BARNES & THORNBURG LLP

The Employer Mandate Has Been Moved One Year. Now What?

July 15, 2013 | | Employee Health Issues, Pregnancy, Currents - Employment Law

Hannesson Murphy
Partner

Question Mark

A Primer On What Employers Need To Know About The Affordable Care Act

Many employers across the country breathed a sigh of relief upon hearing that the implementation of the employer mandate under the Affordable Care Act (ACA) has been delayed until Jan. 1, 2015. Of course once the revelry dies down, employers will come to the sober realization that this just means that the can has been kicked down the proverbial road. Employers who should have been in the process of figuring out the mandate now get a one-year reprieve.

Short of the law unexpectedly going away – which is highly unlikely given (a) the Supreme Court's decision last year and (b) the results of the November 2012 elections – employers will just be in the same position this time next year. In light of the extension, employers that have not already done so should begin familiarizing themselves with the employer mandate as soon as possible so they can make decisions as to whether (and how) it will affect their businesses. Additionally, employers also need to recognize that while the employer mandate is getting all the press, it is not necessarily the only part of the ACA they need to be concerned about.

The (Once And Future) Employer Mandate

Under the ACA, all employers with more than 50 full-time equivalent employees must provide health care coverage for their employees or pay an annual penalty (what in the government's parlance is "the Employer Shared Responsibility Payment") of $2,000 for every full-time worker (except that the first 30 employees can be subtracted from the calculation). This applies to all employers, including for-profit, non-profit and government employers. The penalty is significant. Consider, for example, an employer that has 60 employees but does not offer health insurance. The resulting penalty would be $60,000 [30 employees (60-30) x $2,000].

Getting To 50

The determination of whether an employer has 50 or more full-time employees or full-time equivalent employees (more on that below) for purposes of the employer mandate will be based on the average number of employees that the employer had the previous year. For example, in 2014, this means the 50 threshold will be based on how many workers they had in 2013.

RELATED PRACTICE AREAS

Affirmative Action/OFCCP Compliance
Disability, Leave and Medical Issues
Labor and Employment
Workers' Compensation

RELATED TOPICS

Affordable Care Act

Employers who operate separate entities that, when combined, total at least 50 employees need to be careful. Companies that have a "common owner," such as a parent-subsidiary, will be combined for purposes of determining whether or not they employ at least 50 full-time employees (or the equivalent combination of such employees). If the combined total meets the threshold, then *each separate company* will be subject to the penalty – even those companies that do not employ enough employees on their own to satisfy it.

30 Is The New 40

Ask any employer how many hours are in a full-time work week and they reflexively will answer "40." However, that is not true for purposes of the ACA. Under the ACA, a full-time work week is *30 hours*. This has caused many employers to try to reduce employees' work-hours to under 30 a week to get around the ACA's requirements. Employers that try this, however, should note that this may not work. Under the ACA, the 50-employee threshold is reached based on (a) 50 full-time employees *or* (b) *a combination of full-time and part-time employees that equals at least 50*. Full-time equivalency is determined based on the total number of hours worked each month by part-time employees divided by 120 (note that this is keyed to the number of hours worked and not the number of workers). For example, if a company has 500 hours worked by part-time employees in a month, this would yield an extra 4.1 full-time equivalent employees (500/120=4.1) for purposes of the penalty. If that company has 47 full-time employees, adding the extra 4.1 would put them over the 50 employee threshold and make the company subject to the penalty. In other words, if enough part-time hours are worked in the aggregate, reducing hours below 30 may not make a difference.

What Employers Will Have To Buy

The ACA requires that the coverage offered by employers must be "affordable." What this means is that the coverage must not cost an individual employee more than 9.5 percent of the employee's annual household income, or the employee's annual W-2 wages.

New Lawsuits Are Coming To A Courthouse Near You

The ACA prohibits discrimination based on race, sex, national origin, age, disability and gender identity in connection with health care plans. On June 4, 2013, an advocacy group filed suit under the ACA in federal court in New York against various educational institutions and hospitals alleging sex discrimination in health care plans because the plans provided by the defendants allegedly do not provide pregnancy coverage for the employee's dependent children. This appears to be one of the first cases filed under this provision of the ACA. Where the case goes is an open question, but this is likely to be the first in a wave of new claims against employers under the ACA for discrimination in connection with health care plans.

Additionally, beyond discrimination, the ACA also creates a new whistleblower cause of action for employees that claim to have been retaliated against for providing information to their employer or to governmental agencies concerning what the employee reasonably believes is a violation of the ACA. On top of that, the ACA provides a wide variety of government fines for not only the Employer Mandate, but also things such as failing to automatically enroll employees in coverage (which companies with 200 or more full-time equivalent employees are required to do under the ACA). In short, the ACA provides a potential boon for disgruntled employees and further traps that employers will have to learn to navigate around.

Takeaway

Employers who want to breathe easy now that the employer mandate has been pushed from Jan. 1, 2014, to Jan. 1, 2015, need to understand that this is nothing more than postponing the inevitable. Eventually employers will need to come to grips with the ACA – not just the employer mandate, but all of the ways it will affect their businesses. The sooner employers can master the requirements of the ACA and make sure they comply with its terms, the less headaches they will have down the road.