BROOKS PIERCE

The Affordable Care Act – It's Time to Start Counting Hours

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The 2010 enactment of the Affordable Care Act ("ACA" or the "Act") ushered in an enormous social reform effort aimed at improving the nation's health care system through a series of mandates, premium subsidies, and taxes. Although the full impact of the Act will not be known for years to come, its intended goals were to expand health insurance coverage and to reduce costs.

After much discussion and debate, as well as legal challenges all the way to the U.S. Supreme Court, implementation of the ACA is upon us. As a result, employers must comply with the Act's myriad requirements, the most significant of which become effective on January 1, 2014. Regulatory guidance is pouring forth, and it is not too early for employers to determine how the rules of the Act apply to their businesses. In fact, employers with calendar-year plans may want to take action as soon as next month.

Where we are today and preparing for 2014. Many provisions of the ACA have already taken effect. Still, for most employers the most significant aspects of the Act are on the horizon beginning January 1, 2014 – including the individual mandate, employer shared responsibility provisions (including the provision of minimum essential health coverage that is affordable), and the establishment of health exchanges (insurance marketplaces to facilitate individuals' and small businesses' purchase of health insurance meeting certain benefit and cost standards).

Individual Mandate. Beginning in 2014, the ACA's individual shared responsibility provision, or individual mandate, requires that individuals have basic health insurance coverage, qualify for an exemption, or pay a penalty initially set at $95 per person or 1% of income, whichever is greater. The effect of the Act on sole proprietors will be much like the impact on individuals with respect to the individual mandate. As a one-person business, subject to certain exemptions, a proprietor can buy insurance through an exchange scheduled to roll out in 2014.

Employer Play-or-Pay Mandate. For employers with employees, the Act's shared responsibility provisions – known as the "play-or-pay" mandate – are complicated and require careful review and application of the detailed rules. Under the play-or-pay provisions, "applicable large employers" that employ an average of at least 50 full-time employees on business days during the preceding calendar year will be required to provide certain minimum levels of health coverage to "substantially all" of their full-time employees and their dependents or else pay a penalty. In calculating the penalty, the first 30 full-time employees do not count toward the computation.

For a large employer that does not offer coverage and any full-time employee receives subsidized coverage – i.e., a premium tax credit or cost-sharing reduction – in a health plan through an exchange, the penalty is $2,000 per all full-time employees per year.

For a large employer that does offer coverage but the coverage is considered not "affordable" or does not provide "minimum value", and any full-time employee receives subsidized coverage in a health plan through an exchange, the penalty will be the lesser of $3,000 per full-time employee who actually receives a subsidy, or $2000 per all full-time employees per year.

Coverage is considered "not affordable" by any full-time employee if the premium for employee-only coverage is greater than 9.5% of the employee's household income, as measured by the income reported in Box 1 of Form W-2. The coverage does not provide "minimum value" if the plan pays less than 60% of the expected costs under the plan.

Identifying Full-Time Employees. Large employers may choose to offer coverage to all of their employees, both full-time and part-time, thereby avoiding the issue of which employees qualify as full-time employees. However, many employers will need or desire to provide health coverage only to full-time employees. Thus, the identification of the employer's full-time employees becomes critical for purposes of determining whether to play-or-pay.

Full-time employees are defined as those who work more than 30 hours on average per week. Complex rules have been proposed, and can be relied upon, to identify these employees and determine if they must be offered coverage. The rules address how to treat current employees, new hires, seasonal employees, students and interns, those who go from full-time to part-time and vice versa, etc. Employers who do not want to offer coverage to part-time, seasonal, or other "variable hour" employees will need to begin planning now for 2014.

The regulations require that employers classify their employees as full-time or part-time based on their actual hours during a prior look-back period. If an employee is paid by the hour, an employer can easily determine how many hours they worked. For employees who are paid on a salaried basis, employers have several methods available to determine whether those employees worked at least 30 hours per week, including counting actual hours worked or using one of two equivalency methods.

If an employer hires employees whose schedule will vary, or who will be seasonal employees, they will need to determine if such employees will regularly work 30 hours per week on average. The regulations under the Act provide a method for making these determinations using a pre-determined look-back period to count the employee's hours worked, and an additional administrative period to offer the coverage to the employee and complete the enrollment process. The look-back period is selected by the employer, and can extend from 3-12 months. The

administrative period can be up to 90 days in length. Once the full-time employees are identified, the regulations prescribe the length of time those employees must be offered health coverage, and when their status as full time employees can be re-evaluated.

Employers Must Act Now. Full-time or part-time classification in 2013 will drive the play-or-pay requirements for 2014. Employers who plan to use a 12-month look-back period going forward may use a transition rule that allows a six-month look-back period during 2013 to determine which employees will be considered full-time for all of 2014. Employers with a plan year beginning on January 1, 2014, should begin counting employee hours in April of this year if they would like the maximum permitted time to make these full-time employee determinations. Employee hours can be counted during the six-month period between April and September 2013, and the employer can use a 90-day administrative period between October and December to notify employees, handle enrollment, and have all eligible full-time employees enrolled and receiving coverage on January 1, 2014. Employers with a plan year beginning later in 2014 will have a little more time to start counting hours, but all employers should begin planning now so as to be able to use all the time allowed if needed.

Identifying whether employees qualify as full-time for purposes of the ACA can be complicated for employers with employees who work variable hours or seasonally, or for those with frequent turnover. The length of the look-back period chosen impacts the length of time the employer must offer such employees health coverage before their full-time status can be re-evaluated. Employers should consult with their legal and benefits advisors if they need assistance in making these determinations.

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