FULL-TIME AND FULL-TIME EQUIVALENT EMPLOYEES

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2. “Full-Time” and “Full-Time Equivalent Employees.”

Under the Act, an employee is considered to be “full-time” if he or she averages at least *30 hours per week* – not the 40 hour work week most employers are familiar with for purposes of calculating overtime. Work hours include each hour in which the employee is performing duties for the employer, and each hour in which the employee is not performing duties, but otherwise is entitled to pay because of vacation, holiday, illness, incapacity/disability), or a similar excused absence.

In addition to “full-time” employees, “full-time equivalent” employees also can be considered to determine the applicable number of employees for purposes of the mandate. Full-time equivalency is determined based on the total number of hours worked each month by part-time employees divided by 120. For example, if a company has 500 hours worked, this would come to 4.1 full-time equivalent employees (500 / 120 = 4.1). If a company has 47 full-time employees, this would be enough to put them over the 50 employee threshold. As a result, employers who are just below the threshold of 50 workers (or those hovering just under 100 today) should not be cavalier about whether the mandate applies to them.

Because of these provisions, many employers have begun scaling back their workforces to part-time and also have begun regulating more stringently the number of hours that their employees work. However, employers that try to skirt the numerical threshold by relying on part-time labor also need to be careful. Under the Act, the 50 employee threshold can be determined based on (a) 50 full-time employees or (b) ***a combination*** of full-time and part-time employees that equals at least 50. For example, a company will satisfy the 50 employee threshold if it has 40 full-time employees employed 30 or more hours of work a week, plus 20 half-time employees employed at 15 hours per week.

Employers that try to rely more heavily on temporary workers or contract labor to circumvent the requirements of the Act also need to be careful. Under the standards adopted by the IRS and the Department of Labor, a temporary worker or contractor may actually be considered to be a common law employee if the employer has the right to control and direct the performance of the worker. In other words, simply calling a worker by a certain term may not be enough to escape the creation of an employment relationship – and the requirements of the Act. Also, as many practitioners and human resources representatives know, both the Labor and Treasury Departments have devoted significant resources and attention in recent years to the issue of employee misclassification. This poses a serious risk for unwary employers on the threshold of 50 workers: if some employees are regarded as misclassified and they should be considered "employees," this could put the employer into the over-50 category where they would be subject to the mandate. More immediately, this also poses a problem for companies with less than 100 workers where the addition of "misclassified" individuals also would bring them within Applicable Large Employer status and subject to the mandate beginning on January 1, 2015.

Beyond temporary workers and contractors, employers also need to be wary about whether a parent company or subsidiary would affect their calculation of the number of employees – and therefore, the requirement to come within the Act or be subject to the mandate. Companies that have a "common owner" or are otherwise related generally will be combined together for purposes of the Act's determination of whether or not they employ full-time employees (or the equivalent combination of such employees). If the combined total meets the 50 employee (or 100 for Applicable Large Employers) threshold, then ***each separate company*** will be subject to the mandate – even those companies that do not employ enough employees on their own to satisfy it. For purposes of the Act, a "common owner" can include a parent-subsidiary relationship where one entity owns 80% or more of the equity in the other; or alternatively a brother-sister relationship where the same 5 or fewer persons collectively own either 80% or more of a related corporation, or collectively more than 50% of the two separate companies.

Earlier this year, the government authored regulations which shed some light on whether a few other categories of workers will have to be considered for purposes of the calculation of the mandate:

- <u>Volunteers</u>: *bona-fide* volunteers for a government or tax-exempt entity will *not be considered* full-time employees.
- <u>Seasonal Employees</u>: workers whose customary annual employment is six months or less generally will *not be considered* to be full-time employees.
- <u>Student Work-Study</u>: students under federal or state-sponsored work-study program will *not be counted* as full-time employees.

3. The Employer Shared Responsibility Payment.

Employers that do not offer affordable health coverage to full-time employees and full-time equivalent employees are subject to a penalty, otherwise known as the "Employer Shared Responsibility Payment." The basic penalty is $2,000 *per employee* (although the first 30 full-time employees are exempt from the calculation) per month. The penalty is due annually on the employer's federal tax return and is not deductible.

Beginning in 2015, Applicable Large Employers with more than 100 full-time and full-time equivalent employees will need to offer coverage to 70% of their full-time employees. By 2016, employers with more than 50 full-time and full-time equivalent employees will need to provide coverage to "substantially all" (95%) their full-time workers. If at least one full-time employee receives a premium tax credit because the coverage offered by the employer is "inadequate" or "unaffordable," the employer will be required to pay $3,000 for each employee who receives assistance or $2,000 per full-time employee (not counting the first 30 employees), whichever is less.

For an employer that offers coverage for only a few months during the calendar year, the penalty is computed separately for each month for which coverage was not offered. In such a situation, the monthly penalty will equal the number of full-time employees for the no-coverage month (minus 30) multiplied by 1/12 of $2,000. The penalty for the calendar year will be the sum of the monthly penalties computed for each month for which coverage was not offered.

B. Minimum Acceptable Coverage.

1. Minimum Value.

For employers that do offer healthcare to their employees, the Act requires that the coverage satisfy certain minimum threshold levels. First, the coverage must be "affordable." This means that the employee's share of the premium for employer-provided coverage must cost the employee less than 9.5% of that employee's *annual household income*. Of course, most employers would not know the total amount of an employee's annual ***household income*** (as this would require them to know how much a spouse, parent or other individual living with the employee makes on an annual basis). A "safe harbor" provision in the Act provides that an employer can avoid the penalty by providing coverage that does not exceed 9.5% of the employee's *W-2 wages*. In other words, the provision comes full circle. Unless employers demand that their workers divulge how much everyone living with them makes, 9.5% of an employee's annual income appears to be the gold-standard by which the penalty provision will be measured. Considering that percentage, the provision will have the greatest effect on smaller businesses, and particularly those with large numbers of lower wage individuals (restaurants, etc.) since it will be difficult to find coverage satisfying the minimum threshold that would fit within 9.5% of their employees' annual income.

2. Essential Health Benefits.

In addition to price, all non-grandfathered health plans offered by an employer also must include certain minimum coverages, called "Essential Health Benefits:"

- Ambulatory patient services;
- Emergency services;
- Hospitalization;
- Maternity and newborn care;
- Mental health and substance abuse;
- Prescription drugs;
- Rehabilitative services and devices (physical therapy, artificial limbs and other medical equipment);
- Laboratory services (X-Rays, MRIs, blood tests);
- Preventative and wellness services and chronic disease management (screening tests and help living with long-term illnesses like diabetes); and

- Pediatric services, including oral and vision care – dentist check-ups, routine eye doctor visits, eyeglasses, immunizations and more.

3. Different Classes Of Employees Must Be Treated The Same.

Employers that provide the required coverage under the Act also must ensure that they provide the *same coverage* to *all employees* *<u>at all levels of employment</u>*. One size fits all is the rule: employers will not be able to design flexible plans that have different eligibility, premium cost-sharing or other coverage rules among different groups of employees. Accordingly, individuals such as highly compensated employees, officers, and shareholders *cannot be treated differently*.[1] The penalty for noncompliance is ***steep***: $100 *per day* for each worker who is not eligible for the same package, until the plans are brought into parity. As an example, if a 100-employee company offers a premium package to 10 executives; it would be penalized at a rate of $100 per day x 90 employees (the ones who did not get the premium package) – up to $500,000.

4. Automatic Enrollment.

Companies that employ 200 or more full-time equivalent employees automatically will be required to enroll the employees in their health care plans and to continue the enrollment of current employees in the health plans offered. Employers must provide employees with adequate notice of the automatic enrollment and give them an opportunity to opt-out of the health plan. Employees can opt-out of the coverage, but employers will be required to provide notice of the benefit, the automatic enrollment and the ability to opt-out.

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[1] However, a plan can exclude certain non-participating employees with less than 3 years of service, who are under age 25, who are part time or seasonal employees, or who are non-resident aliens or certain collectively bargained employees.