BuchalterNemer
A Professional Law Corporation

Client Alert

June 2013

Pay or Play?

What Employers Need to Know About the Affordable Care Act

Julie A. Simer, Esq., Stuart A. Simon, Esq. and Philip J. Wolman, Esq.

What does the Affordable Care Act (aka "Obamacare") require of employers in 2014?

Beginning January 1, 2014, every "large employer" will be subject to Affordable Care Act penalties if at least 95 percent of its full-time employees are not offered affordable health care coverage. A large employer is an employer that employed an average of at least 50 full-time employees during the preceding calendar year, including full-time equivalent employees. The testing period for 2014 is the 2013 calendar year, making 2013 a critical year for determining the need to provide coverage.

Who is a full-time employee?

A full-time employee is one who works at least 30 hours per week.

How do part-time employees count in determining whether an employer is a large employer?

For the purpose of calculating whether an employer is a large employer, the number of full-time equivalents is added to the number of full-time employees to determine whether an employer has 50 or more full-time employees. Full-time equivalents are calculated by combining the hours worked by part-time employees. Thus, part-time and full-time employees are added together in the following example: 40 full-time employees employed 30 or more hours per week on average plus 20 half- time employees employed 15 hours per week on average equal 50 full-time employees.

Is a large employer required to offer coverage to part-time employees?

A large employer may, but is not required, to offer coverage to part-time employees.

When does an employer determine whether it is a large employer?

Employers will determine each year, based on their current number of employees, whether they will be considered a large employer for the next year. An employer may measure its employees using an average over any six-consecutive-month period in 2013. Many employers will use the period from January 1, 2013, through June 30, 2013 for measurement so that the employer has time to analyze the results and make changes before 2014.

Does the large employer have to offer coverage to a full-time employee's dependents?

A large employer is required to offer dependent coverage to a full-time employee's dependents. For this purpose, a spouse is not a dependent.

Does a large employer have to pay the cost of an employee's single or family coverage?

A large employer is only required to offer affordable coverage to the employee. The large employer does not have to pay the full cost of the employee's coverage, but the employee's portion of the payment for individual coverage may not exceed 9.5 percent of the employee's household income. A large employer is not required to pay any portion of the employee's dependent coverage. Nor is there an affordability test for dependent coverage.

What are the minimum coverage requirements for the health insurance that a large employer must offer to full-time employees in 2014?

The health insurance offered by an employer to its full-time employees and their dependents must cover certain "essential health benefits." Essential health benefits include items and services in these categories:
(1) ambulatory patient services; (2) emergency services; (3) hospitalization; (4) maternity and newborn care; (5) mental health and substance use disorder services, including behavioral health treatment; (6) prescription drugs; rehabilitative and habilitative services and devices; (7) laboratory services; (8) preventive and wellness services and chronic disease management; and (9) pediatric services, including oral and vision care.

This alert is published as a service to our clients and friends. The material contained here is provided for informational purposes only and is not intended to constitute advertising, solicitation or legal advice. For more information, visit www.buchalter.com.

What are the other requirements for the health insurance that must be offered to full-time employees in 2014?

The plan offered to full-time employees and their dependents must provide “minimum essential coverage.” This means that it must cover 60 percent of the health care costs of covered services. Coverage must also be affordable, i.e., the cost of the lowest level of individual coverage must not exceed 9.5 percent of the employee’s household income.

What is the penalty if a large employer does not offer health insurance coverage to full-time employees in 2014?

Internal Revenue Code Section 4980H(a) imposes penalties on a large employer that fails to offer 95 percent of its full-time employees and their dependents the opportunity to enroll in minimum essential coverage. The penalty is calculated monthly, but, for ease of reference, on a yearly basis it is $2000 per full-time employee (not counting the first 30 full-time employees).

Will individuals be required to obtain health insurance coverage in 2014?

Unless exempt, all individuals must purchase health insurance in 2014. An individual who does not obtain health insurance from an employer may be penalized if the individual does not purchase health insurance. However, individuals who do not obtain insurance from an employer may be eligible for premium credits or cost-sharing assistance through the health benefit exchange.

Will a large employer be penalized if the coverage offered to full-time employees is not affordable?

Section 4980H(b) imposes penalties on a large employer that fails to offer affordable coverage to full-time employees. In order to avoid a potential penalty under section 4980H(b), the coverage offered must be affordable, generally meaning that the employee portion of the self-only premium for the employer's lowest cost coverage that provides “minimum essential coverage” for “essential health benefits” must not exceed 9.5 percent of the employee's household income.

What is the penalty to a large employer if the coverage offered to full-time employees does not meet the 9.5 percent affordability test?

The penalty for a large employer that fails to offer affordable minimum essential coverage to full-time employees is calculated monthly, but, for ease of reference, on a yearly basis it is $3000 (but subject to the limitation described below) for each full-time employee that is certified as having received a premium tax credit or a cost-sharing reduction when the employee purchases insurance through the exchange. However, penalties for failing to offer affordable coverage can never exceed the penalties that would be imposed for not offering coverage at all. For example, if the employer that does not offer coverage has 100 full-time employees, the penalty for not offering coverage would be $140,000: 70 (100-30) times $2,000 per employee. If the same employer offers coverage that is not affordable and 50 full-time employees receive premium credits through the exchange, the penalty would still be $140,000. Although 50 x $3000 is $150,000, the penalty for failing to offer affordable coverage may not exceed the penalty for not offering coverage at all.

Are the penalties deductible?

Shared responsibility penalties are not deductible from federal or state taxes. This effectively raises the cost of the penalties.

How does an employer determine the employee’s household income?

Recognizing the inability of employers to ascertain their employees' total household incomes, the Internal Revenue Service has created three affordability safe harbors. The Form W-2 Safe Harbor, under which coverage offered by an employer to an employee is treated as affordable for section 4980H liability purposes, is met if the employee's required contribution is no more than 9.5 percent of the employee's wages from the employer reported in Box 1 of Form W-2 (Form W-2 wages) instead of household income. This safe harbor would apply in determining whether an employer is subject to the penalty under section 4980H(b), but would not affect an employee's eligibility for a premium tax credit. There are 2 other safe harbors available for

This alert is published as a service to our clients and friends. The material contained here is provided for informational purposes only and is not intended to constitute advertising, solicitation or legal advice. For more information, visit www.buchalter.com.

calculating affordability penalties, for required employee contributions. The Rate of Pay Safe Harbor permits an employer to test affordability by multiplying an employee's lowest rate of pay by 130 hours. The Federal Poverty Line Safe Harbor permits an employer to test affordability by comparing an employee's required contribution to the Federal Poverty Line for the state in which the employee is employed. The employer only needs to satisfy one safe harbor for each employee to avoid a penalty for that employee.

What if employers divide their staff between separate companies to avoid the penalties?
Employers will not be able to avoid the penalties by dividing employees between separate companies with related ownership. The IRS has announced that companies that have common ownership or are otherwise related generally are combined for purposes of determining whether or not the aggregate group constitutes a large employer. The IRS also intends to issue regulations to prevent employers from using leasing companies or other entities to avoid the requirements.

What if the employer offers coverage to full-time employees but the employee declines it?
The employer is not penalized if the coverage offered to the full-time employee:

(a) Does not exceed 9.5 percent of the employee's household income; and
(b) The plan covers 60 percent of the medical costs of the essential health benefits.

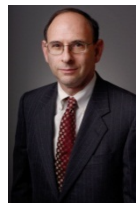
Of course, the employee can be penalized for not having individual coverage if he or she does not qualify for an exception.

What if the employer does not offer affordable coverage, but the employee is eligible for Medi-Cal (California's Medicaid program)?
An employee is not eligible to purchase coverage on the exchange if he or she is covered under Medi-Cal. Therefore, there is no penalty to the employer for not offering affordable coverage if a full-time employee is eligible for Medi-Cal. One might say that the employer has already paid for the Medi-Cal coverage by paying taxes.

What type of notices must an employer give to employees?
Further information and model notices are available on the Department of Labor's website:
http://www.dol.gov/ebsa/newsroom/tr13-02.html.

The full text of proposed regulations on the employer mandates may be found at 78 Fed. Reg. 217-253 (January 2, 2013).

Julie Simer is a Shareholder in the Firm's Health Care Practice Group. She can be reached at 949.224.6259 or jsimer@buchalter.com.



Stuart Simon is Of Counsel in the Firm's Tax, Corporate and Real Estate Practice Groups. He can be reached at 213.891.5019 or ssimon@buchalter.com.

Philip Wolman is a Shareholder and Chair of the Firm's Tax and Estate Planning Practice Group as well as a member of the Firm's Corporate Practice Group. He can be reached at 213.891.5390 or pwolman@buchalter.com.

This alert is published as a service to our clients and friends. The material contained here is provided for informational purposes only and is not intended to constitute advertising, solicitation or legal advice. For more information, visit www.buchalter.com.