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Preparing for the Affordable Care Act Employer Mandate

From the Experts

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As of January 1, 2015, the Patient Protection and Affordable Care Act (ACA--otherwise known as Obamacare) begins to impose certain health coverage requirements on employers who have at least 50 employees. Even though its implications are almost one year away, it is not too soon for employers to prepare for the Employer Mandate. Employers would be wise to figure out if the mandate applies to them, understand the potential penalties that can be imposed on them and, taking into account all of the various considerations, decide if they want to pay or play.

What Is the Employer Mandate?

Beginning in 2015, the ACA will impose numerous obligations on employers who meet certain defined threshold requirements. Ultimately, if an employer is a covered entity under the mandate, it will have to provide the requisite health coverage to its employees or face financial penalties for failure to do so. In particular, if such an employer does not offer "affordable" health coverage that provides a "minimum" level of coverage to its full-time employees, the employer will be subject to a penalty if at least one of its full-time employees receives a subsidy for purchasing individual coverage on a state or federal health benefits exchange (referred to as the "exchange" or the "marketplace"). The circumstances presented to employers as to whether to provide the requisite coverage or subject themselves to the corresponding penalties has become known as the Pay or Play Mandate.

Who Does the Mandate Apply To?

The mandate applies to Applicable Large Employers (ALEs). An employer will be characterized as an ALE if it employs an average of at least 50 employees during the preceding calendar year. That calculation considers both full-time employees (FTEs) and full-time equivalent employees (FTEEs), all of whom are aggregated together to determine if the 50-employee threshold is reached.

FTEs are those individuals employed for at least 30 hours per week on average during a month of service. Such individuals are treated as em-

ployees so long as they are common law employees. Consequently, individuals not to be counted would include partners of a partnership, sole proprietors, leased employees, 2 percent S-corp. shareholders and employees who work outside of the United States.

Meanwhile, the number of FTEEs is determined by (1) adding up the total hours of all employees who were not employed on average for 30 hours per week; and then (2) dividing by 120 the total hours those individuals worked in a month. The resultant total (rounded to the nearest integer) is the number of FTEEs for that particular month. Then, the number of FTEs is added together with the number of FTEEs for all months in the preceding calendar year and divided by 12. The result is the total number of employees for the applicable measuring period, i.e., the preceding calendar year.

If the number is 50 or greater, the employer is considered an ALE and is subject to the employer mandate. For example, if an employer has 40 FTEs work 40 hours (or at least 30 hours) per week on average in a month and also has 22 other employees work 15 hours per week on average in the month (1,320 hours worked in month (330 x 4 weeks) / 120 = 11 FTEEs), the employer would have a grand total of 51 qualifying employees for the applicable month. As a result, under this example, the employer would qualify as an ALE for that month.

Additionally, there are special rules for seasonal employees. An employer is not considered an ALE if its workforce: (1) exceeds 50 FTEs for 120 days or fewer during the calendar year; and (2) the employees in excess of 50 employed during that 120-day period are "seasonal workers" (as defined under Internal Revenue Service and employment laws). A retail company that employs additional workers exclusively during the holiday season would be an example. So, if such an employer only surpasses the 50-employee threshold during a period of less than four months, that employer likely would not be characterized as an ALE and not be subjected to the mandate's requirements. Also of note when performing the requisite calculations is that there are various safe harbor provisions and other considerations for "ongoing" employees and newly hired variable-hour employees that may benefit employers.

What Are the Penalties?

Under the employer mandate, there are two possible penalties an ALE faces. Specifically, an ALE will be penalized if it either: (1) does not offer minimum "essential" health insurance coverage to full-time employees and their dependents; or (2) fails to offer coverage that is considered affordable. As a general matter, minimum essential health insurance coverage must provide a minimum value of at least 60 percent of the total expected costs of the plan and also include 10 core benefits: ambulatory patient services; emergency services; hospitalization; maternity and newborn care; mental health and substance use disorder services; prescription drugs; rehabilitative services and devices; laboratory services; preventative and wellness services and chronic disease management; and pediatric services, including oral and vision care. Meanwhile, coverage is deemed "unaffordable" if an individual full-time employee's required contribution for self-only coverage (not including dependents) exceeds 9.5 percent of the employee's household income. "Household income" is the modified adjusted gross income (MAGI) of the employee and any members of the employee's family, such as a spouse or dependents.

The penalties have been analogized to different types of "hammers": the failure to provide sufficient insurance is akin to a "sledgehammer," while the employer's provision of unaffordable coverage is akin to a "tack hammer."

The Sledgehammer: An ALE is subject to such a penalty if it fails to offer minimal essential coverage to FTEs and their dependents ("dependents" encompass children but do not include spouses for this purpose). If an ALE fails to offer such coverage to the greater of at least 95 percent of its FTEs or to all but five actual FTEs (and their dependents), and at least one FTE receives a

subsidy to obtain insurance through a health care exchange, then the penalty to the ALE is $2,000 per year for each FTE in excess of 30 employed by the company. (Note: the first 30 FTEs are exempted and not included in calculating the applicable penalty amount.)

The Tack Hammer: This penalty applies if an ALE's offered plan is unaffordable. If the plan is unaffordable, and at least one FTE receives a subsidy to obtain insurance through a health-care exchange, then the ALE's penalty is the lesser of the sledgehammer penalty or $3,000 per year for each FTE who receives a subsidy.

Employers should be aware that, even though part-time employees are included in the calculations of FTEEs and taken into account for purposes of determining if the employer meets the 50-employee threshold for being considered an ALE, the penalty amounts are not impacted by the number (or insurance practices) of part-time employees or FTEEs. Also of note is the fact that undocumented workers are ineligible to receive insurance coverage from the exchange, and thus cannot seek a subsidy that would trigger penalties for an employer.

What Can Employers Do to Prepare?

First, employers should determine if they are, or may be, an ALE and subject to the obligations of the employer mandate. If they qualify as an ALE and are concerned about the applicable requirements, an employer might consider making structural changes to the company. However, dividing a currently existing company into a series of related entities, each with less than 50 FTEs, will not save the employer from being deemed an ALE and thus being subject to the mandate. IRS rules apply to decide if a group of affiliated entities will be considered a single entity or separate entities for purposes of the ACA.

Meanwhile, there are lawful ways for an employer to structure its workforce so that it will not be considered an ALE. For instance, an employer may be able to reduce its overall workforce by trimming inefficiencies or having certain employees work additional overtime hours. Also, an employer might consider restructuring its workforce to include fewer FTEs or changing the ratio of FTEs and FTEEs in order to get below the 50-employee threshold. However, the potential changes to the resultant mix requires diligent care because FTEEs still are counted toward the 50-employee total when determining whether or not an employer is an ALE.

In addition, conducting a detailed assessment of the workforce can provide a huge benefit to an employer. Employers can analyze the make-up of their workforce and consider using/hiring internal or external human resources personnel to collect and analyze demographics data on employees. For example, an employer may want to estimate the household gross income of each of its employees, because those resultant figures might enable an employee to qualify for a subsidy on a health care exchange, thereby triggering the applicable penalty on the employer. Alternatively, an employee's household income might be so high (because of others' income) that the employer-provided health coverage becomes affordable, even though the employee is required to pay more than 9.5 percent of that employee's annual income for his own individual coverage. As a result, the employer then might be able to satisfy the threshold requirements for the insurance coverage, and therefore would not be subject to a penalty for providing coverage that otherwise would have been "unaffordable."

Similarly, it also will be worthwhile for an employer to determine if its employees have families, because dependents (i.e., children, not spouses) must be offered insurance coverage under the plan. If many of them do, then the employer's health care costs likely would be more expensive. Meanwhile, if workers are younger than 26, then they potentially could be dependents for purposes of coverage under their parents' insurance plan. So, younger employees (who still would be eligible to obtain coverage under their parents' plans) might be less likely to obtain coverage on

their own behalf, and thus unlikely to go to an exchange where they possibly could receive a subsidy.

Also, an employer may believe that some workers are potentially undocumented. Because undocumented workers cannot seek a subsidy that would trigger penalties, an employer might face lesser penalties for unaffordable coverage if it has such workers (of course, there are many other risks and penalties that the employer could face as a result of employing such undocumented workers). Yet, even though undocumented workers are ineligible, their dependents may be eligible to receive insurance coverage or obtain a subsidy.

Finally, along with the financial considerations of providing health insurance or paying the penalties, each employer should consider practical considerations such as its own company culture and community reputation. These considerations likely would include such elements as talent retention and whether the company needs a competitive benefits package to recruit and maintain high-level, reliable employees.

Other Important Aspects of the ACA

As with the employer mandate itself, the ACA's reporting requirements that require ALEs to furnish requisite reports and other information to the IRS have been postponed to 2015. However, as of October 2013, employers are required to distribute a statement to all FTEs containing information about the employer-provided health care coverage that is offered, regardless of whether the employee enrolls. Notably, though, there are currently no adverse ramifications on an employer for failing to comply with that reporting requirement.

Further, the ACA amended the Fair Labor Standards Act to include retaliation protections for employees related to the ACA requirements. As such, an employer may not discriminate against or terminate an employee because he or she received a tax credit or subsidy for enrolling in a qualified health plan, objected to an activity or practice he or she believed was an ACA violation, or assisted in an investigation regarding such a violation. The new antiretaliation protections seek to protect employees who receive a subsidy and thereby cause their employer to be penalized.

In conclusion, now that the employer mandate has been postponed until 2015, employers should take advantage of the additional time to thoughtfully consider their options and consult an attorney or specialist to develop a plan to minimize the potentially adverse financial impact on their businesses.

Addendum

On February 10, 2014, only a few days after this article initially was published, the U.S. Treasury Department and the Internal Revenue Service announced another one-year delay for a portion of businesses covered by the ACA's employer mandate. Specifically, otherwise-covered entities with 50 to 99 full-time employees will not have to comply with the mandate until January 1, 2016. Meanwhile, employers with 100 or more full-time employees now only will need to offer coverage to 70 percent of their full-time employees in 2015. However, all covered employers will be required to offer coverage to the previously mandated 95 percent of full-time employees beginning in 2016.

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