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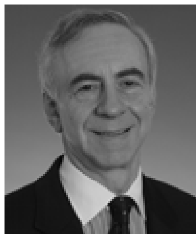
ACA's Employer 'Pay or Play' Mandate Delayed—What Now for Employers?



BY FRANK C. MORRIS JR. AND ADAM C. SOLANDER

The past few weeks have changed the way that most employers will prepare for the employer ''shared responsibility'' provisions of the Affordable Care Act (ACA). Over the past year or so, employers have scrambled to understand their obligations with respect to the shared responsibility rules and implement system changes, oftentimes with imperfect information to guide their efforts to comply with ACA.

Understanding the difficulties that both employers and the health insurance exchanges or marketplaces would have, the Internal Revenue Service (IRS) on July 2 issued a press release stating it would delay the shared responsibility provisions and certain other reporting requirements for one year, until Jan. 1, 2015.

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On July 9, the IRS published Notice 2013-45 (Notice), providing additional information on the one-year delay. Specifically, the following three ACA requirements are delayed:

1) The employer shared responsibility provisions under Section 4980H of the Internal Revenue Code (Code), otherwise known as the employer mandate;

2) Information reporting requirements under Section 6056 of the Code, which are linked to the employer mandate; and

3) Information reporting requirements under Section 6055 of the Code, which apply to self-insuring employers, insurers, and certain other providers of ''minimum essential coverage,'' as defined by ACA.

The IRS notice clarifies that *only* the above three requirements are delayed. The notice does not affect the effective date or application of other ACA provisions, such as the premium tax credit or the individual mandate. Given the fact that the law itself is not delayed, the notice has raised significant issues for employers de-

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spite their being generally pleased with the mandate and penalty delay.

This article will discuss the impact of the delay and some of the issues that employers should consider as a result of the delay.

I. The Employer Mandate and Information Reporting Requirements Under Section 6056

Under the employer mandate, applicable large employers—employers with 50 or more full-time employees (or full-time equivalents)—that elect to ''play'' must generally offer affordable, minimum value health coverage to full-time employees. If an applicable large employer does not offer such coverage and a full-time employee receives a premium tax credit, the employer may be subject to a tax penalty—the ''pay'' side of the mandate.

Section 6056 of the Code requires an applicable large employer to report annually information related to the coverage that it offers (or does not offer) to its full-time employees. This provision is essential to the employer mandate as it provides the IRS with the information needed to determine whether an employer is subject to an employer mandate penalty—a key financing provision of ACA.

Under the Notice, both the employer mandate and its related Section 6056 information reporting requirement will be delayed until 2015—meaning that no penalties will be assessed on applicable large employers that do not comply in 2014.

II. Information Reporting Requirements Under Section 6055

Under Section 6055 of the Code, self-insuring employers, insurers, government agencies, and certain other providers of minimum essential coverage must annually report certain information related to offers of minimum essential coverage, such as the individuals for whom coverage was provided. Under the Notice, self-funded employers and other entities now have until 2015 to comply—and no penalties will be assessed on entities that do not report in 2014.

Proposed rules for the information reporting provisions under Sections 6055 and 6056 should be published this summer. After these rules have been issued, employers and other affected entities are ''strongly encouraged'' to voluntarily comply with the reporting requirement in 2014, but without risk of a penalty if they do not do so.

III. Legality of the Delay

The effective date of the shared responsibility rules was articulated in the text of ACA itself. According to Section 1513 of ACA, the employer mandate ''appl[ies] to months beginning after December 31, 2013.'' Thus, employers offering calendar-year plans would have to offer conforming coverage beginning Jan. 1, 2014, or pay a penalty. Given the fact that the effective date of the shared responsibility provisions is defined by statute, some employers and others have questioned whether the Obama administration has the legal authority to impose the delay and whether they should rely on it.

The recent guidance delaying the employer mandate articulates a policy reason, but not a legal justification for the delay. It is therefore difficult to assess the legality of the Obama administration's power to delay a statutory deadline. While basic principles of federalism dictate that the power to legislate resides with the Congress, the president does have power to ensure that the laws are ''faithfully executed.''

The result of this power is that the president has discretion on how a particular law is interpreted. According to often-cited language from the U.S. Supreme Court, ''[t]here is no provision in the Constitution that authorizes the president to enact, to amend, or to repeal statutes.'' The issue therefore becomes whether the decision to delay is a valid excuse of the president's authority to enforce the law or whether it is an encroachment into Congress's power to legislate.

This discussion is certainly interesting from a separation of powers standpoint; however, it unlikely to affect employers in the short term. At a practical level, any legal challenge faces long legal and practical odds, and there are unanswered questions. The first question is who would have standing to challenge the delay and presumably seek to pursue a mandamus action? A second question at the practical level is will the courts want to wade yet again into the swamp of executive versus legislative power and prerogatives on this highly political issue?

A practical problem is that such a litigation challenge might simply be allowed to linger until the delay had run its course and the case could be dismissed as moot. All in all, the prospects for a definitive ruling on the legality of the delay before the delay simply expires on its own seem exceedingly slim if not virtually nonexistent.

IV. HR Issues and the Effect of the Delay on Employees

As noted above, only the employer shared responsibility provisions, including penalties, and the identified reporting requirements and assessment are delayed until 2015. While this delay provides some welcome breathing room for employers, it has raised significant questions with regard to employees whose individual mandate responsibilities are not delayed. As a result, employers should consider human resources repercussions as they plan for 2015.

Beginning in 2014, ACA requires that most individuals maintain health care coverage or pay a tax penalty. Many individuals who will be subject to this requirement were relying on their employer to offer them an opportunity to enroll in coverage. Such an offer of coverage would have presumably provided employees with an affordable and available means to satisfy their obligations under the individual mandate.

As is well understood, the shared responsibility provisions greatly expand plan eligibility by requiring employers to offer any employee averaging 30 hours of service per week the opportunity to enroll in coverage or pay a penalty.

Perhaps the most acute impact of the delay will be for employees who are not currently eligible for coverage under an employer's plan but would have been in 2014 when the 30-hour threshold would have become effective. Because this provision has been delayed, these employees will have to either purchase coverage through another source or pay a penalty.

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By instituting a bright line 30-hour threshold for determining which employees are eligible for coverage, any employer action in reducing employees' hours below that threshold might be cited as evidence of a specific intent to interfere with a right to benefits.

In order for individuals who are not eligible for public assistance to take advantage of the premium tax credits and cost-sharing subsidies available under ACA, they will have to purchase coverage through a health insurance exchange. However, exchange assistance is not available to individuals who are offered minimum essential coverage through another source, such as an employer's plan. Therefore, employees who are not currently eligible for coverage but who will be in 2015 will have to enroll in exchange coverage in 2014 and then ''dis-enroll'' in coverage in 2015.

It is easy to see how employees may become frustrated with this development and may look to their employer for assistance. Consequently, if an employer does nothing, it is likely that workforce morale and productivity issues could arise. In such cases, doing nothing in this instance may be akin to dropping coverage in 2015.

For example, employers that do nothing may find it more difficult to recruit or retain employees if a competitor chooses to offer benefits in 2014. It is also possible that employees forced to enroll in an exchange maybe more susceptible to union appeals as they seek assistance from any available source.

Because of the obvious downsides of doing nothing, employers are considering options, from pushing forward with their benefit offerings to assisting employees with exchange enrollment. While the approach that an employer chooses to take is a business decision based on the circumstances, that particular decision should reflect the human resources consequences that may result from that decision.

V. Workforce Management and Litigation Risk

The delay gives employers more time to determine whether their employees have averaged 30 hours of work per week. Because employers may use up to a one-year look-back period, the earliest this measurement period may begin is Jan. 1, 2014. Thus, the delay is positive from the perspective that it gives employers more time to consider and implement their workforce management decisions, which could minimize the risk of litigation.

Employers should be aware that certain workforce management practices could give rise to claims under Section 510 of ERISA. In general, Section 510 makes it unlawful to interfere with employee benefits and protects an employee's right to present and future entitlements. As a consequence, any workforce realignment that reduces the number of hours that an employee works to less than 30 per week, thereby making that individual ineligible for benefits, could give rise to arguments that the employer interfered with an employee's right to present or future health care benefits under Section 510 of ERISA.

To prove a Section 510 claim, the courts require that an employee show that an employer acted with a specific intent to interfere with the employee's right to benefits. By instituting a bright line 30-hour threshold for determining which employees are eligible for coverage, any employer action in reducing employees' hours below that threshold might be cited as evidence of a specific intent to interfere with a right to benefits. Employers should then consider carefully any plans to reduce the hours, particularly of current employees, to less than 30 per week.

It would appear that an employer may reduce litigation exposure if workforce management actions are implemented as far as possible in advance of any measurement period, thus reducing the force of any temporal proximity argument and potentially assisting the argument that the change was made for a legitimate business purpose.

VI. No Time to Hibernate

With the looming deadline now lifted, many employers may consider delaying their implementation efforts to simply wait for issuance of further regulations. However, the Obama administration has made clear that this delay is temporary and that it will issue additional guidance in the near future. Therefore, employers should learn from past experiences relative to the 2012 elections and the U.S. Supreme Court's decision to uphold essentially all of the ACA and not delay any more than necessary to develop sensible ACA compliance strategies. Even with a year-and-a-half, compliance with the shared responsibility and employer reporting requirements is still a significant undertaking.

Employers should learn from past experiences relative to the 2012 elections and the U.S. Supreme Court's decision to uphold essentially all of the ACA and not delay any more than necessary to develop sensible ACA compliance strategies.

Further, employers should not allow the delay to interfere with other implementation plans that may have a larger impact on the future of their benefit plans.

Perhaps the biggest risk to the future of the employer-based health insurance system is the so-called Cadillac tax. Beginning in 2018, employers whose plan costs exceed statutorily defined thresholds ($10,200 for individual coverage and $27,500 for family coverage) will be subject to a 40 percent nondeductible excise tax on the amount in excess of such thresholds. For employers affected, the tax will grow in amount each year; thus, the amount spent each year on health benefits will grow disproportionately without providing

additional benefit to employees—and benefiting only the U.S. Treasury.

While most employers are likely to attempt to cut the richness of their plans in order to avoid the tax, this strategy has limits under ACA and may result in seeing the forest for the trees.

The only real way in which to limit the cost of employer plans and to bear the golden fruit of healthier and more productive employees who require less medical care, especially for high-spend chronic conditions like obesity, diabetes, and chronic obstructive pulmonary disease, in the long run, is to change the way in which employers pay for care through value-based purchasing and improving the health of their population through wellness initiatives.

The problem is that this type of real change takes time to implement. If employers wait to take action until after the employer mandate becomes effective, there is a real possibility that they will be too late to effect such changes and that they will allow themselves to be run over by the Cadillac tax.

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