

# Providing subsidized student health insurance to graduate students under the Affordable Care Act

12 April 2016

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# Agenda

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- ▶ Overview
- ▶ Affordable Care Act (ACA) treatment of student health plans
- ▶ ACA guidance affecting subsidized student health insurance
- ▶ Transition relief for subsidized student health insurance
- ▶ Key questions and compliance alternatives
- ▶ Possible administrative and legislative solutions

# Overview

## ACA and student health plans



# ACA provisions raise long-standing questions

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- ▶ The ACA raised long-standing questions about whether a student is also an employee and, if so, when:
  - ▶ How do the individual and employer mandates apply?
  - ▶ How does the ACA treat student health plans?
  - ▶ Can students go to the exchanges and receive a tax credit?
  - ▶ Can university subsidize graduate student health plan?

# Basic employer coverage rules

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- ▶ Large employers may be subject to an excise tax if at least one *full-time employee*\* whose household income is between 100% and 400% of the federal poverty level receives a premium tax credit for Exchange coverage and an employer either:

Fails to offer coverage to *full-time employees* and their dependents

or

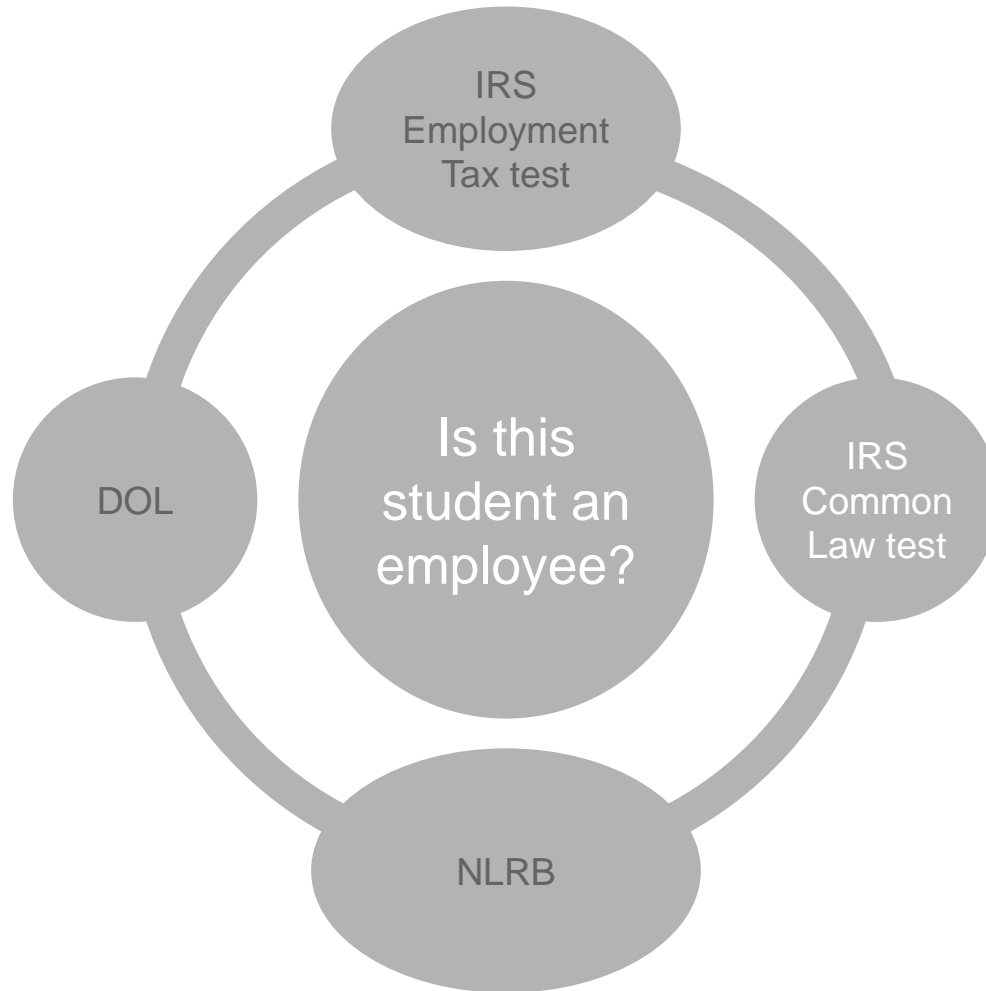
Offers coverage to *full-time employees* that does not meet the law's affordability or minimum value standards

\* An "employee" is defined under the common-law rules.

\* A "full-time employee" is an employee who works on average 30 hours or more per week.

# Is the student an employee?

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# Regulatory guidance on student/employee status

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- ▶ **Department of Labor (DOL):** Fair Labor Standards Act (FLSA) Operations Handbook states that a *student will not be considered an employee* even if payment is received for work, provided the activities are educational. Graduate students engaged in research are not employees.
- ▶ **National Relations Labor Board (NLRB):** *Brown Univ. v. Int'l Union, et al*, 342 NLRB 483 (2004) found that a university's relationship with graduate students is primarily educational; *graduate students at private institutions should not be treated as employees*. (This position is being challenged in the Columbia University and New School matters.)
- ▶ **Internal Revenue Service (IRS):** Employment tax (Federal Insurance Contributions Act (FICA)) guidance, based on a statutory exception, states that *students are not employees* if they are enrolled and taking classes, work is incidental to study, and they are not employed 40 or more hours/week etc.

# Who is a common law employee?

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- ▶ Facts and circumstances test:
  - ▶ Are the graduate students who provide teaching, research or other services considered employees?
  - ▶ IRS 20-factor test—behavioral control, financial control and type of relationship
  - ▶ Bottom line—does the university have the right to control the relationship and direct the working conditions?
- ▶ If the graduate student is considered a common law employee, the IRS would treat that student as an employee for purposes ACA purposes, even if not considered a “full-time employee.”

# ACA

## Treatment of student health plans



# ACA treatment of student health insurance plans

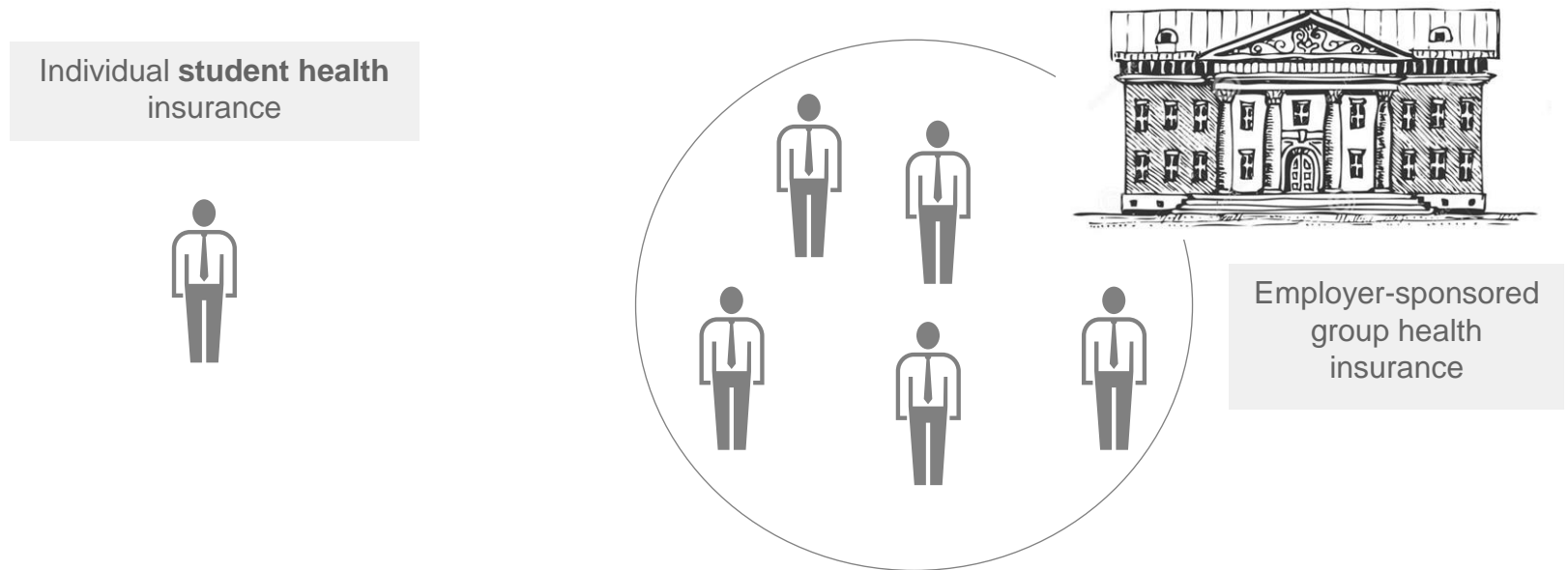
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- ▶ The ACA reinforces the importance of student health coverage. Section 1560(c) provides:
  - ▶ “Nothing in this title ... shall be construed to prohibit an institution of higher education ... from offering a student health insurance plan, to the extent that such requirement is otherwise permitted under applicable Federal, State or local law.”

# HHS regulations

## Student health plans are individual coverage

- ▶ The Department of Health and Human Services (HHS) final regulations treat insured student health coverage as a type of **individual market coverage** (see HHS final regulations, 45 CFR 147.145).



# Self-funded student health plans

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- ▶ Self-funded health plans are not regulated by HHS; however, they may be regulated by a state.
- ▶ Self-insured student health plans are not considered individual market coverage.
- ▶ Universities that sponsor self-funded student health plans must apply annually to HHS to receive approval that the plan constitutes minimum essential coverage; application must include:
  - ▶ Explanation that coverage meets “substantially all” ACA requirements; certification of compliance by appropriate individual

# ACA guidance

## Impact on subsidized student health insurance



# ACA guidance on payment of employee health insurance coverage

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- ▶ Employer-sponsored health reimbursement plans (HRAs) and employer payment plans (EPPs) that **pay or reimburse** *common law* employees for **all or some of the premium** of an **individual market plan** violate the ACA insurance market reform rules. (IRS Notices 2013–51, 2015–17 and 2015–87, joined by DOL and HHS):
  - ▶ applies to all employers that sponsor an HRA or EPP, unless the arrangement is integrated with another group health plan.
  - ▶ Employers find this rule to be complicated and lacking in logic.



# Excise tax penalty for failure to comply with ACA market reforms

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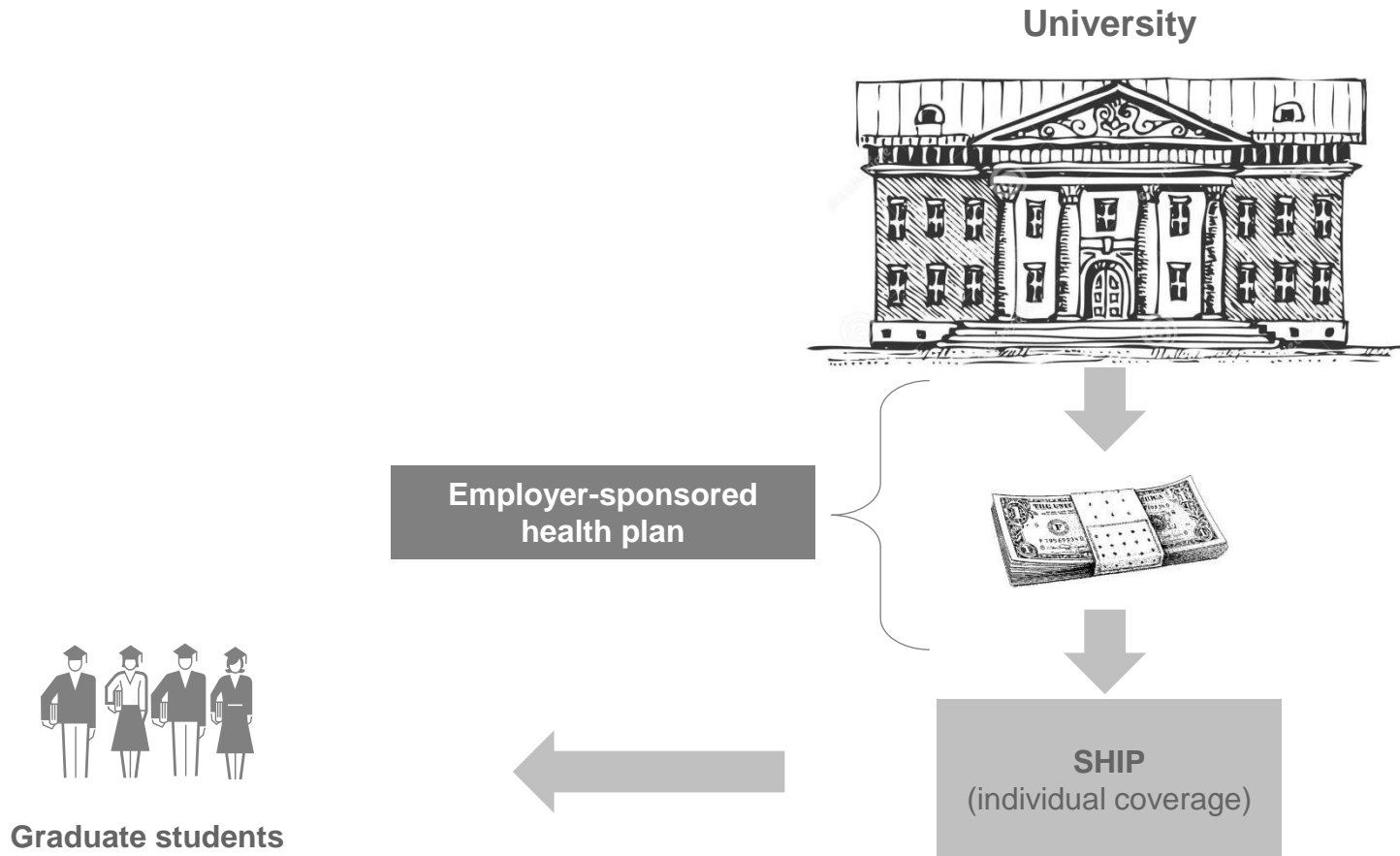


# What does this mean for higher education institutions?

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- ▶ If the IRS views a graduate student providing teaching, research or other services as an institution's common law employee, the **institution's premium reduction** health care arrangement could be considered an employer-sponsored group health plan that **would violate ACA market reforms** because their subsidies would be used to purchase student health insurance—a type of individual market health care coverage—rather than a group health plan.
- ▶ Result could be an excise imposed on the university equal to \$100 per day, per affected participant.

# Student Health Insurance Plan (SHIP) and employer payment plans



# Transition relief (Notice 2016–17)



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- ▶ Notice 2016–17 provides that the IRS, DOL and HHS (the Departments) will not assert that an institution of higher education violated the ACA market reform provisions if the institution offers student-employees a premium reduction arrangement in connection with their student health insurance coverage.
- ▶ The Notice defines a premium reduction arrangement as an arrangement “designed to reduce the cost of student health coverage (whether insured or self-insured) through a credit, offset, reimbursement, stipend, or similar arrangement.”
- ▶ This enforcement relief applies for plan years beginning prior to 1 January 2017 or through the 2016–17 academic year.

# Key questions and compliance alternatives



# Key questions

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- ▶ Is the graduate student premium reduction arrangement combined with an insured student health plan or other individual market policy, or is it combined with a self-funded arrangement?
- ▶ Is the graduate premium subsidy provided on a pre-tax or after-tax basis?
- ▶ Are other alternatives available to bring the graduate student health care coverage into compliance with the ACA and other tax provisions?

# Possible alternative approaches and challenges under current guidance

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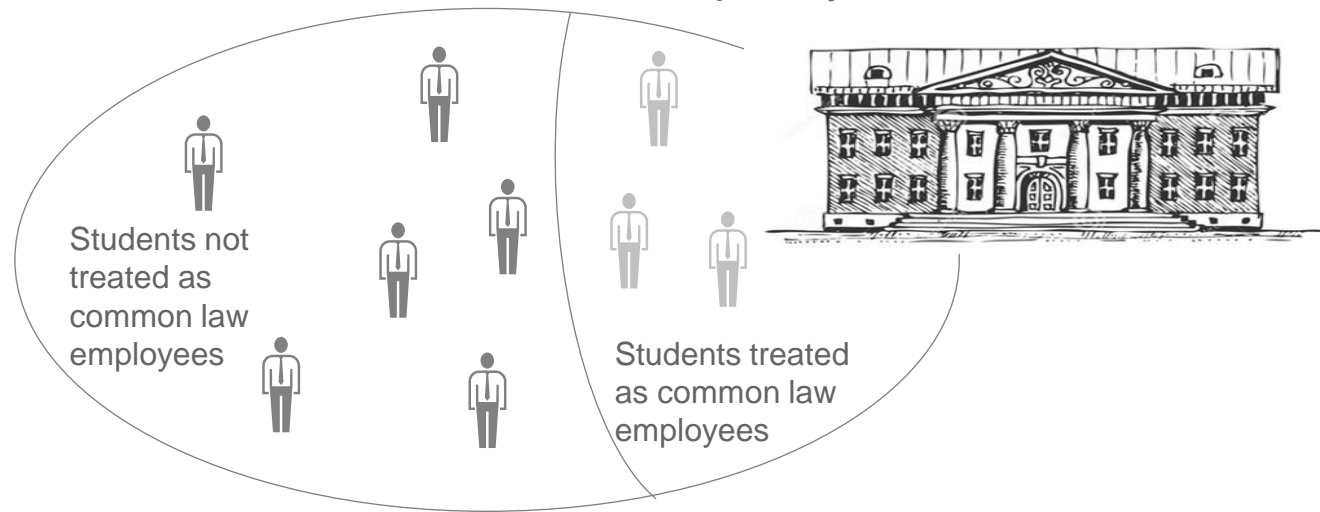
- ▶ Integrate graduate student subsidized coverage with university's group health plan:
  - ▶ Treatment of graduate student providing services as an employee
  - ▶ Cost considerations for students and institution
  - ▶ Not tailored to student needs
  - ▶ Churn between employee and student status
- ▶ Provide subsidies to all graduate students regardless of services provided:
  - ▶ Cost considerations
  - ▶ Tax considerations for student
  - ▶ Complications for some grants and fellowships



# Possible alternative approaches and challenges under current guidance

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- ▶ Apportion the student health plan between non-employee students and students treated as common law employees:
  - ▶ Administrative guidance may be required.
  - ▶ Graduate student employee portion becomes subject to Employee Retirement Income Security Act (ERISA) and group health plan requirements.
  - ▶ It creates additional administrative complexity.



# Possible alternative approaches and challenges under current guidance

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- ▶ Self-funded the student health plan:
  - ▶ Consideration whether coverage meets employer mandate
  - ▶ Consideration whether graduate student must be treated as an employee to comply with ACA guidance, consideration regarding ERISA and group health plan implications
  - ▶ Requires annual HHS approval to be treated as MEC
  - ▶ State law implications
- ▶ After-tax gross up:
  - ▶ May still be treated as an EPP if tied to individual health insurance
  - ▶ May not meet requirements of employer mandate
- ▶ Retain or eliminate subsidies, pursue guidance change:
  - ▶ May not meet market reforms or employer mandate requirements
- ▶ Other approaches

# Legislative and regulatory opportunities



# Regulatory and legislative approaches

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Regulatory

Legislative

# Questions?



# Ernst & Young LLP contacts

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