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## Employer Mandate Delay: Beware of Ignoring the ACA

By Ilyse Schuman and Steven Friedman

On July 2, 2013, in a surprise move, the Department of the Treasury announced that it is delaying the Affordable Care Act (ACA) employer pay-or-play mandate and accompanying employer reporting requirements by one year. Accordingly, employers will not be subject to penalties for failing to offer full-time employees healthcare coverage that meets certain standards until 2015. Under Section 4980H of the Internal Revenue Code (IRC), “applicable large employers” must offer their full-time employees “minimum essential coverage” that provides “minimum value” and is “affordable” or pay a penalty. The question of whether to play by offering such coverage or pay the penalty has become an important issue for many employers, and one that involves strategic choices about benefits structure and workforce composition. The delay comes as a relief to employers who were scrambling to prepare for the mandate’s 2014 effective date. While the delay is certainly welcome news for employers, it does not mean that they can ignore the ACA or the critical decisions it calls upon employers to make.

According to the Treasury Department announcement and subsequent Notice 2013-45 issued on July 9, 2013, this delay is intended to provide additional time for input from employers and other reporting entities in an effort to simplify reporting requirements and “to provide employers, insurers, and other providers of minimum essential coverage time to adapt their health coverage and reporting systems.”<sup>1</sup> The delay affords employers an opportunity to more carefully consider and implement their ACA play-or-pay strategy, hopefully informed by additional and clearer guidance about their obligations under 4980H and the new reporting requirements. In the meantime, other components of the ACA remain in place, including the premium tax credits for eligible individuals to purchase health insurance on a newly created health exchange. The announcement of the employer mandate delay emphasized that other provisions of the ACA will become effective as scheduled—and that the delay was only a delay and not a repeal of the provision. According to the Notice, “both the information reporting and the Employer Shared Responsibility Provisions will be fully effective for 2015.” Accordingly, over the next year, additional ACA obligations will become effective and employers must make preparations to implement the play-or-pay mandate in an ever-changing regulatory landscape.

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<sup>1</sup> IRS Notice 2013-45.

## The Employer Play-or-Pay Mandate – Background

The play-or-pay mandate applies to employers with 50 or more full-time or full-time equivalent 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) (an additional number of deemed employees determined by counting monthly part-time hours and dividing this number by 120). The statute defines a full-time employee as one working 30 or more hours per week, calculated on a monthly basis. 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).

Proposed rules released in December, 2012<sup>2</sup> set forth much-needed direction on the play-or-pay mandate. One of the most critical aspects of the mandate is the definition of “full-time employee.” The statute defines a full-time employee as an employee who was employed on average at least 30 hours per week, calculated on a monthly basis, which the 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. The proposed rule allows employers to use a measurement period method for determining the full-time status of ongoing employees, as well as new variable hour and seasonal employees.<sup>3</sup> Under this approach, 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.” While the use of the measurement/stability period may provide employers with flexibility, its administration is complex. The proposed rule left a number of questions unanswered about its application, leaving employers little time to understand and implement the necessary steps for determining full-time versus part-time employment by the 2014 effective date.

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 a penalty if any full-time employee receives a federal subsidy to purchase insurance through a health exchange. This “no-coverage” penalty under 4980H(a) will be \$2,000 per year multiplied by the number of full-time employees in excess of 30. 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 a penalty under 4980H(b) that is the lesser of \$2,000 per year multiplied by the number of full-time employee (minus 30) or \$3,000 multiplied by the number of full-time employees who receive 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 and whose family income is below 400% of the Federal Poverty Level.

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% 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.

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.

## Employer Reporting Requirements

The Internal Revenue Code requires annual information reporting by health insurance issuers, self-insuring employers, government agencies, and other providers of health coverage. The rules require annual information reporting by large employers relating to the health insurance that the employer offers (or does not offer) to its full-time employees. The IRS has announced that it expects to publish proposed rules implementing these provisions this summer, after a dialogue with stakeholders—including those responsible employers that already provide their full-time work force with coverage far exceeding the minimum employer shared responsibility requirements—in an effort to minimize reporting obligations, consistent with effective implementation of the law. Although these reporting requirements have been delayed until 2015, the IRS “strongly encourages” employers to voluntarily implement this information reporting in 2014 in hopes of a smoother transition to full implementation in 2015.

<sup>2</sup> 78 Fed. R. 218 (Jan. 2, 2013).

<sup>3</sup> See Steven Friedman and Ilyse Schuman, [ACA Employer Play or Pay Requirements: What Does it Mean for Employers?](#), Littler ASAP (Jun. 11, 2013).

As the IRS acknowledged, the information reporting requirement is integral to the administration of the employer play-or-pay mandate. Because an employer typically will not know whether a full-time employee received a premium tax credit, the employer will not have all of the information needed to determine whether it owes a payment under Section 4980H. The IRS will only be able to determine whether the employer will be assessed a penalty under § 4980H once the agency has received 1) the information returns filed by applicable large employers and 2) the information from employees claiming the premium tax credit for any given calendar year. .. If the IRS concludes that an employer owes such an assessment, the IRS will contact the employer and the employer will have an opportunity to respond to the information the IRS provides before a penalty is formally assessed.

## Impact of the Play-or-Pay and Reporting Delay

The IRS recognized that delay in the information reporting requirements would make it impractical to determine which employers owe penalties under section 4980H for 2014, and delayed both the reporting requirements and the employer mandate for one year. These delays create opportunities for employers to better prepare for implementation. Yet, the delays still create impracticalities for employers, employees, health care exchanges and the regulators.

The IRS made a point of stating that the delay in the effective date of the employer mandate and reporting requirements will not impact other provisions of the ACA. The health care exchanges (now renamed by the government "health care marketplaces") through which individuals and eligible small businesses can purchase health insurance are still scheduled to open their virtual doors on January 1, 2014, with open enrollment to begin on October 1, 2013. While questions about the status of the state and federally-run exchanges persist, no delay to their effective date has been announced. Also on track to become effective in 2014 are the premium subsidies to help eligible individuals purchase their insurance through an exchange and the "individual mandate," i.e., the tax on those individuals who do not obtain insurance.

The health exchanges, premium tax credits and individual mandate may be the cornerstones of the ACA, but they are closely tied to the employer play-or-pay mandate. Generally, individuals with household incomes between 100% and 400% of the federal poverty level will be eligible for a federal subsidy. However, access to employer-sponsored coverage that is both "affordable" and provides "minimum value" disqualifies an individual from receiving the subsidy. The reporting requirements described above serve to verify whether or not an employee or dependent has access to such coverage. In the absence of these reports for 2014, exchange verification of employer-sponsored coverage becomes less clear.

Final regulations issued by the Department of Health and Human Services (HHS) on July 5, 2013<sup>4</sup> described how the verification process would work. When applying for a federal subsidy, individuals must attest to their eligibility for employer-sponsored coverage. Proposed rules<sup>5</sup> specified the data sources the exchange must use to verify access to employer-sponsored coverage. If such data was unavailable or is inconsistent with the application, the exchange must select a statistically significant random sample of such applicants and contact any employer identified on the application to verify whether the applicant is eligible for employer-sponsored coverage. The proposed rule allowed exchanges to utilize HHS to perform this verification. However, because HHS will not be ready to perform this verification process on behalf of state exchanges prior to January 1, 2015, the final regulations do not require HHS verification before then. Therefore, in 2014 state-run exchanges can rely on the applicant's attestation without any government random sampling verification process. Federally-run exchanges will still use the sampling process in 2014. What this means is that employers can expect to receive inquiries from the federally-run exchanges regarding health coverage for employees who have applied for a federal subsidy. This also means that employees using both federal and state exchanges will query their employers about employer-sponsored coverage to use in conjunction with their application for a subsidy.

Therefore, employers need to be prepared for questions from HHS (in a state with a federally-run exchange) as well as employees about eligibility for employer-sponsored coverage and whether such coverage is affordable and provides minimum value. Therefore, employers cannot ignore affordability and minimum value determinations until 2015, even though the employer penalty will not apply until then.

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4 78 Fed. R. 42160 (July 15, 2013).

5 78 Fed. Re 4594 (Jan. 22, 2013).

## Notice Required by October 1

In fact, employers likely will need to disclose imminently whether their plan meets “minimum value” and “affordability” standards as part of their obligation to inform employees about the new health insurance exchanges. The ACA requires employers to send a notice to current employees by October 1, 2013 advising them about the availability of coverage through a health insurance exchange. The Department of Labor released model notices that can be used to fulfill this requirement. The notice must be sent to new employees hired on or after October 1, 2013 within 14 days of hire.

HHS has developed the pre-enrollment template to help an individual complete the questions related to employer-sponsored coverage on the single, streamlined application. The use of the template is voluntary, although HHS contends that it will facilitate the collection of related employer-sponsored coverage information from employers, and in doing so, streamline the application process, and increase the accuracy of eligibility determinations. HHS also notes that employers have the option of combining the employer coverage tool with the exchange notice.

Employers will face communications challenges surrounding their issuance of the exchange notice which coincides with the beginning of the open enrollment period for the exchanges and for many employer-sponsored plans. With the delay in the employer play-or-pay mandate, some employers may not implement changes to health plan eligibility, cost and coverage until 2015, thereby making some employees eligible for premium tax credits in 2014. Some employers may wait until 2015 to provide “affordable” and “minimum value” coverage to all full-time employees. While these employers will not pay a penalty in 2014, those employees with household incomes below 400% of the federal poverty level may be eligible for the premium tax credit next year.

In effect, the delay in providing affordable, minimum value coverage next year may actually benefit some employees—at least for 2014. Those employees who receive a premium tax subsidy to purchase exchange coverage for 2014 will no longer be eligible for the tax subsidy if the employer then offers them qualifying health coverage in 2015 to avoid having to pay the “play-or-pay” penalty. Employers may face a backlash from those employees who enjoyed their subsidized exchange coverage in 2014 and prefer it to the qualifying employer coverage they become eligible for in 2015. Employers should carefully consider the employee relations concerns associated with delaying offering qualifying health coverage until 2015.

The question of whether to play or pay and when to do so is not as simple as it may seem. Employers need to look beyond 2014 and weigh the costs and benefits to their workforce, business operations and their bottom line. The delay clearly gives employers more time to evaluate and implement optimal play-pay strategies. Employers considering workforce restructuring strategies, such as reducing the hours of their workers or hiring more part-time employees, need to carefully evaluate the benefits and employment law implications of such actions. Employers should pay close attention to legislation pending in Congress that would change the ACA definition of a full-time employee from 30-hours a week, to the more customary 40-hours a week. Any legislative or regulatory changes to the definition of full-time employee under Section 4980H could alter current approaches to the play-or-pay mandate.

Some employers may consider providing so called “skinny” plans to their employees to minimize, but not avoid, penalties under 4980H. Such “skinny” plans, which would provide little beyond required preventive care services, would serve to provide “minimum essential coverage,” but likely would not provide “minimum value.” This means that employers may avoid paying the no-coverage penalty under 4980H(a), which is \$2,000 multiplied by the number of all full-time employees in excess of 30. Instead, employers would pay the penalty under 4980H(b), which is the lesser of the 4980H (a) penalty or \$3,000 multiplied by the number of full-time employees who receive a federal premium tax credit only. Some employees who would otherwise be eligible for the tax credit may prefer the employer’s skinny plan to exchange coverage, which would reduce the amount of the employer penalty.

The IRS is expected to issue final regulations on the play-or-pay penalty in the year ahead. Final regulations may contain significant changes to the proposed rules and require employers to reevaluate their determination of full-time versus part-time employee status. The proposed rule did not settle the definition of seasonal employees and the treatment of adjunct faculty, employees paid on commission and employers contributing to multiemployer plans. The IRS appears to be grappling with how to treat these situations. While the IRS should issue clearer guidance on these and other issues in final regulations, the additional direction may not be favorable for employers.

Another important and outstanding regulatory issue is the application on the non-discrimination rules in Section 105(h) of the IRC to non-grandfathered insured plans. The ACA extended the Section 105(h) rules, which currently prohibit a self-funded health plan from discriminating in favor of highly-compensated individuals, to fully-insured plans. However, the effective date of the ACA non-discrimination rule has been delayed until after the IRS issues regulations on the topic. The delay in the employer mandate calls into question when the non-discrimination rules will be issued, leaving a cloud of uncertainty over many employers play-or-pay planning.

## Employers Cannot Ignore other ACA Provisions

Even with the delay in the employer mandate and reporting requirements, employers cannot ignore other provisions of the ACA that have become effective already or will become effective in 2014. These include the following:

**90-Day Waiting Periods Limit:** Effective for plan years beginning on or after January 1, 2014, a group health plan or health insurance issuer cannot impose any waiting period that exceeds 90 days.

**Maximum Out-of-Pocket Limitation:** Effective for plan years beginning on or after January 1, 2014, group health plan must comply with a new maximum out-of-pocket limitation, which is \$6,350 for employee-only coverage and \$12,700 for family coverage. There is limited transition relief for plans and issuers that use more than one service provider to administer benefits that are subject to the annual limit. This requirement applies to both self-funded and insured plans.

**Patient-Centered Outcomes Research Institute (PCORI) Fee:** Health insurance issuers and sponsors self-funded plans must pay a fee to fund the patient-centered outcomes and research institute based on the average numbers of lives covered. The PCORI fee is \$2 (\$1 in the case of a policy or plan year ending before October 1, 2013, and \$2 for subsequent years). The fee expires in 2019.

**Transitional Reinsurance Fee:** Insured and self-funded plans must pay a per enrollee fee of \$63. The number of enrollees must be reported by November 15, 2014. The first fee must be paid in early 2015.

**Preexisting Condition Exclusions:** Effective for plan years beginning on or after January 1, 2014, the prohibition on preexisting condition exclusions (currently applicable only with respect to individual under age 19) is extended to individuals of all ages.

**Elimination of Annual Limits:** Effective for plan years beginning on or after January 1, 2014, annual limits on the dollar amount of essential health benefits are prohibited.

## What Does This Mean for Employers?

According to the statement from Mark Mazur, Assistant Secretary for Tax Policy at the Treasury Department, "During this 2014 transition period, we strongly encourage employers to maintain or expand health coverage." Employers should consider whether they will maintain or expand health coverage in 2014 in the context of their planning for 2015 when the mandate becomes effective—and beyond. Employers should not view the decision about whether to play-or-pay in isolation. How the exchanges operate in 2014 and the cost of exchange plans will impact the decision, as will legislative or regulatory changes in the year ahead.

The delay in implementation of these employer requirements, a key component of the healthcare reform law, calls into question whether or not other provisions of the law slated to begin in 2014, namely the new healthcare exchanges, will meet the deadline. While much about the implementation of the ACA remains uncertain, the one-year delay affords employers an opportunity to try to simplify the burdens created by the mandate and implement optimal play-or-pay strategies.

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