AN EMPLOYER'S GUIDE TO THE PATIENT PROTECTION AND AFFORDABLE CARE ACT

Susan Chelsea and Thomas Daugherty
Klinedinst PC

Employers are on the front line of change precipitated by the Patient Protection and Affordable Care Act (PPACA).[1] Beginning January 1, 2014, large employers must, for the first time, offer affordable healthcare coverage to full-time employees and their qualified dependents. In addition, the "individual mandate" takes effect, and state and federal governments must offer healthcare coverage to U.S. citizens through healthcare exchanges.

The U.S. Treasury Department (Treasury Department) and U.S. Department of Health and Human Services (HHS) are in the process of drafting implementing regulations for the PPACA. Both agencies have issued notices, accepted public comment, and issued proposed regulations that address an employer's responsibilities and obligations under the PPACA. While not final, the draft regulations are the best guidance currently available to employers. This article will discuss key provisions of the PPACA including: how to determine if an employer is subject to the PPACA, employer obligations under the PPACA, and employer penalties for non-compliance.

WHICH EMPLOYERS ARE SUBJECT TO THE PPACA?

The PPACA applies to large employers, defined as employers with at least 50 full-time employees.[2] Large employers must offer "affordable" health care coverage to full-time employees and their qualified dependents, or pay a penalty. If the employer does not employ 50 or more full-time employees, the employer is *not* required to offer healthcare coverage to its employees.

Determining if an employer is a "large employer" may be difficult, especially if the employer utilizes part-time employees or seasonal workers. The draft regulations define a "large employer" with respect to a calendar year as an employer that employed an average of at least 50 full-time employees (including full-time equivalent employees, or FTEs) on business days during the preceding calendar year.[3] FTEs are part-time employees, each of whom individually is not treated as a full-time employee because he or she does not provide more than 30 hours of service per week.[4] FTEs are used solely for purposes of determining whether an employer is a large employer.[5]

The number of FTEs for each calendar month in the preceding calendar year is determined by calculating the aggregate number of hours of service for that calendar month for employees who were not full-time employees (but not more than 120 hours of service for any employee) and dividing that number by 120. Fractions are taken into account.[6]

To determine if an employer is an "applicable large employer" for a calendar year, the employer adds the total number of full-time employees (including any seasonal workers) for each calendar month in the preceding calendar year and the total number of FTEs (including any seasonal workers) for each calendar month in the preceding calendar year. The sum total of full-time employees and FTEs are divided by 12. If the result is not a whole number, it is rounded to the next lowest whole number.[7] If the result of this calculation is 50 or more the employer is an applicable large employer for the current calendar year, unless the seasonal worker exception in paragraph (b)(2) of section 54.4980H-2 applies.[8]

WHICH EMPLOYEES MUST BE OFFERED HEALTHCARE COVERAGE?

A "large employer" must offer healthcare coverage only to its *full*-time employees and their qualified dependents. Dependents are defined as children who have not attained age 26. Spouses are *not* dependents.[9] A large employer is *not* required to offer healthcare coverage to its part-time employees, regardless of the number of part-time employees counted as FTEs to calculate the number of full-time employees. Hypothetically, an employer of only part-time employees could be considered a "large employer" and subject to the PPACA, but have no obligation to provide healthcare coverage to its employees.

A full-time employee provides an average of at least 30 hours of service per week.[10] "Hours of service" is defined as, "[e]ach hour for which an employee is paid, or entitled to payment by the employer for a period of time during which no duties are performed due to vacation, holiday, illness,

incapacity…, layoff, jury duty, military duty or leave of absence."[11]

For many employers, including staffing companies, retail establishments and restaurants, it is not always clear if a current or new employee should be considered full-time or part-time. The draft regulations include an optional "Look-Back Measurement Method" to determine if ongoing and new variable hour employees qualify as full-time or part-time employees.[12] Employers may adopt a standard measurement period of not less than three months but not more than 12 months to evaluate if a variable hour employee is full-time or part-time. During the subsequent stability period the employer must treat the employee as full-time or part-time based upon hours of service provided during the standard measurement period. An employer may also adopt an administrative period, not to exceed 90 days, to evaluate an employee's status and offer healthcare coverage if applicable.[13]

WHAT COVERAGE MUST BE OFFERED?

Large employers must offer healthcare coverage that meets minimal value requirements, defined as covering 60% of the employee's medical costs and providing certain specific protections.[14] Section 1302(d)(2)(C) of the PPACA sets forth the rules for calculating the percentage of total allowed costs of benefits provided under a group health plan or health insurance plan.

On November 26, 2012, HHS issued proposed regulations providing guidance on methodologies for determining minimum value.[15] A minimum value calculator will be forthcoming from the IRS and the HHS. Employers should be able to input certain information about the plan into the calculator to determine whether the plan provides minimum value.

Lifetime dollar limits for key health benefits are prohibited and insurance carriers may not cancel coverage solely because of an honest mistake made on the insurance application. Dependent healthcare coverage for employees' adult children is extended to age 26 (although, until 2014, group plans grandfathered in do not have to offer dependent coverage up to age 26 if a young adult is eligible for group coverage outside their parent's plan.)

Certain plans are grandfathered in to the new law, which allows some existing plans to remain in place. Healthcare coverage from a plan that existed on March 23, 2010 and that has covered at least one person continuously from that day forward may be considered a "grandfathered" plan and are exempt from certain requirements.

IS THE COVERAGE AFFORDABLE?

Healthcare coverage for an employee under an employer-sponsored plan is "affordable" if the employee's required contribution for self-only coverage does not exceed 9.5 percent of the employee's household income for the taxable year. Since employers generally will not know their employees' household incomes, the proposed regulations set forth an affordability safe harbor that allows the employer to use the wages paid to the employee as reported in Box 1 of the W-2 form. As implementation of the PPACA draws near, additional tools and guidance will be forthcoming from HHS and the Treasury Department.

WHAT PENALTIES APPLY FOR NON-COMPLIANCE?

If a large employer does not offer healthcare coverage, offers healthcare coverage that does not meet the basic coverage requirements, or requires its employees to pay more than 9.5% of their total household income for healthcare coverage, employees can choose to buy individual coverage from an insurance exchange set up by the employee's state government, or, if applicable, the federal government. Employees should receive a premium tax credit for doing so, and large employers may then be required to pay a penalty.

If a large employer does not offer the required healthcare coverage, the penalty is $2,000/year for each full-time employee, not counting the first 30 employees. The penalty increases each year by the growth in insurance premiums. If a large employer does not pay for at least 60% of covered health care expenses, or if an employee must pay more than 9.5% of their household income for the coverage, the large employer penalty is $3,000/year per employee receiving a premium tax credit, not counting the first 30 employees.[16] HHS estimates that less than 2% of large employers will have to pay these penalties.

CONCLUSION

The changes in the health care laws are complex and in many instances, still changing, as HHS and the Treasury Department grapple with drafting the regulations to implement the PPACA. For example, the Treasury Department is still considering how employers should treat employees paid on a commission basis and leased employees.

Large employers must have a strategy in place by October 2013 when enrollment periods are expected to commence for federal and state healthcare insurance exchanges. Large employers must decide if they will "play" or "pay," that is, offer compliant healthcare coverage to full-time employees or pay the penalty. Large employers should carefully compare the cost of offering health care coverage against the cost of applicable penalties for failure to offer the mandated healthcare coverage.

Employers with questions relating to obligations under the PPACA are encouraged to consult with qualified employment counsel to discuss the specifics of their situation.

1 H.R. 3590, signed into law (P.L. 111-148) on March 23, 2010, as amended by the Health Care and Education Reconciliation Act of 2010 (H.R. 4872), signed into law (P.L. 111-152)
2 Draft Regulations 26 CFR §54.4980H-2
3 Draft Regulations 26 CFR §54.4980H-1(4)
4 Draft Regulations 26 CFT §54.4980H-1(19)
5 Draft Regulations 26 CFR §54.4980H-2(b)
6 Draft Regulations 26 CFR §54.4980H-2(c)
7 Draft Regulations26 CFR §54.4980H-2(b)
8 The PPACA provides a seasonal worker exception: if the sum of an employer's full-time employees and FTEs exceeds 50 for 120 days or less during the preceding calendar year, and the employees in excess of 50 who were employed during that period of no more than 120 days are seasonal workers, the employer is not considered to employ more than 50 full-time employees (including FTEs) and the employer is not an applicable large employer for the current calendar year.
9 Proposed Regulations 26 CFR §54.4980H-1(11)
10 Proposed Regulations 26 CFR §54.4980H-1(18)
11 Proposed Regulations 26 CFR §54.4980H-1(21)
12 Proposed Regulations 26 CFR §54.4980H-3
13 Proposed Regulations 26 CFR §54.4980H-1(1)
14 26 USC 36B(c)(2)(C)(ii)
15 77 FR 70644
16 Proposed Regulations 26 CFR §54.4980H-1(36) and (37)

Susan K. Chelsea is a Senior Counsel with Klinedinst, and has over two decades of business litigation, employment law, construction law, and transactional experience. She Co-Chairs the firm's Employment and Labor department, and maintains a complex general business practice handling business litigation, corporate transactions, contract disputes, government contract claims, and construction litigation.

Thomas E. Daugherty is an associate in the San Diego office of Klinedinst PC. His legal practice includes employment law, professional liability, and commercial litigation. He also has significant experience in real estate litigation, as well as products liability, medical malpractice, and lawsuits involving general liability.