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May 2014

Labor Pains: The $2 Million Part-Time Employee

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One of your employees (we'll call him "Don") cannot enroll in your health insurance plan because you classify him as "part-time" (one who works less than 30 hours a week). This forces Don to get health insurance through a government exchange under the Affordable Care Act – you know, "Obamacare." Furious about his exclusion from your health plan, Don "blows the whistle" with the Internal Revenue Service (IRS). Don complains that you erroneously classified him as a part-time employee, when in fact he often works more than 30 hours a week. The IRS agrees, hits your company with a multi-million dollar tax penalty based on your misclassification of Don, and then gives Don a six-figure reward for reporting you. Science fiction? Not anymore.

Embedded within the Affordable Care Act (ACA) are significant employment litigation risks that have virtually nothing to do with the structure or content of health insurance plans. For illustrative purposes, consider this highly-condensed summary of ACA: If you are a "Large Employer," which means you have at least 50 full-time employees, you must offer compliant health insurance coverage to at least 70% of your full-time employees in 2015 (95% in 2016). You need not offer coverage to your "part-time" employees – those who work less than 30 hours a week. Failure to meet this 70% level of coverage can result in a draconian tax penalty: $2,000 per year for nearly each of your full-time employees, even those who are enrolled in your health insurance plan. If you have 1,000 full-time employees, that's almost $2 million – and it is a non-deductible tax expense.

ACA also requires employers to disclose to the IRS detailed information about its workforce and employee health insurance enrollment. Armed with this data, the IRS can assess tax penalties against employers that do not offer compliant health insurance coverage to enough of their full-time employees. Even though the IRS may spin its wheels for years sifting through this quagmire of employer data, there are mechanisms by which employees can "blow the whistle" on employers, and the IRS will pay them a huge bounty if they are successful.

The $2 million part-time employee emerges like this: Let's say you have 1,200 employees – 1,100 full-time and 100 part-time. You offer health insurance coverage to ***exactly*** 70% of your full-time employees (770), and no coverage to your part-time employees. No risk of the tax penalty, right? Well, don't be surprised if some of your part-time employees disagree with your belief that they only work "part-time." In addition, don't be surprised if some of your part-time employees are upset because you exclude them from your health plan.

Here is the $2 million rub. Under this scenario, if you have misclassified just one employee as part-time, when in fact he works full-time under ACA standards, and that employee obtains health insurance from an exchange and receives a tax subsidy, you ***failed*** the 70% coverage rule. In other words, you offered coverage to 770 full-time employees, but since you really had 1,101 full-time employees under ACA standards due to your single employee misclassification, you offered coverage to less than 70% of your full-time employees. That single misclassification can trigger a tax penalty in excess of $2 million.

What does the misclassified "part-time" employee have to gain by complaining to the IRS? Just a pile of cash. In 2006, Congress amended the Tax Code to authorize payments to individuals who "blow the whistle" on businesses that fail to pay taxes owed. If the complaint results in the collection of taxes or penalties meet certain monetary thresholds, the IRS pays the whistleblower between 15% and 30% of the recovery. The hypothetical 1,100 employee company triggered a $2 million tax penalty with a single part-time misclassification, which could net the employee a $600,000 bounty for complaining to the IRS. There's your employee's (and his lawyer's) motivation.

Obviously, this fictionalized scenario was purposely designed to illustrate how just one part-time employee misclassification could cause an avalanche of tax penalties. To minimize risk of exposure, however, employers should scrutinize the manner in which they count employee hours for purposes of making "part-time/full-time" classifications. ACA's rules for counting employee hours can be extremely

complex and byzantine, especially for employees who work flexible schedules. You will need to learn how to count to 30 using new “ACA math.” In addition, companies should implement protocols for accurately mining their HRIS data so they can easily validate and audit their employee classifications. In order to create a “margin of error” in the event of unintentional employee misclassifications, some employers have lowered the number of weekly hours (to 20 or 25) under which an employee is considered to be “part-time” for purposes of offering coverage. Litigation risks by employees under these and other provisions of ACA are no longer theoretical – the threat is real.

To find out how this law impacts your business or for assistance in updating your protocols to minimize your risk of exposure, please contact **Todd Horn**.

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Todd Horn has over 25 years of experience in employment litigation and compliance initiatives and is the co-author of ***Maryland Employment Law***, a treatise that courts cite as a leading reference. Mr. Horn was selected as the “Lawyer of the Year” for employment law in 2011 in Maryland by the publication *Best Lawyers in America*. Mr. Horn also ranks as a top “Band 1” employment lawyer by *Chambers USA*, which reported that he “is admired as a fantastic litigator – one of the best in the courtroom, with a tremendous presence” and “is particularly sought out for high-stakes litigation.”