A Timely Analysis of Legal Developments

ASAP®

June 11, 2013

ACA Employer Play or Pay Requirements: What Does it Mean for Employers

By Steven Friedman and Ilyse Schuman

Beginning in 2014, the Affordable Care Act (ACA) will require "large" employers to offer their full-time employees healthcare coverage that meets certain standards or pay a penalty. Whether an employer opts to "play-or-pay" is a critical business decision that impacts both their benefits and workforce strategies. With the effective date of the ACA play-or-pay penalty just months away, employers must understand how the mandate works and what it means for their business. The following are key questions employers must ask to make sure they are prepared for the dramatic changes ahead.

Are All Employers Subject to the ACA Play-or-Pay Penalty?

No, only applicable large employers are subject to the employer play-or-pay requirement. The ACA defines an applicable large employer as an employer that, during the prior calendar year, employed an average of at least 50 full-time employees. To calculate the number of full-time employees for this purpose, an employer must look at: (1) actual full-time employees; and (2) the number of full-time equivalent employees (FTEs) represented by the employer's part-time employees. The statute defines a full-time employee as one working 30 or more hours per week, calculated monthly.

Is the Company Part of a Controlled-Group Under Common Ownership?

Companies under common control are combined together to determine whether they employ at least 50 full-time employees (or an equivalent combination of full-time and part-time employees).

Who is an "Employee" for Purposes of the Play-or-Pay Penalty?

The IRS will use the common law standard to define an employee. Generally, an employee is someone performing services for the employer where the employer controls what will be done, and how it will be done.

©2013 Littler Mendelson, P.C. All rights reserved.

Who is a "Full-Time" Employee?

A full-time employee is an employee who was employed on average at least 30 hours per week, which the proposed regulations equate to 130 hours per month. An employee's hours of service include: (1) each hour for which an employee is paid, or entitled to payment, to perform duties for the employer; and (2) each hour of paid leave. Generally, only the hours of service performed in the U.S. are included in the calculation.

Employers can use a "look back" method for determining the full-time status of ongoing, as well as new variable hour and seasonal employees.

Ongoing employees: For ongoing employees, an employer would determine each employee's full-time status by looking back at a defined measurement period of three to 12 months to determine full-time status for a subsequent "stability period." If an employee worked an average of 30 hours per week during the standard measurement period, the employer would treat the employee as full-time during the subsequent stability period, the duration of which would be at least the greater of six consecutive calendar months or the length of the standard measurement period. If an employee did not work an average of 30 hours per week during the standard measurement period, the employer would treat the employee as not full-time during the subsequent stability period, which may be no longer than the associated standard measurement period. Employers may use administration periods of up to 90 days between the measurement period and stability period.

New employees: An employer is not subject to the play-or-pay penalty for failing to offer new full-time employees coverage for the first three months of employment. For new variable hour employees and seasonal employees, an employer may use an initial measurement period of between three and 12 months that begins on any date between the employee's start date and the first day of the first calendar month following the employee's start date. Although through at least 2014 employers are permitted to use a reasonable, good faith interpretation of the term "seasonal employee," the IRS notes that final regulations may provide a specific definition.

How Much is the Play-or-Pay Penalty?

Applicable large employers that fail to offer "minimum essential" health coverage to at least 95% of their full-time employees (and their children) will pay the penalty if any full-time employee receives a federal subsidy to purchase insurance through a health exchange. This penalty will be $2,000 per year for each full-time employee in excess of 30 employees.

Employers that offer minimum essential coverage, but fail to provide minimum value (*i.e.*, the plan's share of the total allowed costs of benefits provided under the plan is not at least 60% of those costs) or provide coverage deemed unaffordable, will pay the lesser of $2,000 per year for each full-time employee (minus 30) or $3,000 for each full-time employee who receives a premium tax credit to purchase coverage through a health insurance exchange. The tax credit is generally available to those employees who cannot buy affordable or minimum value coverage if their family income is below 400% of the Federal Poverty Level.

When is Healthcare Coverage Deemed to be Affordable?

Employers may take advantage of one of three safe harbors to determine whether their plan is "affordable." A plan is deemed affordable if the employee's required contribution for the calendar year for the employer's lowest cost, self-only coverage that provides minimum value during the entire calendar year (excluding COBRA or other continuation coverage) does not exceed 9.5 percent of: (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.

Does the Healthcare Coverage Provide 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.

When Does the Play-or-Pay Penalty Become Effective?

It becomes effective January 1, 2014. However, employers maintaining fiscal year plans as of December 27, 2012 may not be subject to the play-or-pay penalty until the first day of the 2014 plan year if certain conditions are met.

ASAP® is published by Littler Mendelson in order to review the latest developments in employment law. ASAP® is designed to provide accurate and informative information and should not be considered legal advice.
©2013 Littler Mendelson, P.C. All rights reserved.

Are There Special Rules for Union Plans?

Employers participating in multiemployer plans face many unique considerations that the law does not address. However, the IRS provides transition relief that such employers may use in 2014.

What Does This Mean for Employers?

Employers must contend with significant administrative burdens and make key strategic decisions in the months ahead. The cost of penalties can be significant, as can the cost of providing sufficient healthcare coverage to full-time employees. However, the decision of whether to play-or-pay involves more than just weighing the cost of the penalty versus the cost of coverage. It involves evaluating workforce and benefit structures and business needs. Employers must evaluate all of the employment, labor and benefits law implications of the ACA and its play-or-pay mandate to determine the optimal strategy for their business.

Steven Friedman, Co-Chair of Littler Mendelson's Employee Benefits Practice Group, is a Shareholder in the New York City office and Ilyse Schuman is a Shareholder in the Washington, D.C. office. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com, Mr. Friedman at sfriedman@littler.com, or Ms. Schuman at ischuman@littler.com.

ASAP® is published by Littler Mendelson in order to review the latest developments in employment law. ASAP® is designed to provide accurate and informative information and should not be considered legal advice.
©2013 Littler Mendelson, P.C. All rights reserved.