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The ACA's Employer "Play"

DELAYED UNTIL 2015 (mostly) 2016

ALTHOUGH the Affordable Care Act's employer "play or pay" mandate was supposed to have taken effect on

January 1, 2014, this contentious component of the Obamacare law was recently delayed for the second time in just eight months. In an effort to summarize the current status of the law in a clear and concise manner, I've used information from my recent Obamacare presentation at the WPMA Convention in Las Vegas. For those of you who attended my seminar, I apologize for the redundancy. For the rest of you, I hope I can provide you something that will help you in your business.

The first time the employer mandate was delayed was in July 2013. At that time, the Obama administration unilaterally delayed the mandate for one year for all affected employers. (It is important to note that "small employers" with fewer than 50 employees are completely exempt from this requirement of the ACA.) In February 2014, the Obama administration once again delayed the mandate. This time, however, they distinguished the implementation of the law based on the employer's size: (1) employers with 50-99 employees were given a blanket reprieve until 2016 to comply with the law; and (2) for employers with 100 or more employees, the "substantially all" percentage requirement to offer coverage to employees was reduced from 95% to 70% for 2015, and full compliance was delayed until 2016.

What is the shared responsibility ("play or pay") mandate for employers?

The employer mandate of the Affordable Care Act requires employers with 50 or more full-time equivalent employees ("FTEs") to provide "affordable" health insurance with "minimum value" to "substantially all" of their employees and their children (but not spouses) or face financial penalties.

- **The "affordable health insurance" test** means the employee's share of premium for self-only coverage must be less than 9.5% of the employee's household income.

- **In simple terms**, an employer-sponsored plan provides "minimum value" if the plan pays at least 60% of the total allowed cost.
- **FTEs are calculated by converting part-time employees and seasonal employees on "business days"** during the preceding calendar year into full-time equivalent employees, even though those employees don't trigger the "play or pay" penalty. The term "business days" is not explained. Does it mean all days, half of the days, or perhaps just one?
- **For the purpose of determining an applicable large employer**, the IRS's control group test is used when companies with common control or ownership are involved. As such, all employees of all employers within a control group (as defined in the Internal Revenue Code) are combined.
- **Full-time employees are defined as those working at least 30 hours per week or 130 hours per month.** The common law standard is used, so truly leased employees (as defined in IRC §414(n)(2)) are generally not considered employees for the purpose of calculating the number of FTEs.

What is the penalty if an employer fails to provide health insurance?

There are two types of penalties that can be assessed against an employer who fails to comply with the ACA's "play or pay" mandate:

(1) a penalty for failing to offer coverage at all; and (2) a penalty for failing to offer coverage that provides "minimum value" or is deemed "unaffordable." In order for an employer to be assessed any type of a "play or pay" penalty, at least one full-time employee must enroll in a qualified health plan on an Exchange and receive a premium tax credit or a cost-sharing subsidy. If one employee opens the penalty door, the penalty assessment for not offering coverage is calculated based on the total number of employees! In both instances, the penalty tax is calculated monthly, and it is not tax deductible.

- **Penalty for failing to offer coverage at all:** If a large employer doesn't offer "minimum essential coverage" to "substantially all full-time employees," the

or Pay” Mandate

employer will be assessed a penalty tax of \$2,000 per full-time employee (less a 30 employee exemption). The term “minimum essential coverage” is defined very vaguely and broadly, but we know it includes an individual insurance policy, an employer-sponsored plan, a government-sponsored plan (e.g., Medicare, Medicaid, CHIP, TRICARE), and coverage through a self-insured employer plan. Part-time equivalent employees are relevant for counting employees for eligibility purposes, but not penalty purposes. Only employees who work 30+ hours per week are taken into account for the calculation of the penalty.

- **Penalty for failing to offer “minimum value” or “affordable” coverage:** If a large employer offers coverage, but that coverage isn’t deemed to be of “minimum value” or “affordable,” the employer will be assessed a penalty of \$3,000 per full-time employee who obtains insurance through an Exchange (but only if the employee receives a subsidy on the Exchange).

Although the Affordable Care Act is the law of the land, its regulatory implementation is far from set in stone. One thing we know for certain, however, is that the employer mandate will be fully implemented and enforced in 2016 ... unless it’s not.

As Always ...

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