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The Affordable Care Act's Employer Mandate and the Collectively Bargained Workforce

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As 2014 rapidly approaches, employers of all sizes and all industries are working hard to avoid the Affordable Care Act's (the "Act") Employer Mandate, now appearing in the Internal Revenue Code, Section 4980H. For employers who employ a stable, salaried workforce, and who already sponsor a robust health plan for that workforce, the transition to 2014 will be largely seamless. But step away from that model and the terrain begins to get rocky. The Act's rules are less easy to apply for employers with large cohorts of variable hour employees (such as those in the staffing and restaurant industries); those with untraditional ways of counting service (such as educational institutions) and — the subject of this advisory — employers subject to collective bargaining agreements who provide medical benefits through Multiemployer Plans.

A Very Brief & Over-Simplified Overview of the Employer Mandate

Our client alert issued January 16, 2013 and accessible here discusses the Act's Employer Mandate at length. Here are the highlights of the Employer Mandate:

Which Employers Must Comply?

4980H applies to "applicable large employers," defined as employers with at least 50 "full time equivalent" employees.

- Each employee working 120 hours per month counts as one "full time equivalent" employee. Employees working less than 120 hours per month count as a fractional employee.
- All employers in the IRS "controlled group" are aggregated for this purpose. For example, the employees of a company and its 80% owned subsidy are aggregated.

What Must an Employer Do to Avoid a Penalty?

Offer health care coverage to all full time employees (defined as those employees who work at least 30 hours per week) which:

- Costs the employee no more than 9.5% of income (the 4980H proposed regulations[1] provide several safe harbors that employers can use to determine income: the W-2, "rate of pay" and Federal Poverty Line safe harbors);
- Provides "minimum value" meaning 60% of benefits. (To figure this out, employers will be permitted to use one of several methodologies, including an actuarial calculator and a design based checklist, all to be provided by the relevant agencies); and

- Has a waiting period of no more than 90 days.

Note: if an employer does not meet these requirements, any employees below 400% of the Federal Poverty Line will be eligible for a subsidy on a state exchange.

Which Employees Are Considered "Full Time"?

"Full time" employees are those who work at least 30 hours per week.

- If an employee's hours are predicable (e.g., a salaried employee) then the employee's "full time" status is determined at the time of hire.
- A measurement/stability period methodology applies to employees whose hours are not predictable (examples may include employees in the staffing or restaurant industries). Under this methodology:
    - An employer chooses a "measurement period" of 3–12 months and a subsequent "stability period" of at least 6 months (and no shorter than the measurement period);
    - With respect to a new hire who is deemed to be "full time" during the measurement period, coverage must begin no later than 13 months from the employee's start date, plus a fractional month if the employee was not hired on the first day of a calendar month; and
    - An employee's status (either full time or part time) for the stability period is determined using the average hours worked during the preceding measurement period.

What Is the Penalty?

This depends on whether an employer provides any coverage at all, and whether any employee of the employer is eligible for a subsidy on an exchange.

- If the employer offers no coverage, and any employee purchases subsidized coverage on an exchange, the annual penalty is $2,000 x the number of full-time employees. This penalty is calculated on raw headcount of full-time employees (not full-time equivalents) and the first 30 full-time employees are disregarded from the penalty calculation.
- If the employer offers coverage, but it does not meet the requirements described above and one or more employee purchases subsidized coverage on an exchange, the annual penalty is $3,000 x the number of employees who qualify for subsidized coverage through a public exchange.

4980H, Meet the Multiemployer Plans

4980H is geared towards companies that sponsor the "single employer" health plans in which their employees participate. These employers have control over plan design, costs, and waiting periods, and may make adjustments to their plans as need be to satisfy 4980H.

4980H does not fit so well with many employers that employ union workers. These employers enter into one or more collective bargaining agreements that set forth the terms of employment of union workers, including the workers' entitlement to health care. But rather than requiring the employer to enroll these union employees in the employer's own health plan, the collective bargaining agreements typically require the employers to contribute to a "Multiemployer Plan" through the union.

Multiemployer Plans are established by a union to receive contributions from, and provide benefits to the employees of, several unrelated employers who are subject to bargaining with the union. Multiemployer Plans generally aggregate service among these many unrelated employers to determine eligibility, reflecting the fact that, over time, a union employee may work on several different projects for a variety of employers. The terms of each Multiemployer Plan are set by a board of trustees. Although the trustees are jointly elected by the employees and employers subject to collective bargaining, in reality the employers have little or no day-to-day control over the

design or operation of the Multiemployer Plan, including the benefits offered, costs, and waiting periods.

In the preamble to the recently proposed 4980H regulations, the Internal Revenue Service acknowledged some of these unique features by providing a transition rule to apply to Multiemployer Plans through 2014. Under this transition rule, an applicable large employer will not be subject to a penalty under section 4980H with respect to a full-time employee if the following conditions are met:

- The employer is required to make a contribution to a Multiemployer Plan with respect to the full-time employee pursuant to a collective bargaining agreement or an appropriate related participation agreement.
- Coverage under the Multiemployer Plan is offered to the full-time employee (and the employee's dependents).

Note: This poses some challenges to employers. What if the employer is paying into a Multiemployer Plan on behalf of an employee, but the employee is not eligible due to the Plan's waiting periods or other terms?

Note: If the employee's schedule is not predicable at the time of hire, the employer will need to deploy the measurement/stability methodology applicable to variable hour employees in order to determine whether an employee is "full time." This could pose some problems for plans that, for example, use a one-year eligibility period followed by a 90-day administrative period to gather data and determine eligibility, with coverage beginning after the 90th day. Such a process would exceed 4980H's 13-month limit.

- The coverage offered to the full-time employee is affordable and provides minimum value.
    - For "affordable" coverage, the employee must pay no more than 9.5% of income towards the coverage. For this purpose, under the transition rule, the employer can look to any of the general income safe harbors, and may also use the wages reported to the Multiemployer Plan (i.e., actual wages or the collective bargaining agreement's wage rate) to determine income, and
    - Whether coverage provides "minimum value" is determined using the same tests as single employer plans (e.g., the forthcoming actuarial value calculator or checklist). The "minimum value" calculation is based on benefits offered and the extent of cost sharing.

Note: Given that employers usually do not have access to detailed information about Multiemployer Plan benefits, it is unclear how employers will be able to determine minimum value. That said, the general consensus among practitioners seems to be that most Multiemployer Plans will easily meet the "minimum value" standard.

- Despite this transition relief, any waiting period for coverage under the plan must separately comply with the Act's 90-day limitation on waiting periods in section 2708 of the Public Health Service Act.

A Note to Massachusetts Employers

Most employers doing business in Massachusetts have been required to comply, since 2006, with the Massachusetts "Fair Share" law. Under the Fair Share law, employers with 11 or more employees are required to provide their full-time employees with health insurance that passes two tests,[2] or pay the Commonwealth $295 per year per employee. While the Act and the Fair Share law contain some similarities, the two laws diverge in a number of ways.[3]

One notable difference affecting employers subject to collective bargaining agreements: the Massachusetts Fair Share law contains significant carve-outs for employers who provide benefits through Multiemployer Plans. Specifically, any employee receiving benefits through a Multiemployer could be counted as a covered employee in the Primary Test and did not have to receive an "offer" of coverage under the Secondary Test. Under the Act, Multiemployer Plans receive no similar "pass."

On January 8, 2013, Governor Patrick proposed to repeal the Fair Share law, effective June 30, 2013. This is good news for all employees doing business in the Commonwealth, who otherwise would be required to comply with two

distinct mandates.

Conclusion

Federal Health Care Reform brings with it significant changes to employer health care requirements. All employers should be taking steps now to review their employee benefits plans and practices in order to have compliant processes in place in 2014. Employers with union workers must pay special attention to employees receiving benefits through Multiemployer Plans. Finally, all employers doing business in Massachusetts must recognize the differences between the Act and the Fair Share law and adjust to the new rules.

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Endnotes

[1] 78 FR 217, January 2, 2013

[2] The "Primary Test" requires employers to demonstrate that at least 25% of their "full time" employees are enrolled in their health insurance at the end of each calendar quarter. The "Secondary Test" requires employers to offer health insurance with a 33% (or more) employer premium contribution to full-time employees within 90 days of hire. Employers with 50 or more employees must meet both tests *or* show a 75% enrollment; other employers may comply by meeting either test.

[3] Among other things, the Fair Share law does not aggregate employers on a "controlled group" basis and the Fair Share tests do not explicitly consider the affordability and value of coverage.

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