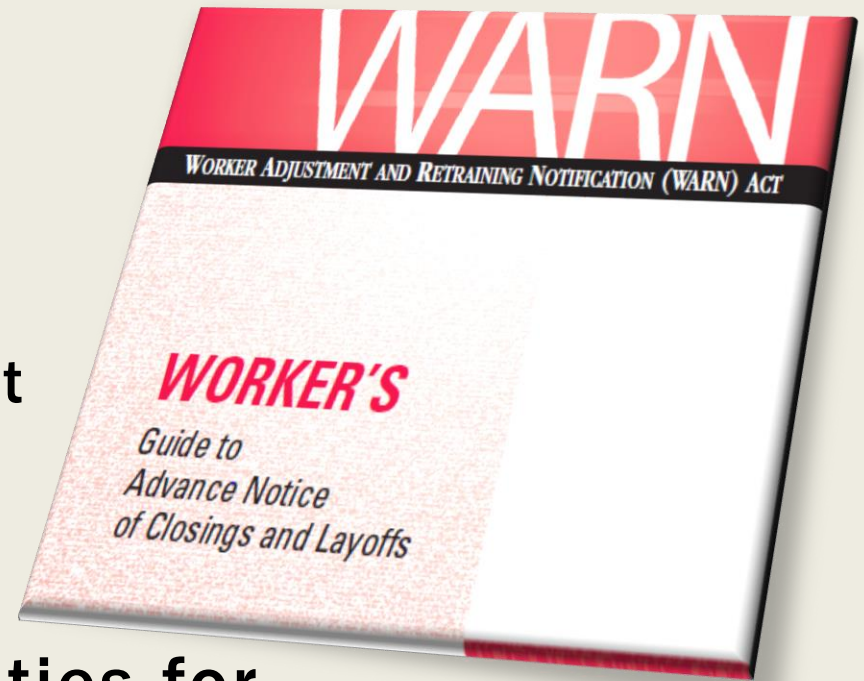
**Worker Adjustment and Relocation  
Notification Act**  
**Americans With Disabilities Act**



**Affordable Healthcare Act**

# OVERVIEW OF WARN ACT

- Provide 60 days' notice of “plant closing” or “mass layoff” to:
  - Affected employees
  - Union representative
  - State dislocated worker unit
  - Chief elected official of the local government
- Civil liabilities and penalties for not providing advance notice



# DOES WARN APPLY?

**Does the Hotel meet the threshold to be covered under WARN?**

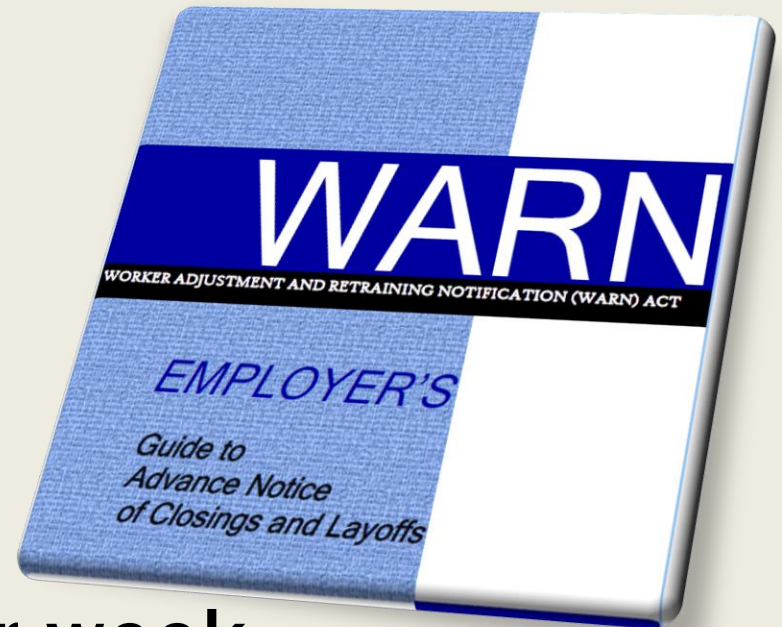
**Has the Hotel displaced 50 or more full-time employees?**

**Is the termination event a qualified employment loss?**



# COVERED HOTELS

- **WARN broadly applies to Hotels with:**
  - **100 or more full-time employees; or**
  - **100 or more (full-time & part-time) employees who collectively work at least 4,000 hours per week**
    - **Overtime excluded**



# THRESHOLD REQUIREMENT

- **Count number of employees on date notice required to be given**

## Count

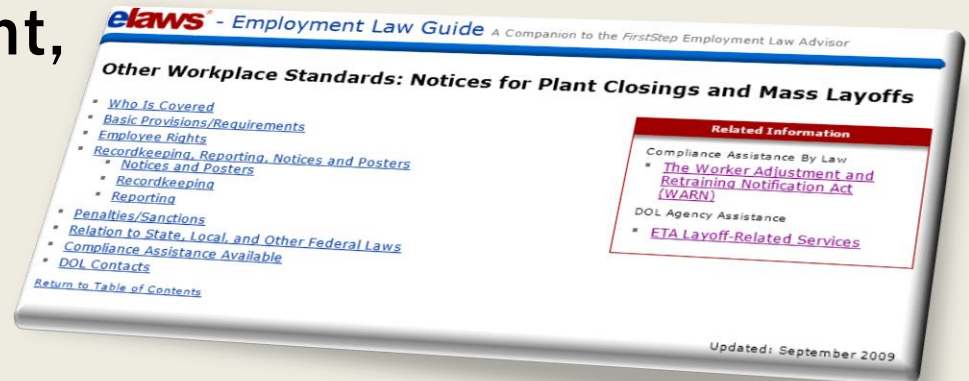
- Full-time employees
- Temporary employees
- Workers on temporary layoff or leave who reasonably expect to be recalled

## Do Not Count

- Employees who work fewer than 20 hours/week
- Full-time employees who have worked less than 6 months
- Seasonal employees

# THRESHOLD REQUIREMENT

- **Part-time employees work:**
  - **Fewer than 6 of 12 months prior to date notice required (e.g., new hires, seasonal workers); or**
  - **Fewer than 20 hours per week**
  - **Average of previous 90 days or the worker's period of employment, whichever is shorter**



# “EMPLOYMENT LOSS”

- WARN only applies when 50+ employees experience an employment loss
- Employment loss includes 3 *exclusive* situations:
  1. Termination of employment (other than discharge for cause, voluntary departure, or retirement);
  2. Layoff exceeding 6 months from date of commencement; or
  3. Reduction in work hours of more than 50% during each month of any 6-month period



# PLANT CLOSINGS

- **Permanent or temporary shutdown of:**
  - **Single site of employment; or**
  - **One or more facilities or operating units within single site of employment**
  
- **Shutdown must result in employment loss at single site for 50 or more full-time employees during any 30-day period**

**Hotels cannot evade WARN notice requirements by laying off employees *before* announcing a plant closing**

# MASS LAYOFFS

- Reduction in force that results in employment loss at single site of employment during any 30-day period for:
  - At least 50 employees who represent 33% or more of total workforce; or
  - At least 500 employees





# WARN APPLIED RETROACTIVELY

- **WARN may apply retroactively even if hotel's initial terminations are not a qualified termination event**
- ***Small group layoffs***
  - **Two or more groups of employees suffer employment losses at a specific site of employment during a 90-day period and each group alone not meet the threshold WARN levels, the groups can be aggregated and treated as a single event**
- ***Extension of six-month layoff***
  - **If hotel announces a 6 month or less layoff that does not trigger WARN BUT subsequently extends the layoffs past six months, then hotel must give WARN notice**

# JOB TRANSFERS

- **Plant closing or mass layoff NOT an employment loss, if before the event:**
  - **Hotel offers to transfer an employee to another site within reasonable commuting distance and not more than 6-month break in employment occurs; or**
  - **Employee accepts a transfer to another site (regardless of distance) with no more than 6-month break in employment and within 30 days of the offer or the closing or layoff (whichever is later)**
- **Closing or layoff must stem from relocation or consolidation of part or all of a hotel's business**



# WHO GIVES NOTICE IN EVENT OF SHUTDOWN?

- Managing entity bears primary responsibility for giving WARN notices
  - Does *not* matter that owner decides to shutdown the hotel
- Notwithstanding, WARN and its regulations require employers to err on side of giving notice *regardless* if legally required to do so



# SALE OF BUSINESS

## Seller

- Provide notice of plant closing or mass layoff up to and including effective date of sale

## Purchaser

- Provide notice of plant closing or mass layoff after effective date of sale

# CONTENT OF NOTICES

- **Notice to non-unionized employees**
  - State date closing or layoff expected to occur
  - State date worker will be discharged
  - State if closing or layoff expected to be temporary or permanent and whether entire Hotel is to be closed
  - Describe bumping (seniority) or transfer rights
  - Identify name, address, and telephone number of a Hotel official to contact for further information
  - Write notice in language that individual affected employee understands



# EXEMPTIONS TO NOTICE REQUIREMENT

- Hotels need **NOT** give notice when:
  - Plant closing is of a temporary facility
  - Plant closing due to strike or lockout during labor negotiations
  - Plant closing or mass layoff is result of completing particular project
    - Applies only if workers hired knowing their employment was limited to project's duration
- “Economic strikers” who have been permanently replaced *not* entitled to notice

Hotels do not avoid WARN notice requirements by labeling an ongoing project or undertaking as “temporary”

# EXCEPTIONS TO NOTIFICATION PERIOD

## Faltering Company

- Applies only to plant closings
- Hotel seeks new capital or business to stay open and giving notice would ruin that opportunity

## Unforeseeable Business Circumstances

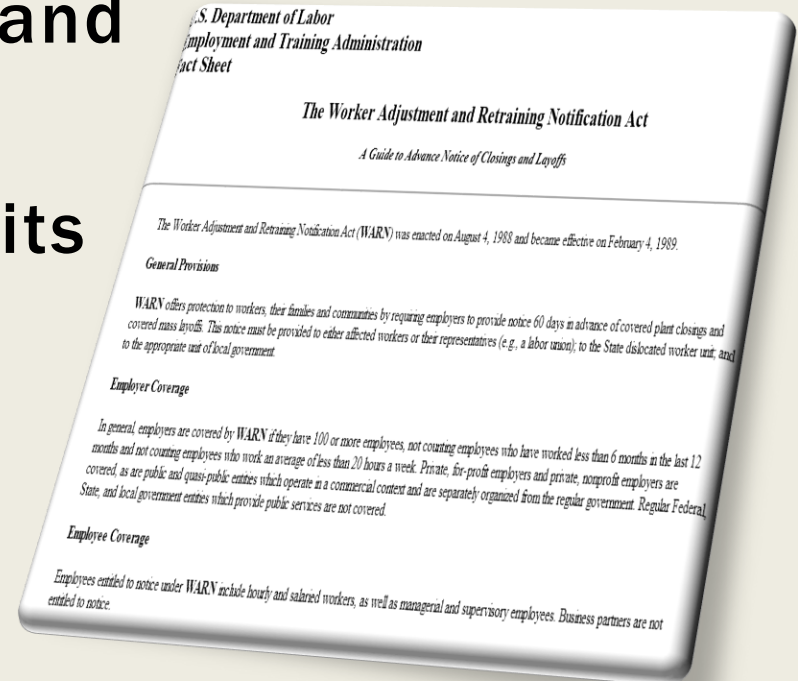
- Applies to plant closings & mass layoffs
- Business circumstances that caused closing or layoff were not reasonably foreseeable at time notice required

## Natural Disaster

- Applies to plant closings & mass loss
- Where a closing or layoff direct result of natural disaster (e.g., flood, earthquake)

# ENFORCEMENT AND PENALTIES

- Civil recovery in federal courts for statutory damages, attorneys' fees, and civil penalties
- Unpaid back pay and benefits for period up to 60 days
- Civil penalties up to \$500 per day not give notice up to 60 days
  - Avoid penalty: Pay full amount of liability to displaced employees within 3 weeks after closing or layoff



# “MINI-WARN” LAWS

State	Coverage and Requirements	Days' Notice
California	Hotels with 75 or more “persons” within the last 12 months	60
Hawaii	Hotels with as few as 50 employees but limited to layoffs caused by sales of businesses or relocations of operation to out of state	60
Illinois	Hotels with as few as 75 employees and layoffs of as few as 25 employees	60
Maine	Hotels with 100+ workers during 12-month period preceding relocation or termination of operations; severance pay to employees; notice to state government	60
New Jersey	Hotels with as few as 50 employees and severance pay if proper notice not given	60
New York	Hotels with at least 50 full-time employees and layoffs of as few as 25 employees	90
Tennessee	Hotels with 50-99 full-time employees and layoffs of 50 or more employees fired within 3-month period	60
Virgin Islands	Hotels with as few as 10 employees	90



# MANAGEMENT AGREEMENTS

## ■ Managers should:

- Allocate each party's responsibilities for WARN notice for plant closings, mass layoffs, or sale of the hotel
- Seek protection from owner against WARN liability for permanent shutdowns
  - Reserve sufficient time to comply with WARN
- Seek indemnification against WARN liability if owner gives insufficient notice to comply



# OVERVIEW OF TITLE III OF ADA

- No individual may be discriminated against on basis of disability in places of public accommodation
  - Right to full and equal enjoyment of goods, services, facilities, or accommodations at hotels, spas, fitness centers, golf clubs, restaurants, etc.
- Obligations of hotels under Title III:
  - Make goods and services available to individuals with disabilities on equal basis with general public
  - Make goods and services usable to individuals with disabilities
  - Remove architectural and structural barriers in existing facilities where readily achievable

**Hotel owners  
and managers  
*jointly and  
severally liable*  
for Title III  
non-compliance**

# 2010 ADA STANDARDS

- **2010 ADA standards became effective in March 2012**
- **Over 15,500 ADA lawsuits filed nationwide**
  - **Most in California, Florida, and New York**
- **DOJ's civil penalties increased to:**
  - **\$55,000 per violation; and**
  - **\$110,000 for subsequent violations**



# 2010 ADA STANDARDS

## Revisions to Policies and Procedures

- Service animals
- Mobility devices
- Reservations for accessible rooms
- Effective communication to individuals with disabilities

## Revisions to Architectural Requirements

- Accessible entrances
- Parking
- Swimming pools, wading pools, spas, saunas, and steam rooms
- Exercise rooms
- ATM's

# READILY ACHIEVABLE STANDARD

- **Pre-1992 unaltered buildings**
  - Barriers must be removed to extent *readily achievable* to do so
- **Readily achievable = “Easily accomplishable without much difficulty or expense”**
  - Relative to size and financial resources of the hotel



# MAXIMUM EXTENT POSSIBLE

- Alterations to hotels must **FULLY** comply with 2010 ADA Standards to *maximum extent possible*
  - “Maximum extent possible” applies only to occasional case where nature of existing hotel makes virtually impossible to comply fully with applicable ADA Standards through planned alteration
- Historical buildings or facilities
  - Alterations to buildings designated as historic under state or local law must comply to maximum extent feasible
  - *Unless* compliance threaten to destroy historical nature of building



# STEPS FOR MANAGERS TO COMPLY WITH ADA

- Closely review areas that general public easily sees and utilizes
  - Parking lot
  - Entrance
  - Lobby
  - Service counters
  - Dining/bar areas
  - Public bathrooms
- Modify policies so disabled guests have equal opportunity to enjoy goods and services

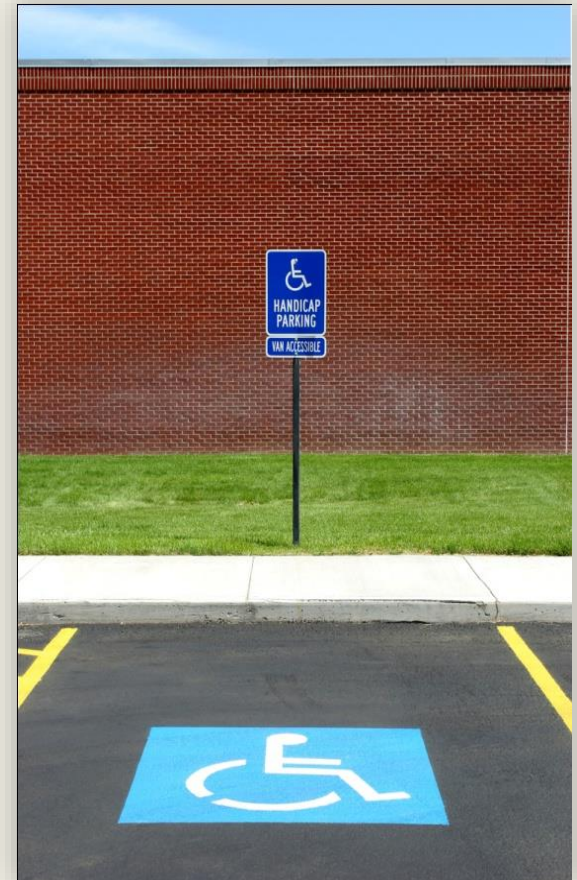




# STEPS TO PREVENT “DRIVE BY” LAWSUITS & DOJ INVESTIGATIONS

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- **Train employees on ADA compliance**
  - Familiarity with ADA standards ensures compliance and avoids discrimination lawsuits
- **Conduct regular inspections of property with legal counsel**
  - Attorney-client privilege protection
  - *Remember* owners and operators jointly and severally liable for ADA non-compliance



# RECOMMENDATIONS FOR MANAGEMENT AGREEMENTS

- **Letter of intent to manage property**
  - Note that due diligence will include survey of facilities
- **Due diligence**
  - Conduct on-site surveys of facilities early in process
  - Collect policies, procedures, construction history, prior ADA surveyor reviews, and historical status property
  - Determine if hotel been target of “drive-by” plaintiffs and government enforcement agencies
- **Indemnification provisions**
- **Representations and warranties**



# RECOMMENDATIONS FOR MANAGEMENT AGREEMENTS

- **Allocate owners' and managers' responsibilities**
  - **Owner:** Financially responsible to pay for remediation and costs of construction
  - **Manager:** Duty defend lawsuit and investigate claims
- **Negotiate involvement and financial responsibility of manager for ADA compliance**
- **Negotiate hotel owner's involvement in defense and litigation strategy of any ADA lawsuits**

# THE AFFORDABLE CARE ACT

- **The ACA Framework**
  - **The Individual Mandate**
  - **Health Care Exchanges (the “Marketplace”)**
  - **Employer Share Responsibility (“Pay or Play”) Rules**
- **Pay or Play Rules**
  - **What does it mean to “pay”?**
  - **What does it mean to “play”?**
- **Management agreement considerations**
  - **Strategic considerations for hospitality employers**

# THE ACA FRAMEWORK

- **Patient Protection and Affordable Care Act of 2010**
- **Intended to provide all Americans with access to affordable health care coverage through:**
  - **Individual Mandate**
  - **Health Care Exchanges**
    - **Expansion of Medicare and Medicaid**
  - **Expansion of Employer Coverage**

# THE ACA FRAMEWORK

- Designed to deliver health care to more people, at a lower overall cost.
- How?
  - The **individual mandate** is designed to promote “shared responsibility” and remove “free riders” from the health insurance market.
  - The **exchanges** are a health insurance marketplace that facilitates competition and improves choice by consumers of health care (both individuals and small businesses).
  - The **employer shared responsibility (“pay or play”)** rules, which require employers to offer certain coverage to certain employees, or pay a tax to subsidize exchange-based coverage that certain employees choose to obtain.

# THE INDIVIDUAL MANDATE

- In general, everyone must now have health insurance or pay a tax.
  
- Tax = Greater of the following:
  - Per Person: \$95 (2014); \$325 (2015); \$695 (2016+)

OR

  - Income: 1% (2014); 2% (2015); 2.5% (2016+)
  
- Why does this matter to hospitality employers?
  - Lower paid employees now have a greater incentive to obtain health insurance, which will likely be through an employer's plan or through an exchange. Lower paid employees who obtain exchange-based insurance coverage will trigger taxes for hospitality employers who do not or cannot offer affordable coverage.

# HEALTHCARE EXCHANGES

- Highly regulated “qualified health plans” will be available on the exchanges:
  - must be issued by licensed health insurance issuer or Consumer Operated and Oriented Plan (CO-OP);
  - must cover “essential health benefits” based on what a typical employer plan would cover;
  - must satisfy certain cost sharing limits;
  - premiums can be adjusted based on age (3 to 1), tobacco use (1.5 to 1), rating area, and individual/family coverage only;
  - must have four benefit categories (bronze, silver, gold and platinum) plus “young invincible” category.

# EXCHANGE SUBSIDIES

- Subsidies are available those who purchase coverage on an exchange and whose household income is between 100% and 400% of federal poverty level
- Subsidies are not available to anyone who:
  - is eligible for public plans (e.g., Medicaid); or
  - is eligible for affordable, minimum value employer coverage; or
  - enrolls in employer coverage, regardless of whether it is affordable or meets the minimum value requirement.
- Whether a state chooses to expand Medicaid to 133% of federal poverty level is therefore important for hospitality employers.

# FEDERAL POVERTY LEVEL GUIDELINES FOR 2014

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Persons in family	Poverty Guideline	133%	400%
1	\$11,490.00	\$15,281.70	\$45,960.00
2	\$15,510.00	\$20,628.30	\$62,040.00
3	\$19,530.00	\$25,974.90	\$78,120.00
4	\$23,550.00	\$31,321.50	\$94,200.00
5	\$27,570.00	\$36,668.10	\$110,280.00
6	\$31,590.00	\$42,014.70	\$126,360.00
7	\$35,610.00	\$47,361.30	\$142,440.00
8	\$39,630.00	\$52,707.90	\$158,520.00



# EMPLOYER SHARED RESPONSIBILITY (“PAY OR PLAY”) RULES—IN GENERAL

- No requirement to provide health insurance – but if you don’t provide it, or your coverage doesn’t provide minimum value or is unaffordable, you are assessed a tax.
- Effective date delayed until 2015.
- Applies to employers with 50 or more full-time employees (including all full-time equivalents).
  - All employees of a controlled group of employers are aggregated to determine if rules apply to controlled group as a whole.
  - But taxes are assessed at the individual employer level. So different employers in the same controlled group can take different approaches (some can pay, some can play).

# “PAY”

- One of two different taxes may apply: a big one (the “Headcount Tax”) or a potentially smaller one (the “Individualized Tax”)
- Failure to Offer Any Coverage = “Headcount Tax”
  - If you fail to offer any coverage
  - to “substantially all” of your “full-time employees”
  - you are assessed a “headcount tax” of \$2,000 per year for each full-time employee

# “PAY”—HEADCOUNT TAX

- Headcount Tax (Example 1):
  - Employer has 200 full-time employees
  - Employer doesn't offer coverage to anyone
  - Employer's Headcount Tax = **\$340,000** (170 x \$2,000)
    - First 30 full-time employees are “free”

# “PAY”—HEADCOUNT TAX

- Headcount Tax (Example 2):
  - Employer has 200 full-time employees
  - Employer offers coverage to 189 full-time employees
  - Employer's Headcount Tax = **\$340,000** (170 x \$2,000)
    - First 30 full-time employees are “free”
  - But also consider:
    - Employer's Cost of Providing Health Insurance to 189 employees = **\$1,512,000** (189 x \$8,000)

# “PAY”—INDIVIDUALIZED TAX

- **Employer Offers Coverage, but the Coverage Fails to Meet ACA’s Conditions = “Individualized Tax”**
  - If you offer coverage to substantially all of your full-time employees,
  - but that coverage is either (1) unaffordable; OR (2) that coverage doesn’t provide minimum value,
  - AND a full-time employee opts out of your coverage,
  - AND that full-time employee is eligible for a premium tax credit (household income between 100% and 400% of federal poverty level),
  - then you are assessed an individual tax of \$3,000 per year for each full-time employee receiving a premium tax credit.

# “PAY”—INDIVIDUALIZED TAX

- Individualized Tax (Example):
  - Employer has 200 full-time employees and offers coverage to all of them
  - Coverage is “unaffordable” for 40 employees
  - Of those 40 employees, 20 opt-out of the employer’s health plan
  - Of those 20 employees, 10 go to the exchange
  - Of those 10 employees, 5 are eligible for premium tax credits
  - Individualized Tax = **\$15,000** ( $\$3,000 \times 5$ )

# “PLAY”

- Offer affordable, minimum value coverage to all of your full-time employees
- Full-time employees: individuals who work, on average, at least 30 hours per week.
- Methods of determining full-time status:
  - For ongoing employees and new part-time or variable hour (including seasonal) employees:
    - Measurement period; administrative period; stability period
  - For new employees who are expected to work full-time upon hire, can only apply a 3 month waiting period

# MANAGEMENT AGREEMENT CONSIDERATIONS

- The employer (the operator) is responsible for compliance
- Unless an owner is an employer (not always clear), owners do not have responsibility for ACA compliance
- In a management agreement, should make clear:
  - Who is the employer?
  - Who will be responsible for reporting and compliance with respect to employees (the operator)?
  - To avoid unintended consequences if there is a joint employer issue, consider including indemnification by the intended employer (the operator).
- In practice, owners (and operators where there is more than one) should carefully consider their activities so as to avoid being a joint employer.



# PAY OR PLAY—STRATEGIC CONSIDERATIONS FOR HOSPITALITY EMPLOYERS

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- No one-size-fits-all approach.
- Determine methodology for counting full-time employees. Be sure to address seasonal employees.
- Determine which employees are likely to trigger individualized taxes for unaffordable coverage (those between 100 and 400% of federal poverty level), and whether it makes financial sense to try to avoid any individualized taxes by offering affordable coverage to these employees.
- If the potential tax for “unaffordable” coverage is minimal, don’t take costly and aggressive actions to avoid a minimal amount of exposure.

# PAY OR PLAY—STRATEGIC CONSIDERATIONS FOR HOSPITALITY EMPLOYERS

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- Consider taking advantage of the ACA's flexibility with respect to part-time employees (by reducing hours) and dependents (by pricing dependent coverage such that it makes up for the inexpensive/affordable single coverage).
- If your employees are in a multiemployer (union) health plan, be aware of waiting periods longer than 90 days (which are prohibited by the ACA, and an issue for contributing employers). Confirm that the union's plan is addressing this issue.
- Be aware of union negotiation requirements if union employees are in your plan. Where union employees are in your plan, most plan changes will need to be bargained.
- Start planning now. Tomorrow is too late.

# QUESTIONS?



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