

THE WHO, WHAT AND WHEN OF THE EMPLOYER MANDATE:

AN OVERVIEW OF EMPLOYER OBLIGATIONS UNDER THE AFFORDABLE CARE ACT

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The Affordable Care Act (ACA) was enacted more than four years ago, yet some of the most sophisticated clients and most inquisitive lawyers openly admit they do not understand it. Some have attempted (unsuccessfully) to wish it away based on their political views. Others stopped trying to understand it when the regulations kept changing what they had already learned. Still, others have decided to wait until the time comes, if it comes, when the law is actually implemented before attempting to understand it. Whatever the reason, clients and lawyers alike often do not grasp the ACA's "employer mandate" requiring employers to provide health care coverage to employees and their dependents or face significant tax penalties.

This mandate is just one component of the ACA (others include the formation of insurance marketplaces known as exchanges, and the mandate that all individuals obtain qualifying health care coverage, the individual mandate), but it has understandably drawn the focus of employers' attention, as the law's implementation is set to begin. This article is intended to provide an overview of the employer mandate by answering the essential questions of who (which employers) are subject to the mandate, what the mandate requires and when those requirements will be enforced.

When Does the Employer Mandate Go into Effect?

Enforcement was originally set to begin January 1, 2014, against all employers that averaged 50 or more full-time employees during the preceding calendar year. However,



subsequent regulations delayed enforcement, which will now occur in two phases. The first phase, beginning January 1, 2015, applies to employers with 100 or more full-time employees, and will impose penalties against those that fail to offer qualifying coverage to at least 70 percent of their full-time workforce.

The second phase, beginning January 1, 2016, will apply to all employers with 50 or more full-time employees and will impose penalties against those that fail to provide qualifying coverage to at least 95 percent of their full-time workforce. This means that employers with more than 50 full-time employees, but fewer than 100, will have an extra year to plan for and implement the employer mandate.

Who is Subject to the Employer Mandate?

As noted, only employers with 50 or more full-time employees are required to provide health care coverage to their employees. Counting employees is not always as straightforward as it seems, however, and raises many questions for employers.

The ACA defines a full-time employee as anyone who works, on average, at least 30 hours of service per week: a

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threshold different from those found in most other federal laws. Employers must also count all “full-time equivalent” employees toward this number. This number is determined by adding all hours worked by part-time employees in a given month (up to 120 hours per such employee) and dividing that number by 120. When a business is divided into various commonly controlled businesses or entities, IRS control group rules require that all employees, full-time and full-time equivalent, be treated as employees of a single employer.

The ACA acknowledges the burden of requiring employers to determine full-time status for each employee at the end of each month, especially for employees with varying hours or seasonal employment. It also recognizes that employers will want to know in advance of a month which employees are full-time and must be offered coverage. Consequently, while an employer can choose to determine full-time status each month, it has the option to instead use a look-back measurement period to simplify the process. Generally speaking, this method allows employers to base an employee’s full-time status for a stability period (such as a plan year for health coverage) on his or her status during the previous stability period. There are two sets of stability periods: one for ongoing employees and another for newly hired, variable-hour or seasonal employees, each of which is detailed in a series of regulations.

Regulations also address the challenge of determining “hours of service” for certain types of employees and provide accepted methodologies for counting those hours. Examples include adjunct faculty, “on-call” employees, temporary staffing firms, seasonal employees and others, each of which has its own accepted methodology. Regulations exclude certain activities from hours of service, such as volunteering for a government or tax-exempt entity and working as a student under a federal- or state-sponsored work-study program.

What Coverage Must be Provided?

Employers subject to the mandate must provide minimum essential coverage that is both adequate and affordable. Each of these terms has a specific meaning under the ACA and has been elaborated upon through subsequent regulations. Generally speaking, minimum essential coverage refers to Essential Health Benefits (EHBs) and other coverage requirements of the health plan that employers must offer to employees and their dependents.

The requirement to provide adequate coverage calls for the plan to provide a minimum value to employees by covering 60 percent or more of the total cost of care. This calculation is based on the plan’s anticipated spending for coverage of EHBs for a standard population, taking into account the employer’s choices regarding cost-sharing required of participants (deductibles, co-pays, co-insurance, etc.). Minimum value is determined by dividing this anticipated spending by the total allowed charges for coverage of those EHBs. To ensure a compliant minimum value (60 percent or greater), employers can avail themselves of several design-based safe harbors, use the online IRS minimum value calculator or obtain an actuarial certification of minimum

value (if the plan has non-standard features that are incompatible with the minimum value calculator).

Finally, the requirement for affordable coverage means that an employee’s share of premiums is 9.5 percent or less of his or her household income. Because employers generally do not have access to information about an employee’s total household income, which may include income in addition to what the employer pays, regulations again provide several safe harbors. These safe harbors are designed to ensure compliance with the affordability requirement by allowing employers to use the W-2 wages paid to an employee, an employee’s hourly income or the federal poverty level as permissible bases for meeting the 9.5 percent threshold.

The ACA penalizes an employer that fails to meet these requirements for coverage in one of two ways. If an employer does not offer its employees (and their dependents) minimum essential coverage, an annual penalty of \$2,000 (adjusted annually) is imposed per full-time employee. This penalty is triggered when at least one full-time employee is certified as obtaining subsidized coverage through one of the exchanges. When this occurs, the employer must pay a penalty of \$2,000 per full-time employee regardless of whether a particular employee obtained coverage through an exchange; however, no penalty is assessed for the first 30 employees.

The second possible penalty applies if an employer provides minimum essential coverage, but the coverage is deemed inadequate or unaffordable under the analyses discussed above. In this scenario, an annual penalty of \$3,000 (also adjusted annually) is imposed per full-time employee who is certified as having enrolled in subsidized coverage through an exchange. The maximum penalty is the penalty that would be imposed if the employer provided no coverage at all and was required to pay the \$2,000-per-employee penalty discussed previously (ignoring the first 30 employees). In other words, the actual penalty assessed against an employer will be the lesser of the two types of sanctions.

Before issuing any penalty, the government will inform employers when an employee receives a subsidy through an exchange and will give them an opportunity to respond. Employers must therefore meet certain recordkeeping requirements to respond to assessments and also are obligated to report certain information to the regarding the coverage they provide, even when penalties are not at issue.

With enforcement of the employer mandate just around the corner, clients cannot delay in understanding and addressing the ACA any longer. Compliance will present unique challenges for each employer; however, the above answers to questions common to all employers provide the foundation necessary to meet those challenges and avoid costly penalties. ■

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