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How the Affordable Care Act Impacts Employers

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In [redacted] United States Congress passed—and President Obama signed into law—the Patient Protection and Affordable Care Act. Since its passage, the Act has withstood challenges to its constitutionality (including the United States Supreme Court ruling last June 2012 in *NFIB v. Sebelius*), and the majority of the law remains intact. The law requires "large employers" to offer "affordable" and "adequate" insurance coverage to their "full-time employees" as defined by the Act, or, under the "play-or-pay" provisions, to pay a penalty. But how does the Act define these terms? Are you a "large employer" with "full-time employees?" How are the "penalties" calculated? Are there any other potential pitfalls to consider? How are temporary employees taken into account? Both the Internal Revenue Service and the Department of Labor have issued regulations over the last few years, attempting to answer these important questions. Therefore, it is imperative that employers are mindful of the following as they prepare for January 2014.

Large Employers

Definition: The Act defines a "large employer" as an employer with at least 50 or more full-time employees or full-time equivalent employees on business days during the preceding calendar year. Temporary employees assigned to an employer by a temporary employment agency are counted as employees of the temporary agency for purposes of determining "large employer" status under the Act. Additionally, there is an exception to the 50 full-time employee requirement. If an employer's workforce is greater than the 50-employee threshold during 120 days or less in the preceding calendar year and the excess employees were "seasonal" workers, then the employer is not a "large employer."

Example: The company employs 40 full-time employees during all of 2013. However, the company also employs 80 seasonal full-time employees from May through August 2013. Therefore, the company has 40 full-time employees for 8 months and 120 full-time employees for 4 months, resulting in an average of 66 full-time employees. But the company's workforce exceeded 50 full-time employees for no more than 120 days, and the

number of full-time employees is less than 50 in those months when seasonal employees are disregarded. Thus, the company is not a large employer for 2014.

Tax Control Groups: For determining large employers, all members of tax controlled groups (i.e., affiliated companies) are treated as a single employer. Thus, employers cannot circumvent the ACA requirements by simply creating new companies. When determining liability for a penalty, however, each member of a tax control group is treated as a separate entity.

Example: For 2013 and 2014, A Corp. owns 100% of stock of B Corp. and C Corp. For every calendar month in 2013, A Corp. had 20 full-time employees, B Corp. had 30 full-time employees, and C Corp. had 40 full-time employees. A Corp., B Corp., and C Corp. are a controlled group of corporations. Because together there are more than 50 full-time employees, A Corp., B Corp., and C Corp. are "large employers." A Corp. does not offer health insurance coverage, while B Corp. and C Corp. do offer insurance coverage. A Corp. would be subject to penalties. But B Corp. and C Corp. would not be subject to those penalties. Any penalties would be limited to each separate entity.

Full-Time Employees

Definition: A "full-time employee" is someone who generally works 30 or more hours per week or 130 or more hours per month. In order to calculate whether employees are "full-time" under the Act, an employer must adopt a standard measuring period (3-12 months) and average its employees' hours for that period. Once a determination is made, there is a stability period where each employee is treated as full-time/part-time based on the measuring period calculation. The stability period must be at least 6 months and cannot be shorter than the chosen measuring period.

Full-Time Equivalents

Part-time employees (i.e., employees who generally work less than 30 hours per week) also must be taken into consideration to determine full-time equivalent employees for purposes of the 50-employee threshold for large-employer status under the Act. Although part-time employees must be included in this calculation, "large employers" do not incur a penalty for failure to provide health insurance to such part-time employees.

Definition/Calculation: An employer takes the total number of hours worked in a month by part-time employees and divides that total by 120, yielding the total number of full-time equivalent employees for the month.

Example: B Corp. only has 40 full-time employees. But B Corp. has 20 part-time employees, each working 96 hours per month. Thus, the total number of hours per month worked by part-time employees is 1,920 (20 x 96). Dividing by 120, B Corp. would be counted as having 16 full-time equivalent employees (1,920/120). While B Corp. only has 40 full-time employees, it is subject to the ACA's play-or-pay provisions/penalties when its part-time employees are included, bringing its total of full-time employees and full-time equivalents to 56. Note that B Corp. is only required to offer affordable and adequate health insurance to the 40 full-time employees.

Play-or-Pay Penalties

The two types of penalties under the Act's play-or-pay provisions are as follows:

Penalty for Not Offering Coverage: Under the Act, an employer who chooses not to offer insurance coverage must pay a penalty if at least one of its full-time employees receives a premium credit or subsidy and uses the credit or subsidy to obtain insurance through a public insurance exchange created by the Act. The exchanges are virtual insurance marketplaces maintained in each state by that state or the federal government where health insurance providers

compete for customers. The formula for the annual penalty is $2,000.00 multiplied by the number of full-time employees minus 30.

Example: A Corp., a large employer who does not offer insurance, has 130 full-time employees. Fifty employees purchase insurance through the insurance exchange and receive a premium credit. As a result, A Corp. would be subject to a penalty of $200,000.00 (130 employees – 30 multiplied by $2,000.00).

Under the IRS' regulations, however, employers will not be assessed the full no-coverage penalty so long as at least 95% of their full-time employees are offered both affordable and adequate coverage. If some of the 5% not offered coverage receive a premium credit or subsidy and purchase insurance from an exchange, then the employer is only assessed a $3,000.00 penalty per such employee.

Application of No-Coverage Penalty Across Tax Control Groups: For control groups, the 30 full-time employee reduction is allocated proportionally across the member companies.

Example: A Corp. and B Corp. are members of the same tax control group. A Corp. has 60 full-time employees, while B Corp. has 40 full-time employees. A Corp. offers health insurance, but B Corp. does not. Because an employee receives a premium credit and obtains insurance through an exchange, B Corp. is subject to a penalty. B Corp. is entitled to an employee reduction of 12 ((40/100) x 30 =12), resulting in a penalty of $56,000 ((40-12) x $2,000).

Penalty for Failure to Offer Affordable or Adequate Coverage: A large employer is subject to a $3,000.00 penalty for each employee who is offered coverage that is not "affordable" or is not "adequate" and receives a premium credit to obtain insurance through an exchange. This penalty cannot exceed the maximum no-coverage penalty assessable against an employer under the formula discussed above.

Affordable Coverage: Insurance is "affordable" when the cost of coverage for the individual employee does not exceed 9.5% of the employee's household income. Regulations allow employers to use an employee's W-2 wages to calculate affordability.

Adequate Coverage: Adequate coverage means that an employer's health insurance provides "minimum value." "Minimum value" is insurance that pays for at least 60% of covered health care expenses. According to the IRS, by 2015, employers must also provide coverage for dependants of full-time employees up to age 26, but not for spouses.

Example: C Corp. offers insurance to its 130 full-time employees, but the coverage is not "affordable" for 20 of the 130 employees. Only 10 of these employees receive a premium credit and purchase insurance through an exchange. Thus, C Corp. is subject to a $30,000 penalty ($3,000.00 x 10 employees).

Temporary Employees: Temporary employees who have worked "full-time" for the same assigned large employer for up to twelve months must be offered affordable and adequate coverage by the assigned employer.

Retaliation Prohibited

The ACA amended the Fair Labor Standards Act (FLSA) to prohibit retaliation by employers against employees who obtain insurance through an exchange and trigger a penalty for their employer or who claim that their employer is in violation of the Act. Retaliation complaints must be filed with OSHA within 180 days of the alleged retaliation.

Therefore, with January 2014 quickly approaching, employers should be in the process of determining whether they qualify as a "large employer" under the Act and, if so, how they plan to respond.

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