7 Key Facts About the Delay in the Employer Mandate

August, 2013

Benefits Pro

Though much has been said (and written), questions remain about the Obama administration's decision this summer to delay the employer mandate of the Patient Protection and Affordable Care Act.

One thing that's crystal-clear, at least to the Congressional Budget Office, is that the price tag of health reform jumped by $12 billion, thanks to the delay. About $10 billion of that reflects a reduction in the penalties that the government would have collected from employers who failed to comply with the requirement to provide health insurance.

The CBO also expects that 1 million fewer people will have employer-sponsored coverage in 2014 than previously forecast.

That's the big-picture stuff. But what about the details? If you're selling or buying benefits, here are the answers to seven important questions about the delay.

1. What mandates were delayed by the IRS?

IRS Notice 2013-45 provided a one-year delay to three requirements under the healthcare reform law:

- The annual obligation under Section 6055 of the Internal Revenue Code (Code) for insurers, self-insuring employers and other parties that provide "minimum essential coverage" to provide certain information to the IRS.
- The annual obligation under Code Section 6056 for applicable large employers to report to the IRS and to the employer's full-time employees as to whether and what healthcare coverage is offered to such employees.
- The requirement under Code Section 4980H for applicable large employers to offer healthcare coverage to full-time employees or pay penalties, commonly known as the "play-or-pay" penalties (POP).

The Notice postpones compliance with only these three requirements until 2015. Other aspects of PPACA that were scheduled to become effective in 2014 will go into effect in 2014.

2. What is the employer mandate that begins in 2015?

Health reform and its "employer mandate" do not require employers to provide health coverage for their employees. However, beginning in 2015, any applicable large employer (one with 50 or more full-time employees) can be liable for a substantial "assessable payment" if it "fails to offer its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan."

There are two alternative penalties. The annual amounts are $2,000 or $3,000, but the actual amount is calculated monthly. Both the $2,000 and $3,000 penalty amounts will be adjusted for inflation. Neither penalty is triggered unless an employee receives a tax credit for the purchase of health insurance on a state exchange.

Generally, if an employee is offered affordable minimum essential coverage (MEC) under an employer-sponsored plan, then the individual is ineligible for a premium tax credit and cost-sharing reductions for health insurance purchased through a state exchange. However, an employee may be offered minimum essential coverage by the employer that is either "unaffordable" or that consists of a plan under which the plan's share of the total allowed cost of benefits is less than 60 percent. In that situation, the employee is eligible for a premium tax credit and cost-sharing reductions if the employee declines to enroll in the coverage and purchases coverage through an exchange.

"Unaffordable" is defined by PPACA as coverage with a premium required to be paid by the employee that is more than 9.5 percent of the employee's household income. This percentage of the employee's income is indexed to the per capita growth in premiums for the insured market as determined by the Secretary of Health and Human Services. The employee must seek an affordability waiver from the state exchange and provide information as to family income and the lowest cost employer option offered to the employee. The state exchange then provides the waiver to the employee. The employer penalty generally applies for employees receiving an affordability waiver.

For purposes of determining whether coverage is unaffordable, required salary reduction contributions are treated as payments required to be made by the employee. However, if an employee is reimbursed by the employer for any portion of the premium for health insurance coverage purchased through the exchange, including any reimbursement through salary reduction contributions under a cafeteria plan, the coverage is employer-provided and the employee is not eligible for premium tax credits or cost-sharing reductions. Thus, an individual is not permitted to purchase coverage through the exchange, apply for the premium tax credit, and pay for the individual's portion of the premium using salary reduction contributions under the cafeteria plan of the individual's employer.

3. How does the state insurance exchange obtain information on the affordability to an individual?

The Tax Code permits the disclosure of taxpayer return information to assist exchanges and state agencies, but not employers, in performing certain functions for which income verification is required. Under proposed regulations, the IRS would be permitted to disclose income and other specified information about an individual taxpayer to HHS for purposes of making eligibility determinations for advance payments of the premium tax credit or the cost-sharing reductions. HHS could then disclose the information to the Exchange or the state agency processing the individual's application. As a condition for receiving return information, each receiving entity (i.e., HHS, the Exchanges, and state agencies as well as their respective contractors) is required to adhere to the privacy safeguards established under Code Section 6103(p)(4).

4. How do the two employer mandate penalties work?

Employers can be penalized for not providing minimum essential coverage or for having an inadequate health plan.

No Minimum Essential Coverage - $2,000 Per Full Time Employee Less 30 Penalty. Employers with at least 50 full-time equivalent employees and with at least thirty-one full-time employees must offer minimum essential health coverage meeting specified requirements. If the employers offer no health plan, they must pay a $2,000 per full-time employee penalty if any of the full-time employees receive a federal premium subsidy through a health care exchange.

The calculation of "a large employer" includes part-time workers. However, the $2,000 per Full-Time Employee Less 30 Penalty is only calculated based on full-time workers therefore, not all large employers who have a full-time employee receiving a credit would actually pay a penalty. This could occur because the first thirty workers are not counted.

For example, an employer with 100 part-time workers (15 hours per week) and 30 full-time workers (30-plus hours per week) would be considered a large employer with 80 full-time equivalent workers. Even if one or more workers received a premium credit, the penalty would only be assessed against the number of full-time workers: (30-30) x $2,000 = 0. Thus, read literally, if only one employee purchases insurance on an exchange and receives a premium tax credit, the penalty applies to all full-time employees less thirty full-time employees times $2,000.

The IRS has indicated that "it is contemplated that the proposed regulations will make clear that an employer offering [minimum essential] coverage to all, or substantially all, of its full-time employees would not be subject to the 4980H (a) 'all-full time employees minus 30' assessable payment provisions."

To avoid the $2,000 penalty, the employer must offer "minimum essential coverage" to its full-time employees and their dependents. Dependents can include not only children, but also parents, siblings, uncles, aunts, nieces, nephews, grandchildren, and various in-laws.Any person who has the same principal place of abode and is a member of the same household as the taxpayer is eligible to become a dependent.

The minimum essential coverage that an employer must offer in order to avoid the "all full-time employees minus 30" penalty calculation is defined in the statutory provisions imposing the individual mandate. It includes only:

- government-sponsored programs (such as Medicare, etc.),
- eligible employer-sponsored plans,
- plans offered in the "individual market,"
- grandfathered health plans, and
- other coverage that "the Secretary of Health and Human Services, in coordination with the Secretary [of the Treasury], recognizes" for purposes of this determination.

There are some fundamental unresolved issues with respect to this definition. First, an "eligible employer-sponsored plan" is defined as a "group health plan or group health insurance coverage" that is either a governmental plan or

another "plan or coverage offered in the small or large group market within a State." Even though the language of that definition specifically seems to contemplate a "group health plan," as opposed to "group health insurance coverage," there was a question as to whether a private self-insured plan would qualify as "any other plan or coverage offered in the small or large group market within a State." However, the IRS has indicated that self-insured plans qualify.

Second, the grandfathered health plan exception may not be applicable because of the ease with which a plan can lose grandfathered status. The actions that can destroy grandfathered status include:

- the elimination of all or substantially all benefits to diagnose or treat a particular condition,
- any increase in a percentage cost-sharing requirement,
- a decrease in the employer contribution rate by more than 5 percent, and
- certain changes to annual limits on benefits.

In addition, it seems that failure annually to give plan participants a notice that the plan is grandfathered causes a loss of grandfathered status.

Third, minimum essential coverage is treated as being provided only if "the plan's share of the total allowed costs of benefits provided under the plan is at least 60 percent of such costs." However, if the employee nevertheless participates in the plan, this rule does not apply. Determining whether this requirement is satisfied is easy only for fully insured plans with no deductibles, co-pays or coinsurance. When the employer pays 60 percent or more of the premium, such a plan would be treated as providing "minimum essential coverage."

How deductibles, co-pays, and coinsurance should be handled is not clear. The plan's 60 percent share is measured against "the total allowed costs of benefits provided under the plan." To the extent that an employee pays deductibles, co-pays, and coinsurance, those benefits are not provided under the plan. If deductibles, co-pays, and coinsurance are to be counted, then, application of the 60 percent test is much more difficult.

Inadequate Health Plan - $3000 Per Full-Time Employee Penalty. A different penalty applies for employers of at least 50 full-time equivalent employees that offer minimum essential coverage that does not meet the federal requirements. Employers that offer health coverage will not meet the requirements if:

- at least one full-time employee obtains a premium credit in an exchange plan, and
- the plan does not provide:
- minimum essential benefits,
- the employee's required contribution for self-only coverage exceeds 9.5% of the employee's household income, or
- the employer pays for less than 60 percent of the benefits.

In 2015, the monthly penalty assessed to the employer for each full-time employee who receives a premium credit will be one-twelfth of $3,000 for any applicable month. However, the total penalty is limited to the total number of the firm's full-time employees minus 30, multiplied by one-twelfth of $2,000 for any applicable month. After 2015, the penalty amounts will be indexed by the premium adjustment percentage for the calendar year.

This penalty is imposed for any month in which "at least one full-time employee of the applicable large employer has been certified to the employer under Section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan through a state health insurance exchange for which a tax credit is allowed or paid." This individual tax credit is available to most low- and middle-income individuals that are not offered affordable, minimum essential coverage by their employers and are not covered by Medicaid.

5. Is the employer mandate excise tax deductible?

The employer mandate excise tax is not deductible. The IRS is establishing a vast information-gathering process through which it will calculate and assess the tax proactively without self-reporting by employers. To avoid the tax, proper health coverage must be offered to at least 95 percent of an employer's employees. Independent contractors who should be treated as full-time employees under the common law standards must be taken into account in the 95 percent threshold test.

6. Does the employer have to offer coverage for all days of the month in order to avoid the penalty?

Yes. If an employer fails to offer coverage to a full-time employee for any day of the month, the employee is treated as not having been offered coverage for the entire month.

7. How are full-time and full-time-equivalent employees calculated?

A large employer potentially subject to the employer mandate penalty is an employer with more than 50 full-time-equivalent employees during the preceding calendar year. Additionally, an employer who is part of a group of employers treated as a single employer under Code Section 414 (b), (c), (m), or (o) (including employees of a controlled group of corporations, employees of partnerships, proprietorships, etc., which are under common control, and employees of an affiliated service group) is treated as a single employer. When a mandate penalty applies, it is to

be paid ratably by members of the group. For employers not in existence throughout the preceding calendar year, the determination of large employer is based on the average number of employees a firm is reasonably expected to employ on business days in the current calendar year. Any reference to an employer includes a reference to any predecessor of that employer.

The statutes use the term “full-time employee” in the definition of large employer, but then expand on the definition to include both full- and part-time workers. Full-time employees are those working 30 or more hours per week. The number of full-time employees excludes any full-time seasonal employees who work for less than 120 days during the year. The hours worked by part-time employees (i.e., those working less than 30 hours per week) are included in the calculation of a large employer, on a monthly basis, by taking their total number of monthly hours worked divided by 120. In addition, an employer will not be considered a large employer if its number of full-time-equivalent employees exceeded 50 for 120 days or less or the employees in excess of 50 employed during the 120-day period were seasonal workers.

Example: A firm has 35 full-time employees who work 30 or more hours per week. In addition, the firm has 20 part-time employees who all work 24 hours per week (96 hours per month). These part-time employees’ hours would be treated as equivalent to 16 full-time employees, based on the following calculation:

20 employees x 96 hours = 1920

1920/120 = 16

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