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SPECIAL FEATURE

Health care law compliance requires immediate attention

By William E. Hannum III and Hillary J. Massey

With the re-election of President Obama, employers need to take seriously the job of preparing for Obamacare, a.k.a. the Patient Protection and Affordable Health Care Act (the "Act"), particularly in light of the U.S. Supreme Court's June 2012 decision upholding the Act.

Employers must ensure they are complying with the Act's requirements that are already in effect and prepare for the requirements that will take effect in the near future.

The Act requires nearly all Americans to obtain health insurance through their employer or a government exchange, using penalties and tax credits as incentives. In this article, we offer a general overview of the requirements of the Act from the employers' perspective.

Covered employers

The Act requires covered employers to provide "minimum essential" health care coverage to employees — or pay a penalty for failing to do so. In that regard, the Act also requires individuals, with limited exceptions, to obtain "minimum essential" coverage or pay a penalty, calculated as a percentage of their adjusted gross income (this is the "tax" that the U.S. Supreme Court upheld in June 2012).

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The Act's requirement applies to employers with 50 or more full-time employees, as defined by the Act. Generally, full-time employees are defined as employees working on average at least 30 hours a week, in any given month. Unfortunately, though, determining "how many full-time employees an employer has" is not always that simple, especially for employers with part-time, seasonal, and variable-hour workers.

For example, employers must include the hours worked by part-time employees (*i.e.*, those working fewer than 30 hours a week) in the calculation by dividing their total number of monthly hours worked by 120 hours (thereby converting them into a fraction of a full-time employee).

Seasonal workers are not included in the employee count as long as the employer exceeds 50 full-time equivalent employees on no more than 120 days during the calendar year, and the employees in excess of 50 are seasonal workers.

For certain employees, including variable-hour and seasonal employees, an employer may not be able to determine on the start date whether the employee will work an average of at least 30 hours a week. To address this issue, guidance issued in August 2012 by the Internal Revenue Service and the Departments of the Treasury, Labor and Health and Human Services establishes a "safe harbor" that relieves employers of the need to monitor the hours of each employee on a monthly basis.

In short, an employer may monitor the hours of such employees over a three-to-twelve month "measurement" period, in order to determine whether coverage must be offered to those employees during a subsequent "stability" period in order to comply with the "play or pay" requirements, discussed below.

The same coverage rules apply to non-profits as apply to for profit employers, *i.e.*, if a non-profit has 50 or more full-time equivalent employees, the non-profit must provide health insurance to all full-time employees.

Requirements already in effect

All health insurance plans offered by employers to employees must include the requirements of the Act that are already in place for all plans, including: (i) mandatory coverage of participants' adult children up to age 26; (ii) ban on lifetime caps on coverage; (iii) ban on exclusions for pre-existing conditions for children under age 19; (iv) restriction on annual limits on coverage; (v) mandatory provision of "medical loss" rebates to enrollees; and (vi) mandatory provision of Summary of Benefits and Coverage.

The mandatory Summary of Benefits and Coverage ("SBC") is a concise and comprehensible description of health plan benefits. Generally, the SBC must not exceed four double-sided pages, of 12-point font. SBCs must be provided on the first day of the first open enrollment period beginning on or after Sept. 23, 2012, to participants in a group health plan.

When renewal is automatic, the SBC must be provided no later than 30 days prior to the first day of the new plan or policy year. The rule applies to all fully insured and self-insured plans, with limited exceptions such as HIPAA-excepted plans (including stand-alone dental or vision plans).

The Departments of Labor, Health and Human Services, and Treasury have issued guidance on preparing an SBC, setting forth extensive requirements concerning content, form, and appearance, and providing model forms. The Act imposes a fine of up to $1,000 a day per enrollee for any entity that willfully fails to provide an SBC.

Other current requirements of the Act do not apply to "grandfathered plans," *i.e.*, group health plans in which individuals were enrolled on March 23, 2010. The Act's grandfathering provision protects the ability of individuals and businesses to keep their grandfathered coverage, while also ensuring the additional protections outlined above.

Plan sponsors must provide a specific notice in any plan materials of its status as a grandfathered plan. Plans lose their "grandfathered" status if they significantly cut benefits below the rate the plans provided on March 23, 2010. New employees and their family members may enroll in grandfathered plans as well.

The Act's requirements that currently apply to *new* plans, but not grandfathered plans, include: (i) free in-network preventive health care and immunizations; (ii) mandatory internal and external appeals processes for adverse benefit determinations; (iii) limits on deductibles that may be imposed by employer-sponsored plans; and (iv) rules prohibiting discrimination as to eligibility or benefits in favor of highly compensated individuals.

Requirements effective in 2013

Employers must prepare for a number of requirements coming in 2013, including mandatory W-2 disclosures, limitation on contributions to health flexible spending accounts, increase in Medicare withholding for higher earners, and mandatory notice of health insurance exchanges.

W-2 disclosures for larger employers: Employers who are required to file more than 250 W-2s must disclose the value of health care benefits on each employee's 2012 W-2 form to be issued in January 2013. The form must report the "aggregate cost" of "applicable employer-sponsored coverage," which includes the amounts paid by the employer and employee.

Contributions to health flexible spending accounts: For plans beginning on or after Jan. 1, 2013, the Act places a $2,500 limit on amounts an employee may defer by salary reduction to a health FSA maintained under a cafeteria plan. The limitation is indexed to the Consumer Price Index for tax years beginning on or after Jan. 1, 2014. Employers must ensure that open enrollment materials accurately reflect the new limit.

Medicare tax withholding: For tax years beginning with 2013, employers must withhold additional Medicare taxes from the wages of high-earning employers. The Medicare tax rate will increase by 0.9 percent (from 1.45 percent to 2.35 percent) on wages over $200,000 for single filers, wages over $250,000 for joint filers, and wages over $125,000 for persons who are married but filing separately. There is no employer match for the tax, and no requirement for employers to notify employees of the increase.

Notice of state and federal health insurance exchanges: On or before March 1, 2013, employers must provide an "exchange notice" to current employees, notifying them of the existence of a state or federal health insurance exchange. In this regard, the Act provides federal funding for each state to create a health insurance marketplace, offering qualified health insurance plans at four different levels; but states are not required to create an exchange, and any voids will be filled by the federal government. Thus, the employer's notice must be tailored to the circumstances in each state, to include a description of the services provided by the relevant exchange and contact information for the exchange. Employers must also provide the exchange notice to new employees at the time of hiring.

Deadlines in 2014 that require employers' attention now

Employers should also begin to prepare now for a number of requirements that will become effective in 2014.

"Play or pay" employer requirement: Beginning Jan. 1, 2014, employers with 50 or more full-time equivalent employees must "play or pay," meaning that employers must either:

- "Play" — *i.e.*, offer full-time employees an (i) "affordable" health plan (a plan for which the premium for single coverage does not exceed 9.5 percent of employees' W-2 income) that (ii) provides "minimum value" (employer covers at least 60 percent of the costs of benefits). The government has preliminarily approved three approaches for determining whether health coverage provides "minimum value," including the use of a "minimum value calculator" (to be provided by the government), compliance with safe harbors, or certification by an actuary.

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- "Pay" — *i.e.*, if (i) an employer fails to "play" and (ii) any full-time employee purchases insurance through an exchange and receives a subsidy, then the employer will "pay" a penalty. The penalty amount depends on which requirement is violated, *i.e.*, whether the employer fails to offer any health insurance, or offers a plan that is not "affordable," or does not provide "minimum value." The penalty in 2014 for failing to offer any coverage equals the number of full-time employees minus 30 multiplied by $2,000. The penalty in 2014 for failing to offer coverage that is "affordable" and provides "minimum value" is $3,000 a year (assessed on a monthly basis) for only those full-time employees who actually receive subsidized health coverage through an exchange.

In order to avoid paying penalties, employers must begin to prepare for the "play or pay" requirement now, by (i) analyzing which employees are eligible for coverage, (ii) tracking employees' hours to determine which employees work 30 or more hours a week, (iii) monitoring the W-2 income of employees to make sure the premiums for the most affordable single option equal less than 9.5 percent of their W-2 income, and (iv) confirming that the employers' plans provide "minimum value."

After that analysis, some employers may decide to pay a penalty rather than offer fully compliant health insurance coverage.

Limitations on waiting periods: For plan years beginning on or after Jan. 1, 2014, employers with at least 50 full-time employees may not impose waiting periods of greater than 90 days for participation in employer-sponsored plans, and will face a penalty if they do so. For variable and seasonal employees, employers must review and comply with the guidance concerning "measurement" periods in order to ensure compliance with the 90-day limitation.

Automatic enrollment: After the government issues applicable regulations, which are expected in 2014, employers with more than 200 employees will be required to automatically enroll new employees in a health care plan and provide notice of the employees' right to opt out.

Tax credits for smaller employers

Employers, including non-profits, with fewer than 50 employees are not required to provide health insurance coverage to their employees. Tax credits for doing so have been in effect since 2010 for employers who (i) have fewer than 25 full-time employees, (ii) have average annual wages of less than $50,000 per full-time employee, and (iii) pay at least 50 percent of the premium cost for each employee.

The maximum tax credit is 35 percent for eligible small employers and 25 percent for eligible tax-exempt organizations. In 2014, the maximum credit will increase to 50 percent and 35 percent, respectively. The credit is refundable for tax-exempt organizations. Smaller employers should contact their tax adviser to determine the tax implications of providing coverage.

Recommendations for employers

Some of the Act's requirements will be quick for employers to address, while others will require substantial time and effort on the part of employers. We recommend beginning with the following steps:

- Designate a health care compliance champion in the organization;
- Determine whether your organization is a covered employer;
- Determine which requirements currently apply to your organization, and ensure you have met them (*e.g.*, providing an SBC to employees);
- Develop a plan for compliance with upcoming requirements in 2013, including the W-2 disclosure in January and the mandatory notice of health insurance exchanges in March;
- Review your plan(s) and prepare for the "play or pay" requirement, including tracking and reviewing relevant data, such as employees' hours;
- Review the status of any grandfathered plans, *i.e.*, whether any changes have caused a plan to lose grandfathered status;
- Verify that at least one plan is "affordable" and offers "minimum value";
- If the organization does not have at least one plan that complies with the "play or pay" requirements, then estimate potential penalties, tax impact and other factors (*e.g.*, employee morale) to determine whether to increase coverage to satisfy the requirements, whether to pay a penalty, or whether to pursue other options, including reducing the number of full-time employees and increasing the number of part-time employees; and
- Continuously monitor ongoing government guidance for changes, updates and developments in the law (*e.g.*, new regulations are coming out frequently) to ensure your organization remains in compliance and meets applicable deadlines. NEIH

Please feel free to contact us if you have questions about the Act and related regulations and guidance, or any other labor or employment law issue.