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Managing and Scheduling Your Workforce: ACA Dos and Don'ts

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Introduction

The Affordable Care Act (ACA) has created new obligations for an "Applicable Large Employer" (ALE). The most significant obligation is the ACA's employer "shared responsibility" or "play-or-pay" mandate, and its penalties which become effective January 1, 2015. Under these rules, ALEs must offer health coverage to all of their "ACA full-time" employees and may face penalties if they fail to offer health coverage that meets certain minimum requirements to at least 95% of their "ACA full-time employees" and their children up to age 26.

Although 2015 seems far off, it is important to keep in mind that many aspects of the play-or-pay mandate, including whether the employer is even subject to the mandate, are based on the number and identification of the employer's 2014 ACA full-time employees and full-time equivalents. In addition, employers who plan to utilize a 12-month measurement or "look-back" period along with an administrative period will need to begin tracking hours of service in 2013. As a result, it is not too early to review the rules associated with this mandate and begin to consider its ramifications.

There has been much publicity about employers reducing full-time employees' hours so that employees average less than 30-hours per week or 130-hours per month; hiring more part-time employees to replace full-time employees; or utilizing independent contractors, employer leasing entities, or staffing companies. These practices raise several potential concerns, and any reduction or change in hours based on the ACA should be vetted with your legal counsel.

This paper will help simplify ACA compliance and provide guidelines for managing and scheduling your workforce.

Determining When an Employer Is an "Applicable Large Employer" (ALE) Subject to the Employer "Play-or-Pay" Mandate

In general, an employer is an "Applicable Large Employer" (ALE), subject to the shared responsibility or play-or-pay mandate, if it employed, on average, 50 or more full-time employees in the prior calendar year. To calculate the number of full-time employees for this purpose, an employer must take into account: (a) actual full-time employees; and (b) the number of its full-time-equivalent employees (FTEs) represented by all of the employer's part-time employees.

To calculate the number of full-time employees, **do** take into account full-time employees and the number of full-time-equivalent employees represented by all of the employer's part-time employees.

An ACA full-time employee is an employee who averages at least 30-hours of service per week or 130-hours of service per month (pursuant to proposed regulations). To determine the total number of its ACA FTEs for a given month, an employer must aggregate the hours of its part-time employees in that month (not to exceed 120-hours per part-time employee) and divide by 120 (rounded down).

For example, for each month in 2014, an employer has 20 full-time employees, each of whom averages 35-hours per week and 40 employees, each of whom averages 90-hours of service per month, and no seasonal employees. Each of the 20 employees, who average 35-hours of service per week, counts as one full-time employee. With respect to the part-time employees, there are 30 FTEs: 40 multiplied by 90 = 3,600. Then the 3,600 hours are divided by 120 providing us with 30 FTEs. The total for each month is then added for all 12 months, with the total divided by 12. As a result of this calculation, the employer has 50 ACA full-time employees and is an ALE subject to the play-or-pay rules in 2015.

Member of a Controlled Group Under Common Ownership

Companies under common control are combined together, to be treated as a single employer, for purposes of determining whether they are an ALE. The law related to the controlled group is complex. However, one rule of thumb is to look at which separate entities are at least 80-percent owned by a common owner.

Do combine separate entities that are at least 80-percent owned by a common owner or are otherwise part of the same controlled group when determining the number of full-time employees.

For example, Corporation A owns 100 percent of each of Corporations B and C. In 2014, Corporation A will have 35 full-time employees, Corporation B will have 10 full-time employees, and Corporation C will have 10 full-time employees. During 2014, each corporation, by itself, had less than 50 full-time employees. However, together, they have a combined 55 full-time employees. As the controlled group has more than 50 full-time employees in 2014, each corporation within the controlled group will be subject to the ACA's play-or-pay requirements in 2015.

<u>**Caution:**</u> As noted, the law related to the controlled group is complex. An employer should consult directly with competent counsel to assess whether a controlled group exists.

Seasonal Employees

A special counting rule applies to seasonal employees. If an employer has 50 or more full-time employees on 120 or fewer days or 4 months or less in the preceding calendar year, and if the only reason that it has over 50 employees is on account of seasonal employees, then the employer does not need to count the seasonal employees for this purpose.

Do understand the special counting rule that applies to seasonal employees.

For example, a retail employer has 45 full-time employees every month of 2014 and 60 seasonal employees during the months of November and December in 2014. By including the seasonal employees, the employer's average number of full-time employees for 2014 would be 55 (45 full-time employees for 10 months and 105 full-time employees for two months). However, because the employer exceeded 50 full-time employees per month for only two months and its average number of full-time employees for 2014 exceeded 50 solely due to seasonal workers, the employer may disregard the seasonal employees. This leaves the employer with an average of 45 ACA full-time employees during 2014, which means it is not subject to the play-or-pay requirements in 2015.

Understanding Play-or-Pay Mandate Penalties

Once an employer establishes that it is an ALE, subject to play-or-pay, it must then decide how it will deal with the play-or-pay mandate. The mandate requires that employers offer healthcare coverage (that meets certain requirements) to their full-time employees and their children up to age 26 or face certain financial penalties.

Potential Financial Penalty: Failure to Offer Minimum Essential Coverage (MEC)

A failure to provide coverage, that can be classified as Minimum Essential Coverage (MEC) to at least 95 percent of full-time employees and their children up to age 26, may result in an annual penalty equal to $2,000 multiplied by the number of full-time employees (excluding the first 30), if at least one employee receives a federal subsidy to purchase coverage through a Health Insurance Marketplace (aka Exchange).

For example, an employer has 150 full-time employees and does not offer healthcare coverage. If one full-time employee receives a federal subsidy to purchase healthcare coverage through a Health Insurance Marketplace/ Exchange, the employer's annual penalty would be: $240,000 (150-30 x $2,000). Note that the penalties are determined on a monthly basis. In this instance, a monthly penalty would equal $20,000 ($240,000/12).

Potential Financial Penalty: Failure to Offer Affordable, Minimum Value Healthcare Coverage

A failure to offer affordable and minimum value healthcare coverage to full-time employees may result in a nondeductible penalty equal to the lesser of:

- $2,000 multiplied by the number of ACA full-time employees (minus 30), or
- $3,000 multiplied by the number of ACA full-time employees who procure coverage for themselves through a Health Insurance Marketplace/Exchange and who receive a federal subsidy for such coverage (a subsidy may be available for these employees if their household income does not exceed 400 percent of the federal poverty level).

Don't view employees as full-time or part-time, based on pre-ACA notions. Many current part-timers, with more than 30-hours of service per week, will need to be reclassified full-time for ACA purposes in 2015.

For example, an employer has 150 ACA full-time employees and does not offer minimum value healthcare coverage. If 20 ACA full-time employees, who have household incomes that do not exceed 400 percent of the federal poverty level, purchase healthcare coverage through a Health Insurance Marketplace/Exchange and receive a federal subsidy, the employer's annual penalty would be $60,000 (20 multiplied by $3,000); the monthly penalty would be $5,000.

Looking at the penalties, it is important to keep in mind that an employer is subject to either penalty only if an ACA *full-time* employee receives a federal subsidy to purchase healthcare coverage through a Health Insurance Marketplace/Exchange. Thus, if an employer's part-time employees average fewer than 30-hours of service per week and receive federal subsidies for the healthcare coverage they obtain through a Health Insurance Marketplace/Exchange, the employer will not be subject to a penalty.

Note for Members of a Controlled Group Under Common Ownership

While controlled group members combine their full-time employees (including FTEs) to determine whether, in total, they have 50 or more employees, controlled group members do not share liability for play-or-pay penalties. A play-or-pay penalty liability is assessed solely on the controlled group member that employed the full-time employee who received a federal subsidy toward the purchase of healthcare coverage through the Health Insurance Marketplace/Exchange.

For example, Corporations A and B are members of a large employer controlled group. For 2015, Corporation A does not sponsor a group health plan and one of its ACA full-time employees receives a federal subsidy toward the purchase of healthcare coverage through a Health Insurance Marketplace/Exchange. Corporation B sponsors a group health plan for its employees. Only Corporation A is subject to the $2,000 play-or-pay penalty and the penalty is calculated based on the number of full-time employees of Corporation A, not the total number of full-time employees in the controlled group. The 30-employee reduction is allocated across the controlled group, based on the number of full-time employees that are employed by each member company. Also note that special rules apply when employees work for more than one member of a controlled group.,

Identifying Full-Time Employees Who Must Be Offered Healthcare Coverage

Solely for purposes of identifying full-time employees, who must be offered healthcare coverage to avoid the play-or-pay penalties, there are two methods an employer may use to identify ACA full-time employees:

(1) The **month-by-month method**, in which the employer identifies its full-time employees on a monthly basis.

> **Do** decide which type of measurement method to determine the full-time status of ongoing and newly hired, variable hour and seasonal employees.

(2) The **look-back measurement period method**, which is described below for "ongoing" and "newly hired" employees.

Employers can use the look-back measurement period method for determining the full-time status of ongoing, as well as newly hired, variable hour and seasonal employees.

> **Don't** automatically classify employees working for just a portion of the year as seasonal employees. Although they may be classified as "seasonals" internally, this may be at variance with ACA rules.

Variable hour employees are defined as employees with respect to whom it cannot reasonably be determined, based on the facts and circumstances at time of hire, whether the employee will be employed on average at least 30-hours per week during the initial measurement period, because the employee's hours are "variable" or otherwise uncertain. Seasonal employees are defined as workers who perform labor or services on a seasonal basis, including but not limited to: (a) retail workers employed exclusively during holiday seasons; and (b) workers who perform labor or services where, ordinarily, the employment pertains to or is of the kind exclusively performed during certain seasons or periods of the year and which may not be continuous or carried on throughout the year. However, a worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though he may continue to be employed during a major portion of the year.

Ongoing employees

For ongoing employees, an employer would determine each employee's ACA full-time status by looking back at a defined "standard" measurement period of three-to-12 months to determine full-time status for a subsequent "stability period." If an employee averages 30-hours of service per week during the standard measurement period, then 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 average 30-hours of service 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 "administrative periods" of up to 90 days between the measurement period and the stability period to make ACA full-time employee determinations with respect to ongoing employees.

Do use administrative periods of up to 90 days between the measurement period and stability period to make ACA full-time employee determinations and perform other administrative functions, such as providing enrollment material.

Newly hired employees

An employer is not subject to the play-or-pay penalty for failing to offer new full-time employees (who are neither variable hour nor seasonal employees) coverage for the first three full calendar months of employment, as long as coverage is offered by the first day of the fourth full calendar month 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 calendar month following the employee's start date. Employers may impose an administrative period of up to 90 days between the measurement period and the stability period; however, the initial measurement period and the administrative period together cannot extend beyond the last day of the first calendar month beginning on or after the one-year anniversary of the employee's start date.

For example, an employee is hired on May 10, 2015. The initial measurement period runs from May 10, 2015 through May 9, 2016. The administrative period runs from May 10, 2016 through June 30, 2016. The employer offers coverage to the employee for a stability period that runs from July 1, 2016 through June 30, 2017, because the employee has an average of 30-hours of service per week during the initial measurement period. This arrangement is compliant because (a) the initial measurement period does not exceed 12 months; (b) the administrative period does not exceed 90 days; and (c) the combined initial measurement period and administrative period does not extend beyond the final day of the first calendar month beginning on or after the one-year anniversary of the employee's start date.

When Healthcare Coverage Is Deemed Affordable and to Provide Minimum Value

In general, healthcare coverage is deemed "affordable" if the employee's required contribution for the lowest cost, "self-only" coverage, that provides minimum value, does not exceed 9.5 percent of the employee's household income. There are three affordability safe harbors for employers. A plan is deemed affordable if the employee's required contribution for the employer's lowest cost, self-only coverage, that provides minimum value, does not exceed 9.5 percent of (1) the employee's box 1, W-2 wages from the employer for the current calendar year; (2) an amount equal to 130-hours multiplied by the employee's hourly rate of pay (or the employee's monthly salary, if the employee is salaried) calculated monthly; or (3) the federal poverty line. Note that if an employer sponsors a group health plan with several healthcare options, only one healthcare option needs to meet the affordability and minimum value criteria.

Don't set rates for 2015 without looking at the "affordability" of coverage and whether employees are eligible for government subsidies.

For a healthcare plan to provide minimum value, the plan's share of the total allowed costs of benefits provided under the plan must be at least 60 percent of such costs. The U.S. Department of Health and Human Services (HHS) has provided a minimum value calculator to help determine if a plan meets minimum value.

Alternatively, the regulators have advised that plans with nonstandard features can use a certified actuary to determine whether they provide minimum value.

Compliance Strategies

In developing compliance strategies, it is important to keep in mind that, for purposes of the play-or-pay penalty, the Internal Revenue Service (IRS) uses the "common law" standard to define an employee. Under this standard, an employee is generally someone performing a service for the employer, where the employer controls what will be done and how it is done. Thus, if someone is working in a capacity other than as an employee, there could be a risk for the government to reclassify such an individual as an employee for purposes of (i) determining the employer's ALE status, and (ii) determining whether all of an ALE's full-time employees are offered coverage. In this regard, if worker misclassification resulted in fewer than 95 percent of full-time employees being offered coverage, the employer could be subject to a penalty of $2,000 per each ACA full-time employee (over the threshold of 30) even if the employer was covering the vast majority of its full-time employees.

Do examine your entire workforce to determine who must be offered coverage.

With respect to reductions in hours or dismissals, first, there is the possibility that the employee will claim that action was taken for discriminatory reasons – i.e., due to age, disability, race, sex, or in violation of federal, state, or local anti-discrimination legislation. Although a more in-depth discussion is outside the scope of this paper, that possibility underscores the need to seek competent counsel prior to engaging in an activity that curtails coverage, results in a loss of hours, or terminates employment. There is also a provision in the Employee Retirement Income Security Act (ERISA) that generally prohibits employers from taking any action that: (a) interferes with a plan participant's exercise of a right under an employee benefits plan; or (b) interferes with the attainment of any right to which a plan participant may become entitled. Because any employment decision could impact the exercise of a right or the attainment of a right to employee benefits, courts require plaintiffs to show specific intent to interfere with benefits to prevail under ERISA Section 510. Remedies for violations of ERISA Section 510 are limited to "appropriate equitable relief," which can include restitution, back pay, and reinstatement.

Do seek counsel prior to engaging in any activity which curtails coverage, results in loss of hours, or terminates employment.

Start Tracking Employee Hours of Service Now

The one-year delay of the ACA's play-or-pay reporting and penalty requirements to 2015 affords employers an opportunity to understand and prepare their optimal play-or-pay strategies. The cost of penalties can be significant, as can the cost of providing sufficient healthcare coverage to ACA full-time employees. However, the decision whether to "play-or-pay" involves more than just weighing the cost of the penalty versus the cost of coverage. It may involve evaluating workforce and benefits structures and business needs. Large employers must evaluate all of the employment, labor, and benefits law implications of the ACA and its play-or-pay mandate to determine the right strategy for their business. Use of automated software solutions to track time and attendance is strongly advised to enable employers to quickly and accurately track employee hours of service. Moreover, an automated solution that integrates Time and Attendance, Payroll, HR, and Benefits is an ideal way to streamline and help enable improved compliance with all the time-consuming administrative aspects of workforce planning, eligibility, affordability, enrollment, and mandatory reporting.

Do use automated software to help track employee hours of service.

The record-keeping requirements of the ACA could potentially create hardships for many employers. Getting it wrong could result in significant penalties. For instance, an employer that miscalculates hours for as few as five percent of its workforce could find itself facing annual penalties of $2,000 for each of its ACA full-time employees (less 30). There is a real need for employers to make sure that they have the appropriate tools to measure hours of service for all employees, who are not on a full-time schedule, to make sure that the right employees are offered coverage. 2015 will be here soon and, for those employers who plan to use a 12-month measurement period and an administrative period, the 2015 measurement period has already begun.

Since many aspects of the play-or-pay mandate, including whether the employer is even subject to the mandate, are based on the number and identification of the employer's 2014 (and maybe even 2013) ACA full-time employees, the time to start tracking employee hours of service is now. For example, an employer with a calendar year plan, using a 12-month look-back period, who plans on using a full 90-day administrative period, will have to have started tracking hours of service with the first pay cycle in October of 2013 and run through the last pay cycle in September of 2014.

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