New Jersey Law Journal

VOL. 211 - NO 17 APRIL 29, 2013 ESTABLISHED 1878

IN PRACTICE

EMPLOYMENT LAW

Preparing for the Employer Mandate

It is time to implement the requirements of the Patient Protection and Affordable Care Act

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On March 23, 2010, President Barack Obama signed into law a sweeping reform of the nation's healthcare system now known as the Patient Protection and Affordable Care Act, more commonly known as "ObamaCare." Of importance to employers, on Jan. 1, 2014, the so-called "Employer Mandate" goes into effect, requiring large employers to offer health coverage to full-time employees and their dependents (children up to age 26, but not spouses) or risk paying a penalty. As a result, large employers will be forced to make a choice — to either "play" by offering health coverage, or potentially "pay" a penalty to the IRS for failing to offer such coverage. This "play or pay" scheme, called "shared responsibility" in the statute, has become known as the Employer Mandate.

Although the Employer Mandate does not become effective until 2014, determination as to whether an employer is an "applicable large employer," in some instances, will be determined based upon the average number of employees the employer had during a six-month "look-back" period in 2013. This article will discuss: (1) how the act determines "applicable large employer"; (2) what constitutes "affordable" coverage under the act; (3) employers' obligations under the act; and (4) the penalties for noncompliance.

How To Determine 'Applicable Large Employer' Status

Generally, an "applicable large employer" is defined as any employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year. A full-time employee is any employee who is employed, on average, 30 hours a week or 130 hours each month. For 2014 only, an employer can choose to use any consecutive six-month period in 2013 to determine whether it is a large employer. Beginning in 2015, the employer must use the full previous calendar year to determine its large employer status. New employers will qualify as an applicable large employer if they are reasonably expected to employ at least 50 full-time employees on business days during 2014 and, in fact, do so. (The regulation is unclear what happens if the new employer does not expect to employ at least 50 full-time employees but, in fact, does so.)

Similarly, any new employee whom the employer reasonably expects to be working full-time will count toward the threshold determination.

Employers with part-time workers must also count "full-time equivalencies" in determining large employer status. "Full-time equivalent employees" are the number of full-time employees an employer would have, based on the hours worked by all employees who are not full-time. To determine the number of full-time equivalent employees for a calendar month, an employer must calculate the aggregate hours of service (including fractional hours, but not including more than 120 for any one employee) for all employees who are not full-time employees for that month. The employer must then divide the total number of hours worked by its nonfull-time employees by 120. The number of full-time equivalent employees is then added to the number of full-time employees to determine applicable large employer status.

Hours of service include paid time for services performed as well as time for which the employee is paid but does not perform any services due to vacation, holiday, illness, disability, layoff, jury duty, military duty or paid leave of absence. For example, if an employer has 10 part-time employees who each work 5.5 hours a day for 19 days in one calendar month, and each employee had one paid holiday day where no services were

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rendered in that same calendar month, the employer would aggregate the total number of hours worked by its part-time employees (10 x 5.5), multiply that number by 20 (19 days of work plus one paid holiday where no services are performed) and divide by 120 for a total of 9 full-time equivalencies. In this example, the employer would have 9.167 full-time equivalent employees: (10 x 5.5) x 20, divided by 120 = 9.167, rounded down to nine.

In addition to counting full-time employees and hours worked by employees who are not full-time, in certain circumstances, the number of employees of "controlled groups" and "affiliated service groups," as defined by the Internal Revenue Code and applicable Internal Revenue Service (IRS) regulations, will be aggregated toward the 50 full-time employee threshold.

Seasonal employees must also be considered in determining large-employer status. A seasonal employee is generally defined as an employee who performs services on a seasonal basis, including, but not limited to, retail employees who are employed exclusively during holiday seasons. However, if the employer exceeds 50 employees for less than four calendar months (not necessarily consecutive) or less than 120 days (not necessarily consecutive) during a calendar year, the mandate does not apply if the employees in excess of 50 during that period were seasonal employees.

Finally, a governmental entity or tax-exempt entity, like other business entities, will be considered a large employer if it employs at least 50 full-time employees on average on business days during the preceding calendar year.

Employer Obligations Under the Act

Any employer that qualifies as a "large employer" under the act is subject to the Employer Mandate and must offer health coverage to its full-time employees and certain of their dependents. The coverage must: (1) provide "minimum essential coverage"; (2) be "affordable"; and (3) satisfy a minimum value requirement.

"Minimum essential coverage" typically includes most private health insurance plans and includes coverage under an employer-sponsored group health plan. Minimum essential coverage, however, does not include stand-alone dental or vision coverage, or flexible spending accounts.

Coverage is considered "affordable" if the employee's contribution or premium for self-only coverage is less than 9.5 percent of the employee's household income. While an applicable large employer is required to provide coverage for certain dependents, the cost of dependent coverage does not affect the affordability calculation. Because most employers do not know their employee's household income, the act provides a safe-harbor for the employer which requires that the cost of the employee-only coverage does not exceed 9.5 percent of the wages reported in Box 1 on the employee's W-2.

The offered coverage must also meet a minimum value requirement. This generally means that the plan must pay at least 60 percent of the expected health-care costs, and the employee is responsible for the remaining 40 percent through co-payments, deductibles and co-insurance. While the terms of the specific benefits will vary, essential health benefits (such as annual physicals) must be provided without any annual limits.

Penalties for Noncompliance

If a large employer does not "play" for some or all of its full-time employees, the employer will have to pay a penalty in two scenarios. The first scenario occurs when an employer does not offer health coverage to "substantially all" of its full-time employees, and any one of its full-time employees both enrolls in health coverage offered through a State Insurance Exchange and receives a premium tax credit or a cost-sharing subsidy. In order to be eligible for a subsidy, an employee must have an income between 100 and 400 percent of the federal poverty line and was not offered affordable, minimum value coverage. In 2013, 400 percent of the federal poverty level, for a family of four, is $94,200.

Thus, in the above scenario, the employer will owe a "no coverage penalty" if it does not offer health coverage to at least one full-time employee that subsequently enrolls in an exchange and receives a subsidy. In this scenario, the no-coverage penalty is $2,000 per year (adjusted for inflation) for *each* of the employer's full-time employees, excluding the first 30. Thus, if an employer with 60 full-time employees does not offer health-care coverage, and one full-time employee receives a subsidy through an exchange, the employer will be fined $60,000 ($2,000 x (60-30)) for the year.

In the second scenario, an employer will have to pay a penalty when it provides health care to its employees, but such coverage is deemed inadequate because: (1) it is not "affordable"; (2) does not provide at least "minimum value"; or (3) the employer offers coverage to substantially (but not) all of its full-time employees, and one or more of its full-time employees enrolls in exchange coverage and receives a subsidy. In this second scenario, the employer will owe an "inadequate coverage penalty." The inadequate coverage penalty is $3,000 *per person* and is calculated based not on the employer's total number of full-time employees, but only on each full-time employee who receives an exchange subsidy. Because exchange subsidies are available only to individuals with household incomes of at least 100 percent and up to 400 percent of the federal poverty line, employers that pay relatively high wages may not be at risk for the penalty, even if they fail to provide coverage that satisfies the affordability and minimum value requirements. It is important to remember, however, that these penalty amounts are only for 2014 and will increase based on premium inflation. Thus, in determining whether to pay or play under the act, employers will have to calculate the potential cost of not offering coverage each year going forward. This means an employer should keep track of employee hours in 2014, even if it decides not to "play," in order to make an informed decision for 2015.

Conclusion

As the foregoing discussion indicates, determining application of the act for employers near the 50 full-time employee threshold can be complicated and time consuming. Those employers that have not begun the process should begin it sooner rather than later. Additionally, employers and their counsel should be aware that the regulations implementing the act may change.■