YOU CAN'T ALWAYS COUNT HOW YOU WANT: WHY TEXAS SERIES LLCS DO NOT OFFER A UNIQUE ADVANTAGE TO EMPLOYERS WHO WISH TO AVOID THE AFFORDABLE CARE ACT'S EMPLOYER MANDATE

Comment

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I. PICK ME OUT A WINNER BOBBY: A NEW ENTITY FORM FOR THE MAKERS OF A FRESH NEW ALE

Series limited liability companies (series LLCs) are a new business entity meant to offer administrative ease and cost savings to business owners seeking to limit risk and liability.[1] At first glance, series LLCs seem to offer everything business owners want from an entity form.[2] Notwithstanding the potential benefits of this new entity form, series LLCs also present many unresolved issues that could sneak up on unwary business owners if their attorneys are unprepared.[3] One such issue is the employer mandate in the Patient Protection and Affordable Care Act (Affordable Care Act), which requires employers of fifty full-time equivalent employees to provide healthcare or pay an annual penalty.[4] Series LLCs can be hard to understand without appropriate context.[5] For a practical example of how the employer mandate could affect series LLCs, consider the following hypothetical.

In the autumn of 2012, Johnny Manziel burst onto the college football scene.[6] His daring exploits and endless capacity for big plays led the Aggies to an 11 and 2 record in the team's first season of Southeastern Conference play, igniting an Aggie euphoria, the likes of which had not been seen since the glory days of Jackie Sherrill.[7] Looking to capitalize on the rabid Aggie fan base's insatiable desire for Aggie football-related items, craft brew wannabe and

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1. *See* Michelle Harner, Jennifer Ivey-Crickenberger & Tae Kim, *Series LLCs: What Happens When One Series Fails? Key Considerations and Issues*, BUS. L. TODAY, Feb. 2013, at 1, 1.

2. *See* Amanda J. Bahena, Note, *Series LLCs: The Asset Protection Dream Machines?*, 35 J. CORP. L. 799, 805–06 (2010) ("The [series LLC], with its internal divisions and low filing costs, might become the next asset-protection dream machine.").

3. *See* discussion *infra* Part II.F.

4. *See* Mary Ann Chirba-Martin, *ERISA Preemption of State "Play or Pay" Mandates: How PPACA Clouds an Already Confusing Picture*, 13 J. HEALTH CARE L. & POL'Y 393, 397–98 (2010).

5. *See* discussion *infra* Part II.A–B.

6. *See* Michael Weinreb, *All Hail Johnny Football: The Legend of 19-Year-Old Johnny Manziel Grows in Tuscaloosa*, GRANTLAND (Nov. 12, 2012), http://grantland.com/features/texas-defeats-alabama-legend-johnny-football-manziel-grows/. Johnny Manziel is commonly referred to by his nickname—"Johnny Football." *Id.*

7. *Jackie Sherrill*, SR/COLLEGE FOOTBALL, http://www.sports-reference.com/cfb/coaches/jackie-sherrill-1.html (last visited Apr. 15, 2014). Jackie Sherrill coached the Aggies from 1982 to 1988 and cemented his status as an Aggie legend by leading the team to three consecutive Southwest Conference Championships and Cotton Bowl victories. *Id.* To put icing on the cake, Sherrill also coached the Aggies to five straight victories over their rival Longhorns from 1984 to 1988. *Id.*

Aggie graduate Bobby Brewer sought to create an ale that would remind all Aggies of the hope that springs eternal at the beginning of every football season. After scouring the planet for the finest possible ingredients and home brewing the recipe to perfection, Bobby believed he had finally concocted a beer that would become the game-day brew of choice for Aggie football fans everywhere. His masterpiece of home brewing genius? A velvety, maroon-colored ale with a crisp, refreshing finish that he would call "Maroon Kool Aid."[8]

Looking to spread the gospel of his fresh new ale across the Aggie universe, Bobby took a batch of the brew to the headquarters of TexAgs.com (TexAgs) and convinced the staff to sample some Maroon Kool Aid.[9] Much to Bobby's delight, TexAgs' staff and owners loved the beer's unique color and taste. TexAgs immediately offered Bobby advertising space and even agreed to incorporate Maroon Kool Aid into an upcoming special offer on TexAgs premium subscriptions.[10] Under the special offer, TexAgs offered a low monthly rate of $2 and a free six-pack of Maroon Kool Aid to every new TexAgs user who subscribed on any day between December 1, 2012, and January 4, 2013—the date of the 2013 Cotton Bowl. Even though Bobby would be forced to take a loss by providing free beer, he decided that it would more than pay off as a way to build some name recognition, brand loyalty, and word-of-mouth advertising for his beer. The strategy paid off; TexAgs users responded in force to the special offer and Bobby ultimately ended up bottling and shipping 1,000 six-packs from his kitchen. As an added marketing ploy, Bobby included an eye-catching card with each six-pack directing customers to his website, www.maroonkoolaid.com, if they wished to order more beer.

Thanks to the special offer, Bobby's clever advertising, and positive word-of-mouth among Aggie fans, Bobby's business exploded in the first half of 2013. To keep up, Bobby hired some of his best friends from college who were burned out on their investment banking jobs, flush with cash, and looking to try something new—Ben Borns and Ryan Rhino. The three budding entrepreneurs moved to College Station, Texas, to build their brewery from the ground up. Bobby, Ben, and Ryan (hereinafter referred to by their first names or as "the members") planned to build a vertically integrated brewing and distribution company.[11] Before the three bought any land, shipped any more beer, or made

8. "Maroon Kool Aid" is a reference to an Aggie football fan's uncanny ability to convince himself that the football team is going to reach unprecedented levels of success. Those holding such undying beliefs are said to be "drinking the Maroon Kool Aid."

9. *See* TEXAGS, http://texags.com/ (last visited Apr. 15, 2014). TexAgs.com is an extremely popular Aggie website on which fans of Aggie football discuss the team. *See id.*

10. See TEXAGS PREMIUM WITH BILLY LIUCCI, http://texags.com/premium (last visited Apr. 15, 2014). TexAgs Premium is a service through which TexAgs users pay a monthly fee to receive access to inside information and recruiting scoop on Aggie football provided by recruiting guru Billy Liucci. *See generally Billy Liucci: TexAgs Senior Writer*, TEXAGS, http://texags.com/premium/TagFeed/179 (last visited Apr. 15, 2014) (detailing a brief biography of Mr. Liucci).

11. *See generally Idea: Vertical Integration*, ECONOMIST (Mar. 30, 2009), http://www.economist.com/node/13396061 (defining vertical integration as "the merging together of two businesses that are at

contracts for supplies, they wanted to pick a legal structure for their business. Unsure what entity to select, Bobby contacted his friend in law school, Sammy Stockman, and asked him what entity would be best for the budding brew kings. Stockman immediately touted the wonders of a new business entity he had learned about in class: the series LLC.

Stockman explained that the series LLC form would provide limited liability for each member, cost savings, and an opportunity to structure their business in such a way that each segment of the business would be immune from litigation against a different segment.[12] Thrilled with Stockman's advice, Bobby, Ben, and Ryan went to the office of a College Station attorney, Keith Moore, and requested that he do the necessary paperwork to form a series LLC. Although Mr. Moore reminded them that series LLCs were relatively new entities and presented many unresolved issues that could sneak up on them in the future, the boys still wanted to use the series LLC form. They were convinced that series LLCs were the entities of the future.

Keith acquiesced to their wishes and completed the necessary steps to create a Texas series LLC for Bobby, Ben, and Ryan. First, Keith drafted a certificate of formation for the series LLC. Keith noted that Maroon Brews LLC would be the "master LLC."[13] In the certificate of formation, Keith also noted that Maroon Brews LLC would encompass two series. Series A (the Bottling series) would own the brewing and bottling equipment and its main business function would be to take raw ingredients and turn them into sweet, delicious beer. Series B (the Distribution series) would hire full-time drivers and deliver the beer to liquor stores and bars. In separating the business functions this way, Keith hoped to protect the assets of the Bottling series from the lawsuits that could result if any delivery drivers got into serious accidents. To comply with the statutory requirements for creating a liability shield around each series, Keith also noted the separate nature and shielded liability of each series in the certificate of formation.[14] Furthermore, Keith drafted an operating agreement for each series within Maroon Brews. Bobby would have a 50% interest and would receive 50% of the profits from each series, while Ben and Ryan would each have a 25% interest and would receive 25% of the profits from each series.

After Keith filed Maroon Brews's certificate of formation with the Secretary of State for the State of Texas, he informed Bobby, Ben, and Ryan that they needed to keep separate books and records for the Bottling series and the Distribution series in order for their separate nature to be recognized

different stages of production").

12. Harner, Ivey-Crickenberger & Kim, *supra* note 1, at 1. A series LLC is a new entity that aims to provide the benefits of a structure involving multiple traditional LLCs while providing cost savings. *See id.* Using this form, the owners of a business can create one "master LLC" and separate LLCs, called series, to serve different business functions beneath the master LLC. *Id.*

13. *See id.*

14. *See* TEX. BUS. ORGS. CODE ANN. § 101.602(b)(2)–(3) (West 2012).

according to the statute.[15] Confident that he had done all he could to make Maroon Brews a success, Keith sent the boys off into the wild world of craft brewing.

Maroon Brews navigated the craft brew wilderness well. During the course of the 2013 football season, Maroon Kool Aid became the tailgate and game day beer of choice for Aggies everywhere. In fact, by the end of 2013, the Bottling series had twenty-five full-time employees between front office and brewery staff, and the Distribution series had twenty-five full-time drivers. The business continued to grow in 2014 as Maroon Kool Aid gained popularity throughout Texas. Even though Maroon Brews was gaining more customers and selling more beer, it still did not have a lot of cash on hand due to the amount of expenses and debt it incurred to finance the acquisition of a brewing facility, brewing equipment, and trucks for distribution.

At the beginning of 2015, Maroon Brews became aware of a problem it had not anticipated when it originally chose the series LLC form. When the employer mandate in the Affordable Care Act goes into effect in 2016, will Maroon Brews have to provide healthcare insurance to its full-time employees or pay a penalty if it chooses not to do so?[16] The Bottling series has twenty-five employees and the Distribution series has twenty-five employees. Even though none of the series individually has fifty employees, the whole operation has a total of fifty full-time employees. Will the Internal Revenue Service (IRS) treat each series as a separate entity when applying the mandate, or will every employee simply be counted as the responsibility of Maroon Brews as a whole? Unsure what to do, the brew masters returned to Keith's office to seek

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15. *See id.* § 101.602(b)(1).

16. *See supra* note 4 and accompanying text. President Barack Obama signed the Affordable Care Act into law on March 23, 2010. *Health Care that Works for Americans*, THE WHITE HOUSE, http://www.whitehouse.gov/healthreform/healthcare-overview (last visited Apr. 15, 2014). The Affordable Care Act sought to boost the availability of healthcare coverage and decrease healthcare costs. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2580 (2012). As part of that effort, Congress included an employer mandate requiring employers with at least fifty full-time employees to provide health coverage or pay an annual penalty when certain conditions are met. *See* Chirba-Martin, *supra* note 4, at 397–98. Although the employer mandate was supposed to be implemented in 2014, the Obama administration has delayed the mandate twice. *See* Juliet Eilperin & Amy Goldstein, *White House Delays Health Insurance Mandate for Medium-Sized Employers Until 2016*, WASH. POST (Feb. 10, 2014), http://www.washingtonpost.com/national/health-science/white-house-delays-health-insurance-mandate-for-medium-sized-employers-until-2016/2014/02/10/ade6b344-9279-11e3-84e1-27626c5ef5fb_story.html. First, the Obama administration announced that the mandate would not be enforced until 2015. *See* Sarah Kliff, *White House Delays Employer Mandate Requirement Until 2015*, WASH. POST WONKBLOG (July 2, 2013, 5:51 PM), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/07/02/white-house-delays-employer-mandate-requirement-until-2015/ (noting that "[t]he Obama administration will not penalize businesses that do not provide health insurance in 2014"). Recently, the administration announced that the mandate would not be enforced against employers with fifty to ninety-nine full-time employees until 2016. *See* Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. 8544, 8574 (proposed Feb. 12, 2014) (to be codified at 26 C.F.R. pt. 301); *Statement on Delay in Some Employers' Health-Insurance Mandate*, WALL STREET J. (Feb. 10, 2014, 4:19 PM), http://blogs.wsj.com/washwire/2014/02/10/statement-on-delay-in-some-employers-health-insurance-mandate/. Because of these two delays, Maroon Brews would not be responsible for providing healthcare until 2016. *See* Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. at 8574.

advice on how the employer mandate would be applied. What should Keith tell them?

The series LLC is a relatively new business form that presents many unsettled issues.[17] The form allows business owners to form one master LLC and as many individual series as they prefer within that master LLC.[18] The new entity form aims to provide convenience to business owners to allocate different business functions and risks among different series without having to pay extra filing fees to form multiple traditional entities.[19] Despite the intended benefits, series LLCs present many uncertainties that attorneys need to be mindful of.[20] Specifically, the IRS has not yet determined whether it will treat each series within a series LLC as a separate legal entity for employment tax purposes.[21] As a result, it is uncertain how the employer mandate will be applied in a series LLC context.[22] This Comment addresses the issues of how a series should be treated for employment tax purposes and discusses how the employer mandate will likely be enforced against a Texas series LLC. Part I provides a brief definition of series LLCs and presents a hypothetical situation in which owners of a Texas LLC are unsure whether or not they will be subjected to a penalty if they do not provide healthcare to their employees.[23] Part II provides a history of the development of the series LLC, a summary of the intended benefits of the series LLC, and a discussion of the legal rules that will be relevant in analyzing how the employer mandate will apply to the series LLC form.[24] Part III analyzes the legal principles the IRS will likely use in deciding the issue of classification of series LLCs for employment tax purposes.[25] Furthermore, Part III then applies the rules that the IRS will likely use in enforcing the employer mandate to the facts of the hypothetical in this introduction.[26] Part IV provides recommendations as to how the IRS should resolve the employment tax classification issue and contains recommendations for practitioners to prepare series LLC clients for the mandate.[27] Lastly, Part V comments on the viability of the series LLC as an entity choice in light of how the employer mandate will likely be applied to the form.[28]

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17. *See* discussion *infra* Part II.F.
18. *See* discussion *infra* Part II.B. The term "master LLC" is borrowed from Harner, Ivey-Crickenberger & Kim, *supra* note 1, at 1.
19. *See* discussion *infra* Part II.D.
20. *See* discussion *infra* Part II.F.
21. *See infra* notes 107–09 and accompanying text.
22. *See* discussion *infra* Part II.F.
23. *See* discussion *supra* notes 1–22 and accompanying text.
24. *See* discussion *infra* Part II.
25. *See* discussion *infra* Part III.
26. *See* discussion *infra* Part III.
27. *See* discussion *infra* Part IV.
28. *See* discussion *infra* Part V.

II. How the Quest for Limited Liability and Favorable Tax Treatment Led to the Series LLC and the Unresolved Issues the New Form Presents

A. The Concept of the Limited Liability Company

General partnerships and partnership associations paved the way for the limited liability company (LLC).[29] Popularized in the latter half of the 19th century, a general partnership is a "business owned by more than one person."[30] This structure benefited owners by (1) allowing them to contract with each other and determine how profits and losses would be allocated; (2) providing flexibility in the management of the company; and (3) allowing owners to decide how the division of assets would take place when one partner left the venture.[31] Despite the benefits, general partnerships did not provide limited liability to owners.[32] Instead, courts applied agency law to partners in a partnership, which meant that a third party could recover against individual partners even if he were not the partner who had breached a contract or committed a tort against the third party.[33] Unlike a general partnership, however, partnership associations offered limited liability for all partners in the

29. *See* Wayne M. Gazur & Neil M. Goff, *Assessing the Limited Liability Company*, 41 CASE W. RES. L. REV. 387, 393 (1991).

30. ERIC A. CHIAPPINELLI, CASES AND MATERIALS ON BUSINESS ENTITIES 727 (2d ed. 2010); *see* Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 911 n.147 (1988) ("In the United States, the Uniform Partnership Act defines partnership as 'an association of two or more persons to carry on as co-owners a business for profit.'" (quoting UNIFORM PARTNERSHIP ACT § 6(1) (1969))).

31. CHIAPPINELLI, *supra* note 30, at 727; *see* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 958–62 (1984). Courts also created presumptions in case partners did not include certain basic components in their contractual agreement. CHIAPPINELLI, *supra* note 30, at 727. These presumptions were "a presumption of symmetry, a presumption of equality, and a presumption that the contracts [were] personal such that another person could not be substituted for, or added to, the original owners." *Id.* The presumption of symmetry forced partners to use proportion to divide profits and losses in the absence of a contractual agreement to do otherwise. *Id.* The presumption of equality gave each partner equal management rights and provided that disagreements about strategy or other matters would be decided by a majority vote of the partners, regardless of their individual ownership share. *Id.*; *see* Paul Carman, *In Search of Partner's Interest in the Partnership: The Alternative of Substantial Economic Effect*, 107 J. TAX'N 214, 217 (2007) (noting a court's reliance on the presumption of equality "[i]n determining the partner's interest in the partnership"). Lastly, the presumption of a personal contract did not allow a partner to transfer his interest in the business to another and required a unanimous vote before one could become a partner in the venture. CHIAPPINELLI, *supra* note 30, at 727; *see* Daniel J.H. Greenwood, *The Dividend Puzzle: Are Shares Entitled to the Residual?*, 32 J. CORP. L. 103, 121–22 n.55 (2006) (noting the "requirement of unanimous consent for any fundamental change in the business").

32. *See* CHIAPPINELLI, *supra* note 30, at 727; Robert R. Keatinge et al., *The Limited Liability Company: A Study of the Emerging Entity*, 47 BUS. LAW. 375, 380 (1991–1992) (noting that "all partners are jointly and severally liable for all obligations" in a general partnership).

33. *See* CHIAPPINELLI, *supra* note 30, at 727–28 ("In a co-owned business, then, each co-owner had the power to bind the other co-owners and, in turn, was bound by his or her co-owners' actions all as determined by agency law."); Jennifer J. Johnson, *Limited Liability for Lawyers: General Partners Need Not Apply*, 51 BUS. LAW. 85, 85–86 (1995–1996).

venture.[34] Because the entity first came on the scene in 1874, before tax considerations became a major factor in entity selection, the principal advantage of the partnership association was a simpler path to limited liability without the attendant hassles and ongoing costs of incorporation.[35] After Congress enacted the first modern income tax in 1913, the partnership association lost traction because of uncertain treatment for tax purposes and state law limits on the number of partners allowed.[36]

This newly enacted income tax had different consequences for different types of business entities, creating the business environment that eventually led to the establishment of LLCs.[37] The most significant disparity in tax consequences existed between corporations and partnerships.[38] Due to the fact that states recognized corporations as separate entities from their owners, Congress had no qualms with collecting an income tax from corporations at both the entity and ownership levels.[39] As a result, corporate income became subject to double taxation, whereby taxes were collected from the corporation and from the shareholders on the income they received from corporate dividends.[40] In contrast, Congress decided to collect income tax only from the partners in a general partnership and imposed no income tax at the entity level.[41] Congress pointed to the nature of both entities to rationalize the difference in treatment.[42] While corporations had formalistic filing requirements and separate entity status, Congress viewed partnerships as a nexus of relationships between individuals who were personally at risk in a venture.[43] Congress's disparate treatment of corporations and partnerships laid the "legal foundation eventually leading to the birth of [LLCs] more than half a century later."[44]

34. William J. Carney, *Limited Liability Companies: Origins and Antecedents*, 66 U. COLO. L. REV. 855, 874 (1995); Gazur & Goff, *supra* note 29, at 393.

35. Gazur & Goff, *supra* note 29, at 393.

36. *Id.* at 394; Susan Pace Hamill, *The Origins Behind the Limited Liability Company*, 59 OHIO ST. L.J. 1459, 1501–02 (1998) (noting that the LLC's "direct roots can be traced to the first modern income tax").

37. *See* Hamill, *supra* note 36, at 1502.

38. *See id.*; Douglas K. Moll, *Minority Oppression & the Limited Liability Company: Learning (or Not) from Close Corporation History*, 40 WAKE FOREST L. REV. 883, 920–21 (2005) (explaining the difference between pass-through and double taxation).

39. Hamill, *supra* note 36, at 1502; *see* Moll, *supra* note 38, at 921 ("In contrast to a partnership, the earnings of a corporation are subject to the 'double tax,' as the firm's profits are taxed once at the entity (corporation) level and, upon the payment of dividends, are taxed again at the owner (shareholder) level.").

40. Hamill, *supra* note 36, at 1502; *see also* Stacy Ward Wood & John Tristam Woodruff, Comment, *The Oklahoma Limited Liability Company*, 29 TULSA L.J. 397, 400 (1993) (discussing the concept of double taxation).

41. Hamill, *supra* note 36, at 1502; Moll, *supra* note 38, at 921; *see also* CHIAPPINELLI, *supra* note 30, at 727 (pointing out that the relationships between partners in general partnerships were mainly contractual).

42. *See* Hamill, *supra* note 36, at 1502.

43. *See* CHIAPPINELLI, *supra* note 30, at 727; Hamill, *supra* note 36, at 1502.

44. Hamill, *supra* note 36, at 1503–04 ("[U]ntil 1960 the presence of limited liability, evidenced by a state law filing similar to articles of incorporation, served as [a] regulatory benchmark mandating association treatment."); Moll, *supra* note 38, at 921–22 ("Given this 'pass-through' taxation/limited liability trade-off, it was only a matter of time before business owners wanted to have their cake and eat it too.").

Over the next few decades, changes in the American legal and business environments led to the first LLC statute.[45] First, prior to 1960, IRS regulations did not allow a business entity that provided limited liability for owners to be eligible for partnership taxation.[46] In 1960, regulatory drafters stopped looking at limited liability as a deciding factor in leveling corporate taxation against a business entity.[47] Second, businesses expecting to generate taxable income had no incentive to move away from the corporate form until changes in the economics of oil and gas markets began to occur in the 1970s.[48]

Specifically, oil producers in the United States, accustomed to cheap, readily available crude imports from overseas, had to seek a new business model when an embargo drove up the price of foreign crude oil.[49] Appropriately, independent exploration and production companies began springing up rapidly to meet the new demand for crude.[50] One such independent company was Hamilton Brothers Oil Company (Hamilton), which sought a way to combine the tax benefits of a partnership and secure limited liability for its investors similar to that of a corporation.[51] Hamilton first used an entity from Panama called the *limitada* to secure these beneficial entity characteristics.[52] Due to concerns about how American courts might treat a *limitada* and burdensome administrative requirements, Hamilton's attorneys drafted a bill that sought to allow businesses to organize as "unincorporated domestic entit[ies]" that met requirements for partnership taxation and provided limited liability for all investors—whether individuals or other entities.[53]

After Hamilton's new entity failed to gain traction in the Alaska legislature, Wyoming passed the first statute in the United States allowing businesses to organize as LLCs in 1977.[54] LLCs aimed to provide the federal income tax benefits of a partnership and limited liability protection similar to that of a corporation for the owners of the business.[55] LLCs initially struggled to establish a reputation as desirable business entities because of unclear tax treatment.[56] This trend began to reverse in 1980 when the IRS declared that an

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45. *See* Hamill, *supra* note 36, at 1503 (discussing the main factors that led to the invention of LLCs).

46. *Id.*

47. *See id.* at 1505.

48. *See id.* at 1502.

49. *See id.* at 1515–16.

50. *See id.* at 1516.

51. *Id.* at 1516–17; *see* Moll, *supra* note 38, at 922.

52. Hamill, *supra* note 36, at 1463 ("Unlike the U.S. entities available at that time, limitadas provided direct limited liability and the ability to secure partnership classification for U.S. income tax purposes."); Moll, *supra* note 38, at 922 ("Hamilton Brothers sought a domestic entity that was comparable to a Panamanian . . . "Limitada"—an entity that possessed both limited liability and favorable pass-through tax treatment.").

53. *See* Hamill, *supra* note 36, at 1464–65.

54. Gazur & Goff, *supra* note 29, at 389; *see* Hamill, *supra* note 36, at 1465 (noting that Hamilton first presented the LLC to the Alaska legislature); Moll, *supra* note 38, at 921–22.

55. *See* Gazur & Goff, *supra* note 29, at 389.

56. *See id.* at 390 (noting that even though a decade had passed since Wyoming first began offering LLCs, only Florida had joined Wyoming by 1988).

LLC formed in Wyoming should be treated as a partnership for federal income tax purposes.[57] Three years later, Texas passed the Texas Limited Liability Company Act, allowing businesses in Texas to organize as LLCs for the first time.[58] Since this Act, LLCs quickly increased in popularity as the "go to" entity choice for business owners in Texas.[59]

In Texas, the owners of an LLC are called "members," generally defined as "an individual, partnership, corporation, trust, and any other legal or commercial entity."[60] Typically, the LLC form allows a member to limit his liability to an amount proportionate to his investment in the LLC.[61] Not only is an LLC owner's financial risk limited to the amount he has invested in the company, but an LLC owner is also protected from lawsuits.[62] Furthermore, members receive "the pass-through tax treatment afforded to partners in a partnership."[63] Pass-through tax treatment means an LLC's income, losses, deductions, and credits are passed through to the members and are included directly on each member's tax return instead of the LLC filing a return and directly paying the tax.[64] As a result, the earnings of the LLC are not subject to double taxation like those of a corporation.[65] In addition, LLC statutes are flexible in regards to capital contributions.[66] No minimum amount is required as a prerequisite to doing business and the members may decide for themselves how much each member will contribute.[67] LLC statutes also allow members more freedom to allocate profits compared to the corporate form.[68]

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57. *See id.*; Moll, *supra* note 38, at 924; *see also* Rev. Rul. 88-76, 1988-2 C.B. 360 ("An unincorporated organization operating under the Wyoming Limited Liability Company Act is classified as a partnership for federal tax purposes . . . ."), *obsoleted by* Rev. Rul. 98-37, 1998-32 I.R.B. 5; Sandra Mertens, Note, *Series Limited Liability Companies: A Possible Solution to Multiple LLCs*, 84 CHI.-KENT L. REV. 271, 272 (2009) (noting that all fifty states now allow businesses to organize as LLCs).

58. Kimberley C. Latham, Comment, *Cheeseheads and Longhorns: Why Texas Should Follow Wisconsin's Lead in the Treatment of Limited Liability Company Member Interests as Securities*, 9 TEX. WESLEYAN L. REV. 59, 63 (2002).

59. *Id.* at 87. In fact, LLCs are the most popular choice for business owners across the nation. CHIAPPINELLI, *supra* note 30, at 789.

60. *Selecting a Business Structure*, TEX. SECRETARY OF ST., http://www.sos.state.tx.us/corp/business structure.shtml (last visited Apr. 15, 2014) (providing a brief overview of the business entities available to choose from in Texas).

61. *Id.*

62. *See* Jacob Stein, *Advanced Asset Protection and Tax Planning with LLCs*, L.A. LAW., June 2006, at 17, 20; Mertens, *supra* note 57, at 297.

63. *Selecting a Business Structure*, *supra* note 60.

64. *See* Wood & Woodruff, *supra* note 40, at 400 (citing 26 U.S.C. §§ 701–02 (2012)).

65. *See id.* (explaining that corporations are subject to double taxation because their earnings are taxed as corporate income and as individual income when distributed to shareholders through dividend payments).

66. CHIAPPINELLI, *supra* note 30, at 798; *see* Keatinge et al., *supra* note 32, at 428.

67. *See* CHIAPPINELLI, *supra* note 30, at 798; *cf.* Hamill, *supra* note 36, at 1464 n.15 (discussing the $500,000 cap on capital contributions imposed by Panamanian limitadas).

68. *See* CHIAPPINELLI, *supra* note 30, at 798 ("Allocation refers to assigning the LLC's profits and losses among its members."); Daniel M. Schneider, *Closing the Circle: Taxing Business Transformations*, 58 LA. L. REV. 749, 757 (1998) (noting that "members of an LLC may allocate profits and losses as they wish"). If the parties fail to contractually agree on the allocation of profits and losses, "LLC statutes typically provide as a default rule that profits shall be allocated in proportion to each member's contribution and that losses shall

Furthermore, the management structure of an LLC is left to the discretion of its members and must be set out in the LLC's certification of formation.[69] Therefore, while a member's interest in an LLC is made up of the right to an allocation of profits and losses and distribution of assets, the member is not personally liable for the LLC's debts.[70] Next, Part II.B discusses how the seemingly perpetual quest to limit financial risk through creative entity formation led to the creation of series LLCs.[71]

B. The Concept of Series Creation

The concept of creating underlying series as subunits of an overarching entity originated in the offshore mutual fund industry.[72] Certain Caribbean islands, traditionally thought of as tax shelters, allowed investment companies to create a different cell company for each of their portfolios.[73] The liabilities of a particular cell within these "segregated portfolio companies" are not enforceable against another cell within the same company.[74] In the United States, the concept of series creation first arose in Delaware with the idea of statutory trusts.[75] Similar to offshore segregated portfolio companies, an investment company organized as a statutory trust may create separate series for each investment fund it operates.[76] Firms engaged in asset securitization also employ series concepts to their advantage.[77] In this setting, a statutory trust will

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be allocated in proportion to each member's share of the profits." *See* CHIAPPINELLI, *supra* note 30, at 798; Schneider, *supra*, at 757 (explaining that "allocation will be according to the book value of the member's membership interest in the LLC" when the parties do not contract for a different arrangement).

69. *Selecting a Business Structure*, *supra* note 60; *see also* CHIAPPINELLI, *supra* note 30, at 805; Larry E. Ribstein, *The Emergence of the Limited Liability Company*, 51 BUS. LAW. 1, 42–43 (1995). Most LLC statutes state that "the LLC will be managed by the members." CHIAPPINELLI, *supra* note 30, at 805; *see* David L. Cohen, *Theories of the Corporation and the Limited Liability Company: How Should Courts and Legislatures Articulate Rules for Piercing the Veil, Fiduciary Responsibility and Securities Regulation for the Limited Liability Company*, 51 OKLA. L. REV. 427, 460 (1998) (stating that "LLCs tend to be small and often are member managed"). In addition, LLC statutes usually provide that members' voting powers will be allocated proportionally according to each member's contribution. CHIAPPINELLI, *supra* note 30, at 805; Keatinge et al., *supra* note 32, at 391 (stating that "LLC statutes generally provide for voting rights in proportion to capital contributions").

70. *See* CHIAPPINELLI, *supra* note 30, at 800 ("Every LLC statute provides that the members and managers shall not be personally liable for the LLC's debts."); Keatinge et al., *supra* note 32, at 397 ("In fact, LLC statutes specifically provide that LLC members and managers are not liable for the LLC's debts.").

71. *See* discussion *infra* Part II.B.

72. *See* Stein, *supra* note 62, at 20; Mertens, *supra* note 57, at 297.

73. *See* Jennifer Avery et al., *Series LLCs: Nuts and Bolts, Benefits and Risks, and the Uncertainties that Remain*, 45 TEX. J. BUS. L. 9, 11 (2012); Stein, *supra* note 62, at 20 (noting that series concepts existed for quite some time "in countries such as Guernsey, British Virgin Islands, Bermuda, the Cayman Islands, Mauritius, and Belize").

74. *See* Avery et al., *supra* note 73, at 11; Bahena, *supra* note 2, at 801 n.14.

75. *See* DEL. CODE ANN. tit. 12, § 3801(g) (West Supp. 2007); Thomas E. Rutledge, *Again, for the Want of a Theory: The Challenge of the "Series" to Business Organization Law*, 46 AM. BUS. L.J. 311, 313 (2009).

76. *See* Rutledge, *supra* note 75, at 313; *see also* Avery et al., *supra* note 73, at 10.

77. Rutledge, *supra* note 75, at 313; *see* Steven L. Schwarcz, *The Alchemy of Asset Securitization*, 1

organize a distinct series for each class of securitized assets that it owns and will issue securities on behalf of each distinct series.[78] Eventually, states adapted the series concept to LLCs.[79]

C. Delaware Applies the Series Concept to LLCs

Delaware took the already-familiar series concept and applied it to business organizations when it passed the first series LLC statute in the United States in 1996.[80] Section 18-215 of the Delaware Code provides that "[a] limited liability company agreement may establish or provide for the establishment of 1 or more designated series of members, managers, limited liability company interests or assets."[81] Furthermore, the statute makes it clear that any series within a series LLC "may have separate rights, powers or duties with respect to specified property or obligations of the limited liability company or profits and losses associated with specified property or obligations, and any such series may have a separate business purpose or investment objective."[82]

D. The Intended Benefits of the Series LLC

While LLCs shield owners from lawsuits brought against the entity, they do not protect the assets within the entity from lawsuits or creditors.[83] Therefore, lawyers will often advise clients to form multiple LLCs for different sets of assets, or even for single assets.[84] Series LLCs allow business owners to achieve the same liability shielding without the transaction costs of creating

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STAN. J.L. BUS. & FIN. 133, 135 (1994) (explaining the basics of asset securitization). Asset securitization begins when a company seeking capital selects assets that can be sold to raise funds. Schwarcz, *supra*, at 135. Companies usually select receivables, which are "rights to payments at future dates." *Id.* Companies seeking to sell receivables to raise capital are called "originators." *Id.* Because receivables are subject to default risk, the originator often transfers the receivables it desires to securitize to a "newly formed special purpose corporation, trust, or other legally separate entity—often referred to as a special purpose vehicle, or 'SPV.'" *Id.* By transferring assets, originators can remove some of the risk that would normally attach to the receivables by virtue of their affiliation with the originator. *See id.* The special purpose vehicle acquires the consideration to purchase the receivables from the originator by packaging the receivables and issuing them as securities that can be traded on market exchanges. *See id.* "The goal of securitization, therefore, is to obtain low cost capital market funding by separating all or a portion of an originator's receivables from the risks associated with the originator." *Id.* at 136.

78. Rutledge, *supra* note 75, at 313.

79. *See* discussion *infra* Part II.C.

80. *See* DEL. CODE ANN. tit. 6, § 18-215(a) (West 2013); Avery et al., *supra* note 73, at 10; Carol R. Goforth, *The Series LLC, and a Series of Difficult Questions*, 60 ARK L. REV. 385, 386–87 (2007).

81. DEL. CODE ANN. tit. 6, § 18-215(a).

82. *Id.*

83. *See* Stein, *supra* note 62, at 20; Mertens, *supra* note 57, at 284; *see also* James D. Blake, *From the Offshore World of International Finance to Your Backyard: Structuring Series LLCs for Diverse Business Purposes*, 9 DEPAUL BUS. & COM. L.J. 1, 15 (2010) (noting that attorneys frequently advise clients to separate LLCs for different assets).

84. *See* Stein, *supra* note 62, at 20; *see also* Goforth, *supra* note 80, at 393–95 (providing examples to show how segregating assets using the series LLC form would work in practice).

multiple LLCs.[85] For this reason, owners can use the series LLC form to allocate assets and liabilities in the most favorable way possible.[86] Furthermore, series LLCs are easier to operate than multiple LLCs.[87] For example, most states allow owners to file only a single annual report on behalf of the entire series LLC.[88] As an added benefit, most series LLC statutes allow the owners of the business broad discretion within the company agreement to arrange the management structure of the company.[89]

In addition to Delaware, Illinois, Iowa, Kansas, Nevada, Utah, Oklahoma, Tennessee, Wisconsin, and Texas have passed series LLC statutes.[90] States with series LLC statutes choose to follow either the Delaware model or the Illinois model.[91] In Delaware, the relevant statute grants series LLCs some of the same rights as separate legal entities, but does not explicitly recognize each series as a separate legal entity.[92] In contrast, Illinois takes the series concept a step further and explicitly states that each individual series within a series LLC is a separate legal entity.[93] The Delaware and Illinois series LLC statutes also differ with respect to filing requirements.[94] Delaware allows the master LLC to file one certificate of formation that establishes the limited liability of any series that already exists or may be created in the future.[95] Illinois, however, requires the master LLC to file separate certificates of designation each time a new series is created.[96] Texas follows the model used in Delaware.[97] The next

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85. Avery et al., *supra* note 73, at 11; Julia Gold, *Series Limited Liability Companies—Too Good to be True?*, NEV. LAW., July 2004, at 18, 19 ("The main advantage of the series LLC is its protection from liabilities.").

86. *See* Wendell Gingerich, Note, *Series LLCs: The Problem of the Chicken and the Egg*, 4 ENTREPRENEURIAL BUS. L.J. 185, 197 (2009) ("The hallmark of the series LLC is the ability of a company to separate its assets and liabilities favorably among its different series, which operate independently but are under one umbrella.").

87. Mertens, *supra* note 57, at 287.

88. *Id.* (citing 805 ILL. COMP. STAT. 180/1-35 (2010)).

89. *See, e.g.*, TEX. BUS. ORGS. CODE ANN. § 101.607 (West 2012) (allowing the owners of a series LLC to form multiple classes of managers, decide the powers and voting rights of each class, and take action to amend the company agreement without approval of the different classes of managers); *see also* Mertens, *supra* note 57, at 288 ("Each state statute authorizing series LLCs gives broad deference to the drafter of the operating agreement, allowing hand-picking of the best provisions from partnership and corporate law.").

90. *See* Avery et al., *supra* note 73, at 11 n.5; Kim Szarzynski & Troy Christensen, *Federal Taxation of Series Limited Liability Companies*, 38 TEX. TAX LAW., Winter 2011, at 1, 1–2.

91. Avery et al., *supra* note 73, at 11.

92. *See* DEL. CODE ANN. tit. 6, § 18-215(c) (West 2013) ("Unless otherwise provided . . . a series established in accordance with subsection (b) of this section shall have the power and capacity to, in its own name, contract, hold title to assets (including real, personal[,] and intangible property), grant liens and security interests, and sue and be sued."); Avery et al., *supra* note 73, at 11.

93. 805 ILL. COMP. STAT. 180/37-40(b) (2010) ("A series with limited liability shall be treated as a separate [legal] entity to the extent set forth in the articles of organization.").

94. Avery et al., *supra* note 73, at 11.

95. DEL. CODE ANN. tit. 6, § 18-215(e) ("A limited liability company agreement may provide for classes or groups of members or managers associated with a series . . . and may make provision for the future creation in the manner provided in the limited liability company agreement of additional classes or groups of members or managers associated with the series . . . ."); Avery et al., *supra* note 73, at 11.

96. 805 ILL. COMP. STAT. 180/37-40(b) (listing whether "the limited liability company has filed a certificate of designation for each series which is to have limited liability" as a condition for proper formation

section specifically addresses the statutory requirements for creating a series LLC in Texas.[98]

E. Statutory Requirements for Creating a Series LLC in Texas

Section 101.601(a) of the Texas Business Organizations Code provides that "[a] company agreement may establish or provide for the establishment of one or more designated series of members, managers, membership interests, or assets."[99] Furthermore, § 101.601(a)(1) establishes that these "members, managers, membership interests, or assets" may have "separate rights, powers, or duties with respect to specified property or obligations of the limited liability company."[100] In Texas, the liabilities of a particular series are enforceable against that series only and the liabilities of the master LLC, as well as those of any other series, are not enforceable against a particular series.[101]

In order to achieve the liability shielding provided for in § 101.602(a), business owners must ensure satisfaction of three conditions set out in § 101.602(b).[102] First, a series must keep separate records from the master LLC.[103] Next, the drafters of the company agreement and certificate of formation must note the separate nature and shielded liability of each series in order to put potential creditors on notice of the structure of the company.[104] Similar to Delaware, however, owners of a series LLC need not file a new certificate of designation laying out the limited liability of each new series created.[105] Instead, general notice of the limited liability of each series that exists at the time of filing or that may be created in the future is sufficient.[106] Various issues, however, have kept the series LLC from gaining popularity, despite its benefits.[107]

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of a series); Avery et al., *supra* note 73, at 11.

97. Avery et al., *supra* note 73, at 11.

98. *See* discussion *infra* Part II.E.

99. TEX. BUS. ORGS. CODE ANN. § 101.601(a) (West 2012).

100. *Id.* § 101.601(a)(1).

101. BUS. ORGS. §§ 101.602(a)(1) (West 2012) ("[T]he debts, liabilities, obligations, and expenses incurred, contracted for, or otherwise existing with respect to a particular series shall be enforceable against the assets of that series only . . . ."), 101.602(a)(2) ("[N]one of the debts, liabilities, obligations, and expenses incurred, contracted for, or otherwise existing . . . shall be enforceable against the assets of a particular series.").

102. *See id.* § 101.602(b)(1)–(3); Avery et al., *supra* note 73, at 12–13 (discussing the conditions a business must meet to maintain separate liability).

103. BUS. ORGS. § 101.602(b)(1); *see* Avery et al., *supra* note 73, at 12–13.

104. *See* BUS. ORGS. § 101.602(b)(2)–(3); Avery et al., *supra* note 73, at 13.

105. *See* ELIZABETH S. MILLER & ROBERT A. RAGAZZO, 19 TEXAS PRACTICE BUSINESS ORGANIZATIONS § 19.35, at 986 (3d ed. 2011 & Supp. 2013–2014); Avery et al., *supra* note 73, at 13.

106. Avery et al., *supra* note 73, at 13.

107. *See* discussion *infra* Part II.F.

F. How Undecided Employment Tax Issues Create Uncertainty for Series LLC Owners

Although the series LLC form offers numerous benefits in the way of cost savings and asset allocation, unresolved issues as to how the series LLC structure will be respected by various areas of the law have kept the entity from being adopted in more states.[108] Some of the biggest question marks arise in the area of federal taxation.[109] For a long time, business owners and their lawyers hesitated to form series LLCs because the IRS had not yet issued guidance on how it would treat a particular series within a master LLC for federal income tax purposes.[110] In 2010, the IRS issued proposed regulations under which each series within a master LLC would be treated as a separate legal entity when filing its federal income tax return.[111] Although the proposed regulations went a long way towards settling the question of the federal income tax treatment of series LLCs, the proposed regulations did not address various employment tax issues.[112] Additionally, business owners and practitioners interested in taking advantage of the series LLC form would be wise to consider how the employer mandate in the Affordable Care Act will be applied to an individual series within a series LLC.[113] Part II.G provides some background on the mechanics of the employer mandate in the Affordable Care Act.[114]

G. The Mechanics of the Employer Mandate

In an effort to increase the number of Americans with healthcare insurance, Congress passed the Affordable Care Act in 2010.[115] The gargantuan piece of legislation contains numerous provisions affecting individuals and employers.[116] One such provision is the employer mandate, a

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108. *See generally* Avery et al., *supra* note 73, at 19–24 (introducing unresolved tax and bankruptcy issues that business owners should be aware of before choosing to organize as a series LLC); Harner, Ivey-Crickenberger & Kim, *supra* note 1, at 1 (evaluating in detail the bankruptcy issues that could negatively affect the viability of the series LLC form); Allen Sparkman, *Tax Aspects of Series LLCs*, BUS. L. TODAY, Feb. 2013, at 1, 2–3 (introducing the questions that still exist concerning federal tax treatment of series within a master LLC).

109. *See, e.g.*, Sparkman, *supra* note 108, at 1–2 (discussing speculation by scholars on how series LLCs would be treated for federal income tax purposes).

110. *Id.*

111. *See* Series LLCs and Cell Companies, 75 Fed. Reg. 55,699-01, 55,703 (proposed Sept. 14, 2010) (to be codified at 26 C.F.R. pt. 301); Sparkman, *supra* note 108, at 1–2 ("The Proposed Regulations apply to series created by 'series organizations' pursuant to 'series statutes.'").

112. Series LLCs and Cell Companies, 75 Fed. Reg. at 55,704 ("[I]t will be necessary to determine how the business satisfies any employment tax obligations, whether it has the ability to maintain any employee benefit plans and, if so, whether it complies with the rules applicable to those plans."); *see* Sparkman, *supra* note 108, at 3.

113. *See* 26 U.S.C. § 4980H (2012) (requiring employers with fifty or more full-time employees to provide healthcare under an eligible plan to those employees).

114. *See* discussion *infra* Part II.G.

115. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2580 (2012).

116. *See id.* (noting that "[t]he Act's 10 titles stretch over 900 pages and contain hundreds of

type of "play or pay" incentive intended to increase the number of employers who provide healthcare coverage to their employees.[117] Under the provision, an employer may choose to "play" by providing healthcare coverage to its employees or "pay" a tax or fee to subsidize the uninsured.[118]

During the legislative battles over what provisions would eventually be included in the Affordable Care Act, politicians and influential business organizations debated intensely over the prudence of including a play or pay-style employer mandate.[119] Eventually, Congress passed the Affordable Care Act, which included a play or pay provision directed at employers.[120] The provision, although not a mandate in the truest sense of the word, requires employers to pay penalties under certain circumstances relating to failure to provide employee healthcare coverage.[121]

Starting in 2016, the Affordable Care Act's employer mandate will apply to businesses that employ fifty or more "full-time equivalents" for more than 120 days during the prior calendar year.[122] A business determines its number of full-time equivalents by dividing "the total number of hours of service for which wages were paid by the employer to employees during the taxable year, by . . . 2,080."[123] Employers with more than fifty full-time equivalents can "choose to 'play' by offering 'minimum essential coverage' to full time employees and their beneficiaries."[124] Section 5000A of the Internal Revenue Code provides that minimum essential coverage includes various government-sponsored healthcare programs, employer-sponsored plans, individual market plans, and grandfathered health plans.[125] Specifically, an "eligible employer-

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provisions").

117. *See* Chirba-Martin, *supra* note 4, at 393–95 (internal quotation marks omitted); Jeanne Sahadi, *Health Care: Will 'Pay or Play' Chase Employers Away?*, CNN MONEY (June 2, 2009, 5:54 PM), http://money.cnn.com/2009/07/02/news/economy/health_reform/.

118. *See* Chirba-Martin, *supra* note 4, at 396.

119. *See id.* at 396–97. For example, The National Retail Foundation and The National Federation of Independent Business opposed any sort of mandate, and Senator Orrin Hatch believed such a measure would be "job killing." *Id.* (internal quotation marks omitted); *Will Democrats Go At It Alone on the Health Care Bill?*, FOX NEWS, http://www.foxnews.com/story/2009/08/20/will-democrats-go-at-it-alone-on-health-care-bill/ (last visited Apr. 15, 2014). Surprisingly, however, Walmart eventually became a staunch supporter of an employer mandate. *See* Chirba-Martin, *supra* note 4, at 397.

120. *See* Chirba-Martin, *supra* note 4, at 397–98.

121. *See id.* at 397 ("Technically, it is not a true 'mandate' since it does not require health-related payments in every instance (unlike the House's original unconditional insistence that employers sponsor benefits or pay additional taxes).").

122. *See* Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. 8544-01, 8574 (proposed Feb. 12, 2014) (to be codified at 26 C.F.R. pt. 301); Chirba-Martin, *supra* note 4, at 397–98; *Employer Responsibility Under the Affordable Care Act*, HENRY J. KAISER FAM. FOUND., http://kff.org/infographic/employer-responsibility-under-the-affordable-care-act/ (last updated July 15, 2013) (noting that employers with twenty-five or fewer employees may qualify for a health insurance tax credit).

123. 26 U.S.C. § 45R(d)(2)(A) (2012). If the formula does not produce a whole number, the employer is to round to the next lowest whole number and that number is treated as the employer's total full-time equivalent employees. *Id.*

124. Chirba-Martin, *supra* note 4, at 398; *see Employer Responsibility Under the Affordable Care Act*, *supra* note 122.

125. 26 U.S.C. § 5000A(f)(1) (2012).

sponsored plan" is "a group health plan or group health insurance coverage offered by an employer to the employee which is . . . a governmental plan . . . or . . . any other plan or coverage offered in the small or large group market within a State."[126] In addition, the employer-sponsored plan must not require the covered employee to contribute more than "9.5% of total household income or 40% of covered expenses."[127] Penalties do not automatically hit an employer of more than fifty full-time equivalents that chooses not to provide coverage via an eligible employee-sponsored plan.[128] Rather, if at least one full-time equivalent employee whose income does not exceed 400% of the federal poverty level qualifies for federal subsidies from a newly created healthcare exchange, then the employer must pay an annual penalty.[129] The annual penalty is equal to $2,000 multiplied by the employer's number of full-time equivalents minus thirty.[130] Part II.H explains the purpose of the Employee Retirement Income Security Act and provides background on the development of employer aggregation rules that could potentially apply to determine whether a series LLC must provide healthcare or pay a penalty.[131]

H. Employer Aggregation: How Rules in the Employee Retirement Income Security Act Aim to Prevent Employers from Avoiding Employee Benefits Responsibilities

Congress enacted the Employee Retirement Income Security Act (ERISA) in 1974 to reform the private pension industry.[132] The bill's passage represented the culmination of nearly two decades worth of government investigation into the industry.[133] Eventually, as a result of government concern

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126. *Id.* § 5000A(f)(2); *see New Rules Define Minimum Essential Coverage and Affordability Under the Affordable Care Act*, SEGAL CONSULTING: CAPITAL CHECKUP (Mar. 12, 2013), http://www.segalco.com/publications-and-resources/multiemployer-publications/capital-checkup/archives/?id=2321 (discussing regulations issued by the Department of the Treasury and the Department of Health and Human Services that refine the definition of minimum essential coverage).

127. Chirba-Martin, *supra* note 4, at 398.

128. *See id.*

129. *See id.* at 398–99 & n.37.

130. *See id.* (noting that this formula would produce $40,000 per year in fines for employers with fifty full-time workers).

131. *See* Series LLCs and Cell Companies, 75 Fed. Reg. 55,699-01, 55,705 (proposed Sept. 14, 2010) (to be codified at 26 C.F.R. pt. 301) ("However, to the extent that a series can maintain an employee benefit plan, the aggregation rules under section 414(b), (c), (m), (o) and (t), as well as the leased employee rules under section 414(n), would apply."); *Graves Requests IRS Guidance on Employer Mandate for Owners of Multiple Businesses*, TAX ANALYSTS: TAX NOTES TODAY (Sept. 6, 2013), http://services.taxanalysts.com/taxbase/tnt.3nsf/dockey/FD53C07DE673EFD985257BDE000681FF?OpenDocument&highlight=0employer+mandate (publishing a letter from Congressman Sam Graves to IRS Commissioner Daniel Werfel asking for guidance on how the employer mandate will be applied to people with ownership interests in multiple small businesses); discussion *infra* Part II.H.

132. *See* Donald T. Bogan, *Protecting Patient Rights Despite ERISA: Will the Supreme Court Allow States to Regulate Managed Care?*, 74 TUL. L. REV. 951, 952, 964 (2000).

133. *See id.* at 966–72 (detailing the key executive and legislative actions that eventually led to ERISA's passage).

about perceived abuses in the private pension market, Senator Jacob Javitz introduced a bill in the Senate that Congress would eventually pass as ERISA.[134]

As indicated in the bill's unusually extensive legislative history, Congress passed ERISA with the chief objective of decreasing harm to employers due to questionable practices in the private pension industry.[135] To accomplish this goal, the bill sought to implement policies to (1) create minimum standards of behavior for fiduciaries charged with administering private pension benefits; (2) enforce the newly created standards of behavior through both criminal and civil sanctions; and (3) reduce uncertainty for workers relying on their private pensions to provide retirement income by creating vesting, minimum funding, and requiring plans to insure underfunded benefits.[136] The detailed legislative history of ERISA demonstrates an undeniable legislative intent to remedy a lack of sufficient oversight in the private pension industry.[137] In contrast, ERISA's original legislative history does not contain evidence that Congress contemplated regulation of employee benefits other than pensions in the lead-up to the bill's passage.[138]

Although ERISA's legislative history is lacking evidence of serious Congressional intent to regulate nonpension employee benefits, the final bill Congress passed contains incredibly broad preemption language.[139] The preemption language means that ERISA applies not only to pension benefits, but also to all state laws that pertain to "welfare benefit plans, which provide medical, health, sickness, accident, and other non-pension benefits."[140] Because of the preemption language, ERISA effectively superseded state laws regulating the administration of employer-provided health plans.[141] Despite this preemption, ERISA lacked a substantive regulatory scheme to fill the void created by preemption of state law.[142]

ERISA's preemption of state law in the employee welfare benefits area, coupled with the lack of substantive regulatory coverage for those benefits in ERISA, led to problems requiring further congressional action.[143] Specifically, employers began to take advantage of a loophole in the Internal Revenue Code

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134. *See id.* at 966–71 (detailing the history of federal government inquiries into the private pension industry).

135. *See id.* at 971–72.

136. *See id.* (citing H.R. Rep. No. 93-533, at 17–18 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4655, 5655–56).

137. *See id.* at 972.

138. *See id*. at 972 & n.102.

139. *See id.* at 977.

140. Wadsworth v. Whaland, 562 F.2d 70, 74 (1st Cir. 1977) (providing a summary of the contents of ERISA's five titles); *see* Bogan, *supra* note 132, at 977–78 (questioning why Congress included such broad preemption language given the fact "that ERISA does not comprehensively regulate welfare plans").

141. *See* Bogan, *supra* note 132, at 978.

142. *See id.*

143. *See* Theodore C. Falk & Greg K. Hitchcock, *How the Management Service Organization Rules Operate*, 65 J. TAX'N 102, 102 (1986).

created when Congress preempted state regulation of nonpension employee benefits.[144] Ordinarily, if an employer wished to deduct its contributions to an employee pension plan, that employer had to comply with the requirements of Internal Revenue Code § 401.[145] Notably, § 401(a)(4) provides that an employee pension plan qualifies "if the contributions or benefits provided under the plan do not discriminate in favor of highly compensated employees."[146] To get around the nondiscrimination requirements, businesses typically reorganized into multiple business entities.[147] Under this structure, one entity employed only highly compensated employees.[148] As a result of the scheme, an employer could provide different benefits to highly compensated employees and still meet § 401(a)'s nondiscrimination requirement.[149]

In response, Congress included § 414(b)–(d) as part of ERISA to limit business organizations' ability to avoid the nondiscrimination rules of § 401 through creative entity formation.[150] At first, these aggregation rules applied only to aid in the enforcement of nondiscrimination rules in a pension benefits context.[151] Due to the regulatory void created by ERISA's preemption of nonpension employee benefit regulation and the fact that nondiscrimination rules did not apply to nonpension benefits after ERISA initially became law, the

144. *See id.* at 102–03 ("Historically, taxpayers tried to avoid the nondiscrimination provisions by using separate organizations."). Normally, the nondiscrimination provisions of § 401 of the Internal Revenue Code regulate employee pension plans set up by employers. *See* 26 U.S.C. § 401(a) (2012), *amended by* Cooperative and Small Employer Charity Pension Flexibility Act, Pub. L. No. 113-97, 128 Stat. 1101 (2014); Comm'r v. Pepsi-Cola Niagara Bottling Corp., 399 F.2d 390, 390 (2d Cir. 1968) (discussing nondiscrimination as a prerequisite to deduct employer contributions to employee pension plans). Even though these nondiscrimination provisions existed, they did not expressly cover nonpension employer-provided benefits such as healthcare. *See* 26 U.S.C. § 401(a) (explaining that the requirements for deductibility of employer contributions contained in § 401 apply to "stock bonus, pension, or profit-sharing plan[s] of an employer").

145. *See* 26 U.S.C. § 401(a)(1)–(4) (listing the requirements for contributions or employee pension plans to be deductible); *Pepsi-Cola Niagara Bottling Corp.*, 399 F.2d at 390 (noting that plans must meet the requirements of § 401 before employer contributions to those plans become deductible under § 404 of the Internal Revenue Code).

146. 26 U.S.C. § 401(a)(4). Section 414(q) of the Internal Revenue Code defines a "highly-compensated employee" as one who "was a 5-percent owner at any time during the . . . preceding year" or who "had compensation from the employer in excess of $80,000, and . . . if the employer elects the application of this clause for such preceding year, was in the top-paid group of employees for such preceding year." 26 U.S.C. § 414(q) (2012), *amended by* Cooperative and Small Employer Charity Pension Flexibility Act, 128 Stat. 1101.

147. *See* Falk & Hitchcock, *supra* note 143, at 102–03 (noting that taxpayer use of separate entities to avoid nondiscrimination requirements was a common practice throughout the history of pension benefits regulation).

148. *See id.*

149. *See id.*

150. *See* Fujinon Optical, Inc. v. Comm'r, 76 T.C. 499, 505 (1981) ("It is true that a significant harm perceived by Congress, leading to the enactment of section 414(b), involved the use of separate corporate entities to circumvent the antidiscrimination provisions.").

151. *See* Bogan, *supra* note 132, at 973 ("While it is true that portions of ERISA apply to nonpension benefit plans, the statute certainly does not provide a complete and coordinated network of rules to govern nonpension employee benefits."); Falk & Hitchcock, *supra* note 143, at 102–03 ("ERISA preempted the field of welfare benefit regulation but did not impose any nondiscrimination tests.").

employer aggregation rules in § 414 were applied to prevent discrimination in favor of highly-compensated employees in the provision of other employee benefits.[152] Significantly, the IRS will use the employer aggregation rules of § 414 to determine how many employees an owner of multiple businesses employs for the purpose of applying the employer mandate.[153]

Adding more complexity to the analysis of how the employer mandate will apply to series LLCs, business owners will also have to navigate the employer aggregation rules under ERISA, assuming the IRS decides to treat each series as a separate employer capable of providing employee benefits to determine whether their entity will be treated as a single employer of fifty full-time equivalents.[154] If the aggregation rules apply, each series within a series LLC could be consolidated and the master LLC could be treated as a single employer, despite the fact that each series is accorded separate entity status for federal income tax purposes.[155] Under the employer aggregation rules, "all employees of all corporations which are members of a controlled group of corporations . . . shall be treated as employed by a single employer."[156]

Before applying the aggregation rules, courts will use common law concepts to determine how many employees a series or master LLC has.[157] The inquiry as to whether one is an employee involves many factors and can become quite complex.[158] For example, in Revenue Ruling 87-41, the IRS listed twenty factors to be used in determining whether a person is an employee for employment tax purposes.[159] These factors focus mainly on control exercised by the potential employer over the details of the work and the rights between the potential employer and the person performing services.[160] The IRS

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152. *See* Falk & Hitchcock, *supra* note 143, at 102 (noting the enactment of two welfare benefits statutes that incorporated § 414(b) and (c)). The trend of applying the aggregation rules in nonpension benefits contexts continued "with TERFA in 1982 and the Deficit Reduction Act of 1984." *Id.*

153. *See* Series LLCs and Cell Companies, 75 Fed. Reg. 55,699-01, 55,705 (proposed Sept. 14, 2010) (to be codified at 26 C.F.R. pt. 301); *Graves Requests IRS Guidance on Employer Mandate for Owners of Multiple Businesses*, *supra* note 131.

154. *See* Series LLCs and Cell Companies, 75 Fed. Reg. at 55,705; *Graves Requests IRS Guidance on Employer Mandate for Owners of Multiple Businesses*, *supra* note 131.

155. *See* 26 U.S.C. § 4980H(c)(2)(C)(i) (2012) ("All persons treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986 shall be treated as 1 employer."); Series LLCs and Cell Companies, 75 Fed. Reg. at 55,705; *Graves Requests IRS Guidance on Employer Mandate for Owners of Multiple Businesses*, *supra* note 131.

156. 26 U.S.C. § 414(b) (2012), *amended by* Cooperative and Small Employer Charity Pension Flexibility Act, Pub. L. No. 113-97, 128 Stat. 1101 (2014); *see Graves Requests IRS Guidance on Employer Mandate for Owners of Multiple Businesses*, *supra* note 131.

157. *See* Series LLCs and Cell Companies, 75 Fed. Reg. at 55,704 (noting that common law concepts will apply to determine whether an employment relationship exists between a particular series and a worker); Matthew R. Madara, *Worker Classification Increasingly Important as ACA Deadlines Approach*, TAX NOTES TODAY (Sept. 13, 2013), http://services.taxanalysts.com/taxbase/tnt.3.nsf/dockey/C3D370AD75159D5D85257BE500062FE9?OpenDocument&highlight=0,employer+mandate.

158. *See* Rev. Rul. 87-41, 1987-1 C.B. 296, 296 (providing IRS guidance as to how employers should determine whether someone working for them is an employee for the purpose of providing employment benefits).

159. *See id.* at 298–300.

160. *See id.* For example, the factors seek to ascertain whether the "person or persons for whom the

uses these factors to determine the key question in employer–employee relationships: whether the employer exercised sufficient control over the end result and details of a person's work for that person to fairly be considered an employee.[161] Next, Part III discusses the legal principles the IRS will consider in deciding employment tax treatment of series LLCs and presents an application of the employer aggregation rules to the series LLC presented in the introductory hypothetical of this Comment.[162]

III. EMPLOYMENT TAX TREATMENT AND EMPLOYER AGGREGATION

This Comment analyzes two issues: (1) whether the IRS is likely to treat each series within a series LLC as a separate employer for the purposes of employment taxes and employee benefits; and (2) if the IRS does decide to treat each series as a separate employer, how the employer aggregation rules in ERISA would likely be applied to the series LLC form.[163]

A. Separate or Together? A Look at How Different States Classify Series Within a Series LLC

The states that have passed series LLC statutes differ as to whether a series within a master LLC is treated as a legally separate entity.[164] Most states with series LLC statutes do not treat each series as a fully separate legal entity.[165] Texas, for example, follows this principle.[166] In Texas, a series has the power to make contracts and incur obligations but it is not considered a fully independent legal entity.[167] A few states do allow for treatment of series LLCs as legal entities completely separate and distinct from the master LLC.[168] Specifically, Delaware, Iowa, and Illinois "allow the series to be

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services are performed have the right to require compliance with instructions" or whether a particular worker received training indicating that "the person or persons for whom the services are performed want the services performed in a particular method or manner." *Id.* at 298. Furthermore, the factors evaluate whether a potential employer controls hiring, hours, and payment of a person performing services. *Id.* at 298–99.

161. *See id.* ("These sections provide that generally the relationship of employer and employee exists when the person or persons for whom the services are performed have the right to control and direct the individual who performs the services . . . .").

162. *See* discussion *infra* Part III.

163. *See* discussion *infra* Part III.B–C.

164. *See* Michael W. McLoughlin & Bruce P. Ely, *IRS Issues Long-Awaited Guidance on Series LLCs; Will the States Soon Follow?*, 20 J. MULTISTATE TAX'N & INCENTIVES, Jan. 2011, at 8 (discussing the difference between state law treatment of series LLCs).

165. *See id.* ("These series under the LLC are generally not treated as separate entities under state law . . . .").

166. *See* S. Comm. on Bus. & Indus., Bill Analysis, Tex. S.B. 847, 83d Leg., R.S. (2013); *supra* note 93 and accompanying text.

167. *See* S. Comm. on Bus. & Indus., Bill Analysis, Tex. S.B. 847, 83d Leg., R.S. (2013) (noting that the purpose of the bill is to "state that a series is not an independent entity but has the ability to acquire and sell assets and exercise all of the powers and privileges as necessary to conduct its business purpose").

168. *See* McLoughlin & Ely, *supra* note 164, at n.6.

formed such that it is a separate entity, if the articles of organization so provide."[169] Undoubtedly, states differ in their treatment of series LLCs.[170] Even so, an entity's treatment for state law purposes does not always correlate with its treatment for federal tax purposes.[171] Next, this Comment will address the overarching legal principles that the IRS will likely consider in determining the treatment of individual series within a series LLC for employment tax purposes.[172]

B. Uniformity and Substance: How Overarching Principles in Tax Law Might Apply in the Series LLC Context

Courts applying various provisions of the Internal Revenue Code have always sought to apply a uniform nationwide policy of federal taxation.[173] Accordingly, in *Lyeth v. Hoey*, the United States Supreme Court articulated the policy concerns that underlie the federal government's decision to seek uniformity when applying federal tax law.[174] The case involved the issue of whether property received by the petitioner pursuant to a compromise agreement arising out of his assertion of claims to his grandmother's property as an heir constituted taxable income.[175] Mary B. Longyear (Ms. Longyear), the petitioner's grandmother, died in 1931, leaving six heirs, the petitioner being one of them.[176] In her will, Ms. Longyear left only a small portion of her substantial residuary estate to each of the heirs.[177] She then left more than $3 million to an endowment trust and stipulated that the trust income be paid to the Longyear Foundation.[178] That foundation was created to preserve the life works of Mary Baker Eddy—founder of the Christian Science religion.[179] The petitioner and the other heirs objected to Ms. Longyear's allocation of her estate

169. *See id.*

170. *See id.*

171. *See* STEPHEN SCHWARZ & DANIEL J. LATHROPE, FUNDAMENTALS OF BUSINESS ENTERPRISE TAXATION: CASES AND MATERIALS 2–7 (5th ed. 2012) (setting out the distinction between an entity's treatment for state law purposes and an entity's treatment for tax purposes).

172. *See* discussion *infra* Part III.B.

173. *See* Banner v. United States, 428 F.3d 303, 310 (D.C. Cir. 2005) (per curiam) (citing Knowlton v. Moore, 178 U.S. 41, 106 (1900)) (noting that the Constitution requires "geographical uniformity" in tax law); Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334, 2339–40 (1997) (noting that the requirement for a uniform policy of taxation is rooted in art. I, § 8 of the Constitution).

174. *See* Lyeth v. Hoey, 305 U.S. 188, 194 (1938); Mark R. Siegel, *Retained Possession and Enjoyment: Searching out the Reality for Residential Transfers*, 24 SW. U. L. REV. 81, 96 n.143 (1994); Nathan R. O'Tool, Note, *Case Note:* Knight *and the 2% Floor: Still in Search of a Workable Standard to Evaluate the Tax Deductibility of Fiduciary Expenses*—Knight v. Commissioner, 36 WM. MITCHELL L. REV. 1333, 1342 n.85 (2010).

175. *Lyeth*, 305 U.S. at 189.

176. *Id.* (noting that the petitioner was the son of one of Ms. Longyear's deceased daughters).

177. *Id.*

178. *Id.*

179. *Id.*

when the will was offered for probate.[180] After the probate court "granted a motion for the framing of issues for trial before a jury," the parties reached a compromise agreement that disregarded Ms. Longyear's gift of her residuary estate to the Longyear Foundation.[181] Instead, the compromise agreement provided that $200,000 be paid to each of Ms. Longyear's heirs and the trust set up for the preservation of Mary Baker Eddy's works.[182] The compromise agreement provided that the $200,000 to which the heirs were entitled was to be paid in shares of stock.[183]

Accordingly, the petitioner received 358 shares of stock as payment in July of 1933.[184] The petitioner paid $56,389.65 in tax on this income and subsequently filed suit for a refund of that amount.[185] The district court granted summary judgment in favor of the petitioner, but the circuit court reversed.[186] The petitioner contended that the stock he received should not be subject to income tax because it was acquired by gift.[187] The IRS took the position that the stock was taxable because he had not received the property subject to the will but subject to the compromise agreement.[188] The IRS based its argument on a Massachusetts statute that provided that a state succession tax would be applied as if the property had passed according to the written will and not the compromise agreement.[189] In siding with the IRS, the circuit court held that the issue of whether property was truly received by gift and, thus, exempt from tax "depended 'upon the law of the jurisdiction under which this taxpayer received it.'"[190] The Supreme Court disagreed with this logic because it reasoned that congressional intent as to the use of the taxing power should decide questions related to federal income taxation.[191] The Court further reasoned that Congress intended to create rules for taxation that would be uniform in their application regardless of the eccentricities of certain state laws.[192]

Lyeth illustrates the first principle that will guide the IRS as it tries to determine whether an individual series within a master LLC will be treated as a separate employer for employment tax purposes—namely, uniformity.[193] Thus,

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180. *Id.*
181. *Id.* at 189–90.
182. *Id.* at 190.
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.* at 191.
187. *Id.*
188. *Id.*
189. *Id.* at 191–92.
190. *Id.* at 193.
191. *Id.* at 194.
192. *Id.*
193. *See id.* ("In dealing with the meaning and application of an act of Congress enacted in the exercise of its plenary power under the Constitution to tax income and to grant exemptions from that tax, it is the will of Congress which controls, and the expression of its will, in the absence of language evidencing a different purpose, should be interpreted 'so as to give a uniform application to a nation-wide scheme of taxation.'" (quoting Burnet v. Hamel, 287 U.S. 103, 110 (1932))); *see also* Jodi Schwartz, *NYSBA Report Addresses*

the fact that states' series LLC statutes vary as to whether a series is a separate legal entity or not will not keep the IRS from promulgating a uniform rule for employment tax purposes.[194] Even though this apparent disregard for the sovereignty of state legislatures may seem unfair at first glance, a uniform policy would help series LLC owners by giving them settled expectations as to whether the IRS will treat them as separate employers or treat the master LLC as the only employer.[195] In turn, this would allow owners of series LLCs and their counsel to know with more certainty whether the master LLC or an individual series is responsible for providing healthcare or paying a penalty pursuant to the employer mandate when it goes into effect in 2016.[196]

In addition to a desire for uniformity, tax law often elucidates a strong preference for substance over form, which minimizes the opportunity for formalistic manipulation of tax rules by taxpayers.[197] When scrutinizing a transaction for its substance, "the Court has looked to the objective economic realities of a transaction rather than to the particular form the parties employed."[198] *Lucas v. Earl* presents a classic example of tax law being more concerned with the substance of relationships rather than the way they are formally structured.[199] In that case, the Court faced the issue of whether the taxpayer should compute his income tax liability based on *all* of the "salary and attorney's fees earned by him" or should compute his tax liability based only on *half* of that amount "in view of a contract with his wife."[200] Mr. Earl had made a contract with his wife in 1901, which stated, among other things, that any earnings the two of them acquired would be "owned by [them] as joint tenants, and not otherwise, with the right of survivorship."[201] Mr. Earl, himself an attorney, thought he had devised a clever way to keep some of his salary and

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Proposed Regs on Series Organizations, TAX ANALYSTS: TAX NOTES TODAY (Aug. 5, 2011), http://services. taxanalysts.com/taxbase/archive/tnt2011.nsf/dockey/F143D0176D4B3B2185257A03003433AA?Open Document&highlight=0,series+llc ("Existing tax principles generally should be applied to resolve employment tax and employee benefits issues involving series [LLCs].").

194. *See* Series LLCs and Cell Companies, 75 Fed. Reg. 55,699-01, 55,703 (proposed Sept. 14, 2010) (to be codified at 26 C.F.R. pt. 301) ("Because Federal tax law, and not local law, governs the question of whether an organization is an entity for Federal tax purposes, it is not dispositive that domestic series generally are not considered entities for local law purposes.").

195. For example, if each series is treated as a separate employer, series LLC owners will know for sure whether they should implement employee benefit plans or pay employment taxes. *See* Series LLCs and Cell Companies, 75 Fed. Reg. at 55,704 (noting that those issues will remain unsettled until the IRS issues proposed regulations on employment tax classification).

196. *See id.* (noting that employer aggregation rules would apply if a series is found to be a separate employer capable of administering employee benefits).

197. *See* Charlene D. Luke, *The Relevance Games: Congress's Choice for Economic Substance Gamemakers*, 66 TAX LAW. 551, 558 (2013) ("Courts have a long history in tax controversies of looking beyond the form used by a taxpayer to the substance of a transaction.").

198. Frank Lyon Co. v. United States, 435 U.S. 561, 573 (1978).

199. *See* Lucas v. Earl, 281 U.S. 111, 113 (1930); *Harvard Law Review Supreme Court Statistics*, 72 HARV. L. REV. 98, 113 (1958).

200. *Earl*, 281 U.S. at 113.

201. *Id.* at 113–14 (quoting the contract between Mr. Earl and his wife) (internal quotation marks omitted).

earnings from becoming gross income to him.[202] Specifically, Mr. Earl posited that Congress aimed "to tax only income beneficially received" when it enacted a federal income tax.[203] Hence, he argued that he should only be taxed on half of his salary and attorney's fees because the contract technically made such income the joint property of him and his wife at the instant he received it.[204] Justice Holmes, writing for the Court, rejected Mr. Earl's argument.[205] He reasoned instead that the application of tax laws does not turn on the technical, formalistic way taxpayers have attempted to structure a transaction or economic relationship.[206] With this principle in mind, the Court held that the purpose of the Internal Revenue Code was to "tax salaries to those who earned them" whether or not the taxpayer in question attempted to avoid the income by assigning it prior to earning it.[207] Thus, Mr. Earl had to pay tax on the whole amount of salary and attorney's fees he earned despite the contract with his wife.[208] Substantively, Mr. Earl received all of the income because he did all the work responsible for creating the income.[209] The Court's rejection of Mr. Earl's attempt to assign his own income to his wife through a contract illustrates the overarching preference in tax law for the substance of an economic transaction or relationship to be determinative in tax disputes.[210]

In the context of series LLCs and employment taxes, the IRS might find that the preference for substance over form cuts both ways.[211] As in the hypothetical posed in the introduction, some series LLCs will be composed of multiple series that perform separate business functions and have employees who perform wholly separate duties for each series.[212] The Bottling series has employees who brew and bottle beer, while the Distribution series has employees who drive delivery vehicles to liquor stores and other customers.[213]

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202. *See id.* at 114.

203. *Id.*

204. *Id.* ("A very forcible argument is presented to the effect that the statute seeks to tax only income beneficially received, and that taking the question more technically the salary and fees became the joint property of Earl and his wife on the very first instant on which they were received.").

205. *See id.*

206. *Id.* ("But this case is not to be decided by attenuated subtleties. It turns on the import and reasonable construction of the taxing act.").

207. *Id.* at 114–15 ("There is no doubt that the statute could tax salaries to those who earned them and provide that the tax could not be escaped by anticipatory arrangements and contracts however skillfully devised to prevent the salary when paid from vesting even for a second in the man who earned it.").

208. *Id.* at 113.

209. *Id.* at 114 (noting that Mr. Earl "was the only party to the contracts by which the salary and fees were earned, and it is somewhat hard to say that the last step in the performance of those contracts could be taken by anyone but [Mr. Earl]").

210. *See id.* at 115 ("That seems to us the import of the statute before us and we think that no distinction can be taken according to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew."); *Harvard Law Review Supreme Court Statistics*, *supra* note 199, at 113 (noting that "the *Lucas v. Earl* rule . . . seeks to protect the graduated income tax from evasion by income-shifting techniques").

211. *See infra* notes 212–21 and accompanying text.

212. *See supra* Part I.

213. *See supra* Part I.

Although the two series are both part of Maroon Brews, one could still say the series perform substantively different business functions.[214] For example, Maroon Brews could have simply contracted with a delivery company, but instead it chose to run its own delivery business.[215] The fact that some series LLCs will contain substantively different businesses with employees that perform distinct functions for one series only militates in favor of treating each individual series within a master LLC as a fully separate legal entity for employment tax purposes.[216]

In contrast, business owners might sometimes use the series LLC in rather formal ways solely for liability or asset protection.[217] For example, a business that owns a number of taxicabs may wish to use the series LLC form.[218] Inevitably, a taxicab owned by the business will get into a car wreck.[219] Pursuant to respondeat superior, the wreck could result in liability for the business that owns the taxicab.[220] Because of this risk, a business that owns taxicabs may wish to use the series LLC form to establish an individual series for each taxicab in order to protect as many assets as possible from liability.[221] In contrast with Maroon Brews—whose employees perform distinctly different business functions for different series—each cab driver would perform substantively the same function for each individual series and the business as a whole.[222] Under this scenario, the IRS might find that the preference for substance over form weighs in favor of not treating each series as an entity separate from its master LLC for the purpose of employment tax.[223]

In determining whether to treat an individual series within a series LLC as a separate employer, uniformity and a rule that favors substance over form will be overarching considerations that determine the final decision; indeed, if the IRS decides to treat each series within a series LLC as a distinct employer, it would be in line with how series are classified generally for federal income tax purposes.[224] Next, Part III.C presents a hypothetical application of how the

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214. *See supra* Part I.

215. *See supra* Part I.

216. *See supra* notes 199–212 and accompanying text (explaining the preference for substance over form in federal tax law).

217. *See* Goforth, *supra* note 80, at 393–95; Bernie R. Kray, Comment, *Respecting the Concept and Limited Liability of a Series LLC in Texas*, 42 ST. MARY'S L.J. 501, 522–23 (2011) (noting that "the beneficial uses for this new business form are virtually limitless").

218. Goforth, *supra* note 80, at 393–94 (providing a taxicab example).

219. *Id.* at 393.

220. *See id.*

221. *See id.*

222. *See id.*; *supra* text accompanying note 214.

223. *See supra* notes 199–212 and accompanying text (explaining the preference for substance over form in federal tax law).

224. *See supra* notes 111, 172–209 and accompanying text; *see also* Schwartz, *supra* note 193 ("Existing tax principles generally should be applied to resolve employment tax and employee benefits issues involving series [LLCs].").

employer aggregation rules apply if the IRS chooses to treat each series within a series LLC as a distinct employer.[225]

C. A Hypothetical Application of the Employer Aggregation Rules to the Series LLC Form

In considering the question of how an individual series will ultimately be classified for employment tax purposes, perhaps it is helpful to visualize what would happen if each individual series were treated as a separate employer for purposes of employment tax and employee benefits.[226] Using the hypothetical posed in Part I, this section applies the employer aggregation rules of ERISA to predict a possible outcome.[227]

In order to give proper advice to the owners of Maroon Brews, Keith will first need to consider which aggregation rule will likely be applied to Maroon Brews.[228] Internal Revenue Code § 414(b) will not apply to Maroon Brews because it did not make a check-the-box election to be treated as a corporation for federal income tax purposes.[229] Section 414(b) provides that "all employees of all corporations which are members of a controlled group of corporations . . . shall be treated as employed by a single employer."[230] A business is classified as a corporation for federal income tax purposes if it is incorporated under state law or is an association, joint-stock company, or insurance company.[231] Because a series LLC is not incorporated under state law and because each series has two or more owners, each series in Maroon Brews would be considered a partnership for the purposes of federal income tax under the default rules provided in the check-the-box regulations.[232] Because the Bottling series and the Distribution series would be treated as partnerships for federal income tax purposes, each would be immune from the aggregation rules that

225. *See infra* Part III.C.

226. *See infra* notes 229–53 and accompanying text.

227. *See infra* notes 230–53 and accompanying text.

228. *See* Series LLCs and Cell Companies, 75 Fed. Reg. 55,699-01, 55,705 (proposed Sept. 14, 2010) (to be codified at 26 C.F.R. pt. 301) (stating, "to the extent that a series can maintain an employee benefit plan, the aggregation rules under section 414(b), (c), (m), (o) and (t) . . . would apply"); *supra* Part I.

229. *See* 26 U.S.C. § 414(b) (2012), *amended by* Cooperative and Small Employer Charity Pension Flexibility Act, Pub. L. No. 113-97, 128 Stat. 1101 (2014); Treas. Reg. § 301.7701-3(a)–(c) (2006). The treasury regulations contained in § 301.7701-3 are commonly referred to as "check-the-box" regulations. *See* SCHWARZ & LATHROPE, *supra* note 171, at 12–13.

230. 26 U.S.C. § 414(b).

231. 26 U.S.C. § 7701(a)(3) (2012).

232. *See id.* § 7701(a)(2) ("The term 'partnership' includes a syndicate, group, pool, joint venture, *or other unincorporated organization* . . . ." (emphasis added)). The default classification for an unincorporated entity is a partnership unless the owners of the company make an election to be taxed as a corporation. *See* Treas. Reg. § 301.7701-3(b)(1); *see also* Carter G. Bishop, *The Series LLC: Tax Classification Appears in Rear View*, TAX NOTES TODAY, Jan. 2011, at 1, 6, *available at* http://papers.ssrn.com/so13/papers.cfm?abstract_id=1709445 (explaining that a series should be classified as a partnership when "two members of the [master LLC] own different percentages in each series").

apply to controlled groups of corporations.[233] The employees of the Bottling series and the Distribution series would not be aggregated under § 414(b).[234] Therefore, the enterprise as a whole would not be counted as having fifty full-time equivalents because of the controlled group aggregation rules.[235]

Unless the IRS promulgates a special rule specifically for series LLCs, § 414(c) of the Internal Revenue Code is the aggregation rule most likely to be applied to Maroon Brews.[236] Under this rule, "all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer."[237] Because each series within Maroon Brews would be considered a partnership—an unincorporated entity—this rule would likely be applied to the series LLC form.[238] Treasury Regulations add gloss to the language in the statute.[239] First, § 1.414(c)-1 states that "employees of two or more trades or businesses under common control within the meaning of § 1.414(c)-2 for any period shall be treated as employed by a single employer."[240]

The regulations in § 1.414(c)-2 provide three different ways that a group of legally separate entities can be considered "two or more trades or businesses under common control."[241] Businesses will be aggregated for employee benefit purposes if they constitute a "parent-subsidiary group of trades or businesses under common control," a "brother-sister group of trades or businesses under common control," or a "combined group of trades or businesses under common control."[242] Of the three options, Keith should analyze whether the Bottling series and the Distribution series will be aggregated under the rules governing brother-sister groups of trades or businesses under common control because of the way each series is organized.[243] Under this rule, a business will be aggregated when two conditions are met: (1) "the same five or fewer persons who are individuals . . . own . . . a controlling interest in each organization;" and (2) "such persons are in effective control of each organization."[244] The Bottling series and Distribution series would meet the controlling interest

233. *See* 26 U.S.C. § 414(b); Series LLCs and Cell Companies, 75 Fed. Reg. at 55,703 (providing that each series within a series LLC will be treated as a separate entity for the purpose of reporting federal income taxes); Sparkman, *supra* note 108, at 1–2 ("The Proposed Regulations apply to series created by 'series organizations' pursuant to 'series statutes.'").

234. *See* 26 U.S.C. § 414(b); Treas. Reg. § 1.414(b)-1 (1988). The statute and corresponding regulation show that this section of the statute applies to corporations. *See* 26 U.S.C. § 414(b); Treas. Reg. § 1.414(b)-1.

235. *See* 26 U.S.C. § 414(b).

236. *See id.* § 414(c).

237. *Id.*

238. *See* 26 U.S.C. §§ 414(c), 7701(a)(2) (2012) (noting that the definition of "partnership" includes "a syndicate, group, pool, joint venture, or *other unincorporated organization*" (emphasis added)).

239. *See* Treas. Reg. §§ 1.414(c)-1 to 5 (1988) (containing regulations explaining the application of § 414(c)).

240. *Id.* § 1.414(c)-1.

241. *See id.* § 1.414(c)-2(a) (internal quotation marks omitted).

242. *See id.* (internal quotation marks omitted).

243. *See id.* § 1.414(c)-2(c).

244. *See id.*

requirement because Bobby, Ben, and Ryan own more than "80 percent of the profits interest" of each of the series.[245] The ownership structure of each series also meets the effective control requirement.[246] For a partnership, the effective control requirement considers the total percentage of profits owned by the owners "only to the extent such ownership is identical with respect to each such organization."[247] In other words, the percentage ownership that will be used to calculate whether a group of owners meets the effective control requirement is the percentage that is identical in each organization.[248] Here, because Bobby has identical 50% interests in each series and the other members have identical 25% interests in each series, the members own 100% of each series.[249] Therefore, the effective control requirement is met for both the Bottling series and the Distribution series.[250] Absent some exception, each series would likely be aggregated under § 414(c) of the ERISA employer aggregation rules.[251]

Keith should explain to Bobby, Ben, and Ryan that their safest option is to provide healthcare to their employees or they will risk paying a penalty in 2016.[252] Next, Part IV makes recommendations as to how the IRS should resolve the issue of treatment of an individual series within a series LLC for employment tax purposes.[253] In addition, Part IV contains recommendations for attorneys to analyze the employer mandate in a series LLC context.[254]

IV. CONSISTENCY AND PREPARATION: HOW THE IRS SHOULD DECIDE THE ISSUE OF EMPLOYMENT TAX TREATMENT AND WHAT ATTORNEYS CAN DO TO PREPARE CLIENTS FOR THE MANDATE

A. The IRS Should Treat Each Series of a Series LLC as a Separate Employer for Employment Tax Purposes

In order to implement a uniform rule that can help business owners determine with certainty what tax rules will apply to their operations, the IRS should promulgate regulations or issue other guidance stating that an individual series within a series LLC is a separate entity for employment tax purposes.[255]

245. *See id.* § 1.414(c)-2(b)(2)(C).
246. *See id.* § 1.414(c)-2(c)(2) (defining "effective control").
247. *Id.* § 1.414(c)-2(c)(1)(ii).
248. *Id.*
249. *Id.* § 1.414(c)-2(c)(2)(iii).
250. *See id.* (noting that business owners have effective control "[i]n the case of an organization which is a partnership, such persons own an aggregate of more than 50 percent of the profits interest or capital interest of such partnership").
251. *See id.* § 1.414(c)-2(c); *supra* notes 226–48 and accompanying text.
252. *See supra* Part I (stating that Maroon Brews has a total of fifty full-time equivalents between each series); *supra* Part II.F (explaining the mechanics of the employer mandate).
253. *See infra* Part IV.A.
254. *See infra* Part IV.B.
255. *See* Series LLCs and Cell Companies, 75 Fed. Reg. 55,699-01, 55,704–05 (proposed Sept. 14, 2010) (to be codified at 26 C.F.R. pt. 301) (leaving open employment tax and employee benefits issues).

As noted earlier, the IRS has already indicated that it will treat each series within a series LLC as a separate entity for federal income tax purposes.[256] This classification indicates that the IRS prefers to treat each series as a substantively different entity, or at least wants to encourage a series to be formed for substantive and not formalistic reasons.[257] Furthermore, classifying each series as a separate entity will give business owners and their attorneys certainty as to which rules will be applied to them when it comes to supplying healthcare or paying a penalty.[258] Specifically, in the context of the employer mandate, an attorney representing clients who own a series LLC can be certain that the clients will need to be mindful of employer aggregation rules when counting employees to determine if they need to provide healthcare or pay a penalty.[259] Lastly, treating each series as a separate legal entity creates a low risk that form will prevail over substance when applying the employer mandate.[260] For example, the IRS already uses employer aggregation rules as an enforcement tool to make sure businesses are providing benefits as required by law.[261] Because of the presence of employer aggregation rules, businesses would likely not be able to organize series LLCs in a formalistic way to escape the mandate.[262] The employer aggregation rules provide less opportunity for formalistic manipulation and fact-intensive, time-consuming litigation. Treating each series separately will uphold preferences for uniformity and substance over form in tax law.[263] Finally, Part IV.B explains how attorneys who consider the employer aggregation rules will be able to structure series LLCs in the most advantageous way possible.[264]

B. Practitioners Need to be Mindful of the Potential Effect of Employer Aggregation Rules When Considering the Series LLC Form

While the IRS has not yet issued official guidance as to whether each series of a series LLC will be treated as a separate employer, attorneys assisting clients who wish to use the form should draft the company agreement with ERISA's aggregation rules in mind in order to best prepare clients to face the employer mandate.[265] The aggregation rules, while extensive, do allow some

256. *See id.* at 55,702.

257. *See id.* at 55,701 ("For example, individual series may have separate business purposes, investment objectives, members, and managers.").

258. *See id.* at 55,705 (noting that if a series is considered to be a separate employer capable of providing employee benefits, then the employer aggregation rules will apply).

259. *See* discussion *supra* Part III.F (describing the employer aggregation rules).

260. *See* discussion *supra* Part III.B.

261. *See* discussion *supra* Part III.C.

262. *See* discussion *supra* Part III.C.

263. *See* discussion *supra* Part III.B (discussing the tax law's preference for uniformity and substantive economic relationships).

264. *See infra* Part IV.B.

265. *See* Series LLCs and Cell Companies, 75 Fed. Reg. 55,699-01, 55,705 (proposed Sept. 14, 2010) (to be codified at 26 C.F.R. pt. 301) (stating that "to the extent that a series can maintain an employee benefit

room for attorneys to eliminate the risk of aggregation through careful drafting of the company agreement.[266] Furthermore, the Texas series LLC statute allows wide discretion to business owners and their attorneys in designing the ownership structure of a business.[267]

In Maroon Brews's case, for example, Keith and the member of each series could avoid aggregation by adding four more members to each series.[268] Recall that the aggregation regulations provide that separate business entities will be considered a "brother-sister group of trades or businesses under common control" if "the same five or fewer persons" own a controlling interest and meet the effective control requirements for both businesses.[269] Since the Bottling series and Distribution series each have only three members—Bobby, Ben, and Ryan—each series falls squarely within the aggregation regulations.[270] Because the partners meet the controlling interest and effective control requirements, the businesses will be considered a single employer of fifty full-time equivalents for tax purposes.[271] If Keith is mindful of the aggregation rules, he can inform the members that they should be prepared to provide health coverage or pay a penalty.[272] Should the members evaluate their options and decide that it would be better for the business to avoid aggregation rather than be forced to cut jobs or employee hours, Keith can look for alternatives.[273] Example 6 of § 1.414(c)–2(e) illustrates how Keith can open an escape hatch for his clients so the business can continue and people can keep full-time jobs.[274] In Example 6, four individuals, A, B, C, and D each own 12% of the stock in corporations U and V, respectively.[275] In addition, individuals E, F, G, and H each own 13% of the stock of corporations U and V.[276] Although this ownership structure meets the effective control requirement, U and V avoid aggregation as a "brother-sister group of trades or businesses under common control" because no group of "the same five or fewer persons" owns a total of at least 80% of the stock in U and V corporations.[277]

Similarly, in our hypothetical, Keith should suggest an amendment to the Maroon Brews ownership structure that would guarantee that the company

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plan, the aggregation rules under section 414(b), (c), (m), (o) and (t) . . . would apply").

266. *See* Treas. Reg. § 1.414(c)-2(a) (1988) (setting out various tests to determine whether a group of entities constitutes "two or more trades or businesses under common control" (internal quotation marks omitted)).

267. *See* TEX. BUS. ORGS. CODE ANN. § 101.607(a)(1) (West 2012) (providing that "[t]he company agreement may . . . establish classes or groups of one or more members or managers . . . each of which has certain express relative rights, powers, and duties").

268. *See* Treas. Reg. § 1.414(c)–2(c).

269. *See id.* § 1.414(c)–2(c)(1) to (2) (internal quotation marks omitted).

270. *See* analysis *supra* notes 239–53.

271. *See* analysis *supra* notes 245–53.

272. *See supra* notes 132, 253.

273. *See* Treas. Reg. § 1.414(c)–2(e).

274. *See id.* § 1.414(c)–2(e), example 6.

275. *See id.*

276. *Id.*

277. *Id.* § 1.414(c)–2(a), (c)(1)(i) (internal quotation marks omitted).

would not meet the controlling interest requirement.[278] For example, the Bottling series and Distribution series could each add four more members for a total of seven members each. Two partners would be given 15% interests in the profits of each series. Then, the remaining five partners would be given 14% interests. Under the new ownership structure, no group of "the same five or fewer persons" will meet the controlling interest requirement of at least 80% of the profits interest in each partnership; while the alternative structure changes the original business deal among the members, the original members might favor dilution as compared to changing the aggregation rules and becoming subject to the employer mandate.[279] The hypothetical demonstrates that attorneys who consider the aggregation rules will be able to provide the best possible advice to their clients on the employer mandate's application in a series LLC context.[280]

V. SERIES LLCS ARE MOST LIKELY NOT A VIABLE WAY TO AVOID THE EMPLOYER MANDATE

In sum, the application of the employer mandate in the series LLC context is yet another complexity that attorneys and their clients will need to consider when running a business as a series LLC or evaluating the series LLC as an entity choice.[281] The series LLC form will likely be no more effective than any other business entity as a way to avoid the mandate.[282] First, the employer aggregation rules will apply to series LLCs in the same way they apply to other business entities if the IRS concludes that each series is a separate employer capable of providing employee benefits.[283] Second, if the IRS decides not to treat each series as a separate employer, a series LLC could only avoid the mandate by making sure the entire enterprise has fewer than fifty full-time equivalents.[284] In order to best prepare their clients to face the employer mandate in 2016, attorneys should structure series LLCs to reduce the risk of aggregation for clients with more than fifty full-time equivalents who wish to hire more employees without providing health coverage.[285] In addition, attorneys with clients who want to be absolutely certain they will not pay a penalty need to make sure the series LLC as a whole employs fewer than fifty full-time equivalents according to the IRS's common law factors for classifying employment relationships.[286] Due to the presence of the aggregation rules and

278. *See id.* § 1.414(c)–2(b)(2)(c).
279. *See id.* § 1.414(c)–2(c)(1)(i); TEX. BUS. ORGS. CODE ANN. § 101.607(b) (West 2012).
280. *See supra* notes 267–68 and accompanying text.
281. *See supra* Part III.C.
282. *See supra* Part II.H (explaining ERISA's employer aggregation rules).
283. *See supra* Part. II.C.
284. *See supra* Part II.G (discussing the employer mandate).
285. *See supra* Part IV.B (discussing an ownership structure that reduces the risk of aggregation).
286. *See supra* Parts II.G–H (discussing the employer mandate and the common law factors for employment relationships).

the risk that the IRS will not treat each series as a separate employer, the new form does not provide any unique advantage to employers as a way around the Affordable Care Act's employer mandate.[287]

287. *See supra* Part III.C.