How to Comply With the Affordable Care Act: Four Things a California Employer Needs to Know

It's the single most controversial law passed by Congress in the last 10 years. Business groups spent hundreds of millions of dollars to defeat it in Congress and to have it overturned in the courts. But now, the Patient Protection and Affordable Care Act (ACA) is the law.

Employer-sponsored health care plans are the source of health insurance for more than 56 percent of Americans, so it is not surprising that the ACA has a significant impact on American employers. That is especially true in California where nearly 80 percent of employers offer health care to their employees.

Without question, the single most talked about aspect of the ACA is the "shared responsibility" requirement on employers with more than 50 employees. Starting in 2015, employers of that size will be required to offer health care insurance to employees who work more than 30 hours in a week or pay a penalty.

But the ACA imposes many other obligations on employers. For example, on October 1, 2013, employers must provide notice to employees of the health care exchanges that are being created under the ACA. Employers in San Francisco will need to ensure that the notices they provide also satisfy their obligations under that city's Health Care Security Ordinance. Employers also are going to be met with the burden to consider implementing wellness plans and to train managers on new kinds of retaliation that can arise under the ACA. For unionized employers, they will have to meet the challenges imposed by the ACA's tax on so-called Cadillac health care plans that are popular with larger unions.

At 906 pages, the ACA is one of the most complicated and cumbersome laws to pass Congress in some time. Nonetheless, an employer does not need to be well-versed in every intricacy of the law in order to fulfill its obligations under it.

This guide has been designed by Hirschfeld Kraemer experts to provide you with the information you need to navigate the most compelling aspects of the ACA on a day-to-day basis.

(1) THE SHARED RESPONSIBILITY REQUIREMENT

The United States is one of the few countries in the world that offers health care insurance to the majority of its citizens through employer-sponsored plans. Before World War II, employer-sponsored coverage was virtually non-existent, but during the war employers were incentivized to offer it as a perk because wage increases were then prohibited. Despite a rising tide of economists opposed to employer-sponsored plans, they are now the rule, not the exception, for working-age Americans.

What Is The Requirement?

The controversial "shared responsibility" requirement of the ACA reinforces that status quo. The ACA perpetuates the notion that employers should be the primary source of health insurance for working-age Americans by requiring that employers with 50 or more employees (or full-time equivalent employees) offer coverage that provides "minimum value" and is "affordable," or alternatively pay a penalty. This requirement goes into effect on January 1, 2015.

Do You Have 50 Or More Full Time Employees Or FTE-Equivalents?

A full-time employee is defined as someone who works at least 30 hours a week. A FTE-equivalent is a combination of employees who, although they do not individually work 30 hours in a week, combined work over that threshold.

To Whom Must Coverage Be Offered?

Coverage must be offered to full-time employees, namely those that work over 30 hours in a week.

What Is Affordable Coverage?

A plan is "affordable" if the employer's lowest cost, individual coverage does not exceed 9.5% of any one of the following: (1) the employee's W-2 wages from the employer for the calendar year, (2) the employee's rate of pay, or (3) the federal poverty level.

What Is Minimum Value?

The Department of Health and Human Services has provided a minimum value calculator to determine if the plan is deemed to pay for at least 60% of the

benefits. Alternatively, the regulators will publish safe harbor plan designs that are deemed to provide minimum value. Plans with nonstandard features may use a certified actuary.

What Is The Penalty For Non-Compliance?

Qualified employers that do not offer "minimum essential" health coverage to 95% or more of their FTE's will pay a penalty of $2,000 per employee if any full-time employee obtains a federal subsidy to purchase insurance through a health exchange. This penalty will be $2,000 per year for each FTE in excess of 30 employees. There are additional penalties if the plan does not meet the standards for minimum essential coverage, minimum value, and affordability.

The Reporting Requirements

Beginning on January 1, 2015, covered employers are required to file a return with the IRS regarding the coverage provided to employees and to provide a related statement to such employees.

(2) WELLNESS PROGRAMS

Starting for plan years after January 1, 2014, the ACA will offer employers new incentives to offer wellness programs for their employees. The theory behind incentivizing employers to offer ACA wellness programs is that they will create a healthier population and, in turn, bring down the cost of health care.

What Is A Wellness Program?

You may already have one and not even know it. The ACA identified two different types of wellness programs:

(1) Participatory programs: These are programs that do not provide a reward and do not include any conditions for obtaining a reward that are based on an individual satisfying a standard that is related to a health factor. These include, for example, reimbursement or discounts for fitness center memberships; participation in a fitness testing program that provides a reward simply for participating in the testing program; a reward for participation in a smoking cessation program irrespective of outcome; a reward for attending a free health education seminar; a reward for simply completing a health risk assessment (HRA) with no follow-up required.

(2) Health-Contingent Wellness Programs: These programs require employees to satisfy a standard related to a health factor in order to obtain a reward. For example, "activity-only" programs may require employees to exercise, walk or go on a diet to comply. "Outcome-based" programs would require employees to attain a particular health outcome, like stopping smoking or testing within certain levels on biometric rates, in order to obtain the reward. The federal government has placed strict limits on the circumstances under which these types of plans can be implemented.

How Does A Wellness Program Benefit Employers?

The ACA was designed with the purpose of promoting health and, in turn, cutting the costs of health care and employer-sponsored health insurance. Before the ACA, employers who offered wellness programs were entitled to offer a reward of 20% of the total cost of coverage to employees, but the ACA increases the maximum allowable reward to 30% for having a wellness program and 50% for qualified wellness programs designed to stop or reduce tobacco use.

Is The EEOC Going To Stand In The Way?

The federal government went to painstaking efforts to ensure that health-contingent wellness programs, in particular, were not a subterfuge for disability discrimination. The proposed regulations, which are now in the Final Rule stage, bear this out in the 36 pages of Rules that were issued on that point.

The EEOC, however, seems to have a different view as to the legality of those programs. In May 2013, the EEOC released an Informal Discussion Letter setting forth its belief that health-contingent programs will violate the Americans With Disabilities Act (ADA), -- even if they do not violate ACA or HIPAA. According to the EEOC, such violation occurs if those programs do not provide reasonable accommodation to employees who are unable to meet the outcomes or engage in specific activities due to disabilities. The EEOC is currently in the process of developing its own guidance that will address requirements for determining whether wellness programs comply with federal equal employment opportunity laws, so stay tuned.

Given The Uncertainty, What Are Employers To Do?

Employers with existing group health plans that offer wellness program components, or who are considering such plans, should consider the Final Rule on the ACA and the EEOC's letter on the point. Chances are that any participatory program you offer will be legitimate, but the

terrain is much less clear for health-contingent programs, especially those with "outcome-based" components. As with many things ACA, stay tuned for additional developments.

(3) RETALIATION AND WHISTLEBLOWING UNDER THE ACA

The ACA adds to the laws prohibiting employment discrimination and whistleblower retaliation in the workplace. Under the ACA, private and public employers cannot discriminate or retaliate (to include intimidating, threatening, restraining, coercing, blacklisting, reducing hours, firing, failing to hire, or disciplining an employee with respect to compensation, terms, conditions or privileges of employment) against an employee (as well as past employees and job applicants) who: (1) got a tax credit under the ACA; (2) reported, testified about or assisted in a proceeding about a possible ACA violation by an employer; or (3) objected to or refused to participate in any task that the employee reasonably believed to violate the ACA.

Like other whistleblower statutes, the ACA's prohibition is broad. It applies even if there has been no actual violation of the ACA by an employer, but the employee reasonably believes there has been a violation. And, the laundry list of acts of retaliation makes it such that just about any conceivable form of conduct can trigger its protection.

The ACA also has an administrative prerequisite. In a discrimination case, an employee must first file a Charge of Discrimination with OSHA. Under the ACA, an employee must file a claim with OSHA, the federal agency charged with investigating ACA retaliation and discrimination complaints, within 180 days after the alleged violation. An employee can seek a jury trial in court if OSHA does not render a final decision within 210 days or if OSHA issues written findings, but fails to render a decision within 90 days.

In an OSHA proceeding, an employee has the regular burden of proof – the preponderance of the evidence – to prove that she engaged in a protected activity, the employer knew or should have known about the protected activity, she suffered an adverse action, and that there are circumstances from which one may infer that the protected activity was a contributing factor in the adverse decision. The employer has a much higher burden of proof – clear and convincing evidence – to prove that it would have taken the same employment action in the absence of the protected activity.

Where a violation is found, remedies under the ACA include reinstatement with seniority and benefits (or, instead, front pay if OSHA finds reinstatement is inadvisable in view of the facts), back pay, compensatory damages, interest, costs (*e.g.*, expert witness fees) and attorneys' fees. On the other hand, if a complaint is frivolous or pursued in bad faith, an employer can recover its attorneys' fees limited to $1,000. Rights under the ACA cannot be diminished or waived by any agreement, policy, form or condition of employment.

For more information on Whistleblower Complaints under the Affordable Care Act, see OSHA's Fact Sheet: https://www.osha.gov/Publications/whistleblower/OSHAFS-3641.pdf.

(4) EMPLOYERS WITH UNION CONTRACTS UNDER THE ACA

Employers with union contracts may find themselves with an unexpected bargaining tool. Beginning in 2018, the ACA imposes a 40% excise tax on any health care plan with a premium of over $10,200 for individuals or $27,500 for a family. And, just about the only place you find these so-called "Cadillac Plans" are in multi-employer union contracts.

This is why unions are suddenly up in arms about the ACA. Unions claim that they have passed on pay increases over the years in exchange for generous employer contributions to health plans. But now, they face the prospect that those same generous plans are going to get them taxed at an extraordinary rate.

So, where does that leave employers with union contracts that have Cadillac plans? Some say it gives them a huge advantage – in negotiations for upcoming contracts, unions will have a big incentive to keep health care costs below the ACA tax threshold. Others expect that unions will expect large pay increases to compensate for the expected loss in health care contributions.

When the ACA was passed, unions successfully fought tooth and nail to delay imposition of the Cadillac tax to 2018 (although their distaste for the provision, regardless of the implementation date, was clear). As time passes and that deadline creeps closer, employers will have interesting choices to face in bargaining.

If you have questions or would like further information regarding the ACA and its impact on your business, please contact Dan Handman (310.255.1820) or Monte Grix (310.255.1827) in our Santa Monica offices, or Jayne Chipman (415.835.9013) or Kristin Oliveira (415.835.9051) in our San Francisco offices.