Insight

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ACA Outlook: What Will 2016 Hold for the Affordable Care Act and Employers?

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For many employers, 2016 will bring new requirements and challenges with respect to Affordable Care Act (ACA) compliance. However, their burden in years beyond 2016 may very likely diminish because of recent changes Congress made to the sweeping health care law. While this year the U.S. Supreme Court once again saved the fate of the ACA in the *King v. Burwell* decision, legislation repealing or delaying some of the law's most problematic provisions potentially reshapes the scope and impact of the law for both employers and employees.

Employers will enter 2016 with the "play-or-pay" mandate in full effect and new burdensome reporting obligations. However, a delay of the controversial "Cadillac" tax on high-cost health plans and the repeal of the ACA's automatic enrollment provision are welcome news to employers. In the upcoming election year, the ACA remains a political punching bag, and additional changes in the future remain possible. Even as uncertainty about the ACA persists, employers should remain diligent in complying with the law and its existing requirements in 2016.

Cadillac Tax Delay

Before adjourning, Congress approved a spending and tax extenders bill that includes a two-year delay until 2020 of the ACA's "Cadillac" excise tax on high-cost health plans. The 40% excise tax on high-premium "Cadillac" health insurance plans, which was set to take effect in 2018, applies to plans costing more than $10,200 for individual-only coverage, and more than $27,500 for family coverage. Although referred to as a tax on Cadillac plans, its impact is far broader and would likely snare many "middle-of-the-road" employer-sponsored plans that may not be considered particularly "rich" plans. The 2016 Consolidated Appropriations Act and tax extenders measure also makes payment of the excise tax deductible.

Although the Cadillac tax, unpopular with unions and employers alike, was not repealed, its delay may be its effective death knell. Indeed, congressional Democratic pressure to delay the Cadillac tax reportedly overcame White House objections. The two-year delay of the excise tax gives opponents additional time to fight for a full repeal of the provision with a new Administration charged with overseeing the health reform law. The Cadillac tax was intended to both raise revenue to pay for the ACA's premium subsidies and to reduce the cost of health care. While welcome news to employers and unions, the delay of the Cadillac tax and prospect of full repeal

raise questions about adequate funding for the law. With key presidential candidates voicing their opposition to the Cadillac tax, there are serious doubts about whether it will ever go into effect. What, if anything, comes in its stead remains to be seen.

Repeal of Automatic Enrollment

On November 2, 2015, President Obama signed into law a two-year budget that repealed a provision of the ACA that had raised questions and concerns for many employers. The Bipartisan Budget Act of 2015, which suspends the debt ceiling limit until March 2017 and raises budget levels, contains measures to generate revenue to pay for the spending hikes. One such offset to pay for the spending increases was a repeal of the ACA's automatic healthcare enrollment requirement. This ACA provision would have required employers with more than 200 full-time employees to automatically enroll their employees in health coverage unless the employees opted out. Repeal of the provision raises almost $8 billion in revenue because, absent automatic enrollment, fewer employees are expected to enroll in employer health plans. This will, no doubt, convert tax-privileged dollars otherwise spent on health benefits into taxable wages. The automatic enrollment provision had yet to take effect and the Department of Labor had repeatedly delayed issuing regulations on its implementation. The statutory text for the automatic enrollment requirement left many questions unanswered. Its legislative repeal eliminates what would likely have been a significant new administrative burden for employers.

Section 4980H – Employer "Play-or-Pay" Mandate to Become Fully Effective

Section 4980H of the Internal Revenue Code, added by the ACA, requires "applicable large employers" with 50 or more full-time employees (including full-time equivalent employees) to offer health coverage to full-time employees and their children or pay a penalty. Even employers that offer coverage may incur a penalty if that coverage does not provide "minimum value" to plan participants or if it is not "affordable." Although the employer shared responsibility or play-or-pay mandate was to become effective in 2014, the IRS delayed this requirement until January 1, 2015 for employers with 100 or more full-time and full-time equivalent employees.[1] For employers with between 50 and 99 full-time and full-time equivalent employees, the employer mandate was delayed until 2016. For those employers above the 99 full-time employee threshold, 2015 brought the challenge of complying with employer mandate and its complex regulations for determining full-time employer status. However, the challenge and penalties for such employers increases in 2016. Transitional rules to ease implementation of the employer mandate that were in effect for 2015 sunset. Therefore, in 2016, applicable large employers above the 99 full-time employee threshold will face the full implementation of the employer mandate, and those employers with between 50 and 99 full-time and full-time equivalent employees will face implementation of the employer mandate for the first time.

Under Section 4980H(a) and the IRS final rule,[2] "applicable large employers" must offer "minimum essential coverage" to at least 95% (as compared to only 70% in 2015) of their full-time employees (and dependent children) or pay a penalty if any full-time employee receives a federal subsidy to purchase insurance through a health exchange. The 4980H(a) or "A" penalty is $2,000 multiplied by the number of full-time employees in excess of 30 employees. The $2,000 amount will be indexed to inflation. For 2015 only, the penalty exempts the first 80 full-time employees instead of 30.

Under Section 4980H(b) employers may be subject to an additional penalty if any full-time employee receives a premium tax credit to purchase health insurance on an exchange because: (1) the employer health coverage offered did not provide "minimum value" (that is, the plan's share of the total allowed costs of benefits provided under the plan is not at least 60% of those costs); (2) the employer health coverage offered was "unaffordable"; or (3) the employee was not among the 95% (70% in 2015) of full-time employees offered coverage. The "B" penalty under Section 4980H(b) is the lesser of (1) what the "A" penalty would have been had it been levied ($2,000 multiplied by the number of each full-time employee in excess of 30 (80 in 2015)) or (2) $3,000 per full-time employee who procures coverage from a health insurance exchange

1 Employers with fiscal year plan years did not have to meet the requirements of 4980H until the first day of the 2015 plan year if certain requirements were met. 79 Fed. Reg 8544 (Feb. 12, 2014).

2 79 Fed. Reg. 8544. For more information on the IRS final rule, see Ilyse Schuman, *IRS Final Rule Partially Delays ACA Employer Shared Responsibility Requirement*, Littler Insight (Feb. 24, 2014).

who receives a premium tax credit to enable him or her to purchase coverage through the health insurance exchanges. Individuals must have household incomes between 100% and 400% of the federal poverty level to be potentially eligible for a federal subsidy.

The increase in 2016 of the percentage of full-time employees who must be offered coverage from 70% to 95% to avoid the "A" penalty is significant. Employers will have little margin for error for failing to offer their full-time employees health coverage. Employers who are exploring options to avoid or minimize penalties, while at the same time containing health coverage costs, will find this more difficult in 2016. The risks of misclassifying employers as independent contractors and of failing properly to count employees' hours increases in 2016, as no more than 5% of full-time employees can be ineligible for "minimum essential" health coverage to avoid the "A" penalty. It may be more difficult to avoid the "B" penalty as well.

One strategy some employers used in the past to avoid paying the "A" penalty was to offer so-called "skinny" plans to full-time employees.[3] Although such plans could still subject an employer to a "B" penalty if they failed to provide minimum value, the employer would avoid paying the "A" penalty. According to regulations issued by the Department of Health and Human Services, whether a plan provides minimum value can be determined using a minimum value calculator, a plan design safe harbor, or certification by an actuary for certain plans. The calculator developed by HHS was found to deem some plans that failed to cover in-patient hospitalization or physician services as providing minimum value. The IRS recently issued guidance to target the use of certain low-cost plans to avoid paying either an "A" or "B" penalty. IRS Notice 2014-69[4] would prohibit employers from passing the minimum value test by using the minimum value calculator if the plan fails to provide in-patient hospitalization or certain physician services.

Although employer-sponsored group health plans other than insured plans in the small group market are not required to offer a package of "essential health benefits," the "minimum value" component of the play-or-pay penalty is effectively being used as a back door to impose similar requirements. As announced by Notice 2014–69, HHS published proposed regulations on November 26, 2014,[5] and final regulations on February 27, 2015,[6] to provide that an eligible employer-sponsored plan provides minimum value only if, in addition to covering at least 60% of the total allowed costs of benefits provided under the plan, the plan benefits include substantial coverage of inpatient hospitalization and physician services. On September 14, 2015, the IRS issued a supplemental notice of proposed rulemaking[7] that incorporates the substance of the rule in the HHS regulations. For purposes of section 4980H(b), the changes to the minimum value regulations do not apply before the end of a plan year that begins no later than March 1, 2015, provided the employer had entered into a binding written commitment to adopt the noncompliant plan terms, or had begun enrolling employees in the plan with noncompliant plan terms, before November 4, 2014.

Because the penalty under 4980H applies only with respect to full-time employees, the determination of full-time employee status is critical for compliance with the employer play-or-pay mandate. The ACA defines a full-time employee as one working 30 or more hours a week, or a monthly equivalent of 130 hours. Because the IRS "common law" definition of employee is used for this purpose, the task of properly classifying workers as employees versus independent contractors becomes even more critical. The IRS final rule allows employers to use the "lookback" measurement method as an alternative to a strict monthly measurement of hours of service. Employers can use the lookback method for determining the full-time status of ongoing as well new variable hour, part-time and seasonal employees as an alternative to a strict monthly calculation. The lookback method is not available for new employees who are reasonably expected to work full time. New employees who are hired to work a full-time scheduled must be offered coverage by the first day of the fourth calendar month after the date of hire to avoid a potential penalty.

For employers that have grappled with the complexity of the IRS final rule and the application of the lookback measurement method during 2015, a number of questions and ambiguities still remain. With transitional relief from penalties ending in 2015, the risk of failing to properly determine the status of full-time employee grows in 2016, while the complexity and lack of clear direction from the regulators continue.

3 These plans have also been referred to as "bare bones" or "MEC" plans, an apparent reference to a health plan that provides "minimum essential coverage" and little else. Such plans usually provide basic preventive services required by the market reforms of the ACA, doctor visits, and the like, but exclude hospitalization, surgical and other major medical expenses. See IRS Notice 2014-69 for a general description of such plans.

4 Notice 2014-69, *available at:* http://www.irs.gov/pub/irs-drop/n-14-69.pdf.

5 79 Fed. Reg. 70674, 70757 (Nov. 26, 2014).

6 80 Fed. Reg. 10872 (Feb. 27, 2015).

7 Internal Revenue Bulletin 2015-37, *available at* https://www.irs.gov/irb/2015-37_IRB/ar11.html.

Recordkeeping Requirements

One of the most vexing compliance challenges that many employers will face in 2016 are new reporting requirements imposed by the ACA. The ACA requires employers and/or health insurance issuers to report to the IRS information about employer-sponsored health coverage. Although slated by the statute to begin in 2014, these reporting requirements were delayed until the 2015 tax year to coincide with the delay in the employer play-or-pay mandate. Under Section 6056 of the Internal Revenue Code, as added by the ACA, applicable large employers (ALEs), must provide information to the IRS about the type of health coverage offered to their full-time employees. ALEs must also provide this information to employees. Form 1095-C Employer-Provided Health Insurance Offer and Coverage, is to be used to report the information required under Section 6056 for each full-time employee and, if self-insured, for part-time employees enrolled in coverage as well. Form 1094-C is to be used to transmit the 1095-C returns to the IRS. The IRS will use these forms to determine whether the employer owes a penalty under Section 4980H, and whether employees are eligible for premium tax credits.

Section 6055 of the ACA requires health insurance issuers and employers that sponsor self-insured health plans that provide individuals with "minimum essential coverage" to report to the IRS information concerning the type and period of coverage offered for the purposes of enforcing the ACA's individual mandate. Form 1095-B is to be used to report the information required under Section 6055, and Form 1094-B is to be used to transmit the 1095-B return to the IRS. Self-insured ALEs report the information required under both Sections 6055 and 6056 on a single combined Form 1095-C.

ALEs must file a Form 1095-C for each employee who was a full-time employee of the employer for any month of the calendar year. An ALE that provides health coverage through an employer-sponsored self-insured health plan must also complete Form 1095-C, Part III, for any individual (including any full-time employee, non-full-time employee, employee's family members, and others) who enrolled in the self-insured health plan. The forms use a series of codes to describe whether offers of coverage were made to full-time employees and their dependents, and whether such coverage provided minimum value and was affordable.

Employers subject to the employer shared responsibility provisions and ALE members that sponsor self-insured group health plans that fail to comply with the applicable information reporting requirements may be subject to the general reporting penalty provisions for failure to file correct information returns and failure to furnish correct payee statements. For returns required to be made and statements required to be furnished after December 31, 2015, the following apply. The penalty for failure to file an information return generally is $250 for each return for which such failure occurs. The total penalty imposed for all failures during a calendar year cannot exceed $3 million. The penalty for failure to provide a correct payee statement is $250 for each statement with respect to which such failure occurs, with the total penalty for a calendar year not to exceed $3 million. Special rules apply that increase the per-statement and total penalties if there is intentional disregard of the requirement to furnish a payee statement.

In recognition of the complexity of the new reporting requirements and the challenge for first-time filers, the IRS has offered some relief for the 2015 reporting forms, due in 2016. For 2015 reporting, the IRS will not impose penalties on a filer for reporting incorrect or incomplete information if the filer can show that it made good-faith efforts to comply with the information reporting requirements for 2015.

The IRS also recently announced a delay in the reporting deadlines. IRS Notice 2016-4 issued on December 28, 2015, announced an extension for 2015 information reporting. The notice extends the due date (1) for furnishing to individuals the 2015 Form 1095-B, Health Coverage, and the 2015 Form 1095-C, Employer-Provided Health Insurance Offer and Coverage, from February 1, 2016, to March 31, 2016, and (2) for filing with the IRS the 2015 Form 1094-B, Transmittal of Health Coverage Information Returns, the 2015 Form 1095-B, Health Coverage, the 2015 Form 1094-C, Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns, and the 2015 Form 1095-C, Employer-Provided Health Insurance Offer and Coverage, from February 29, 2016, to May 31, 2016, if not filing electronically, and from March 31, 2016, to June 30, 2016, if filing electronically.

The extension is welcome news for employers trying to comply with reporting requirements that remain complex, burdensome and, in some respects, unclear. Yet, the convergence of full implementation of the employer mandate and the onset of the reporting requirements in 2016 will present ongoing challenges for employers throughout the year.

What's Next for the Affordable Care Act and Employers?

While Republican congressional efforts to effectively repeal the ACA through the budget reconciliation process were blocked by a presidential veto, the political jockeying around the health care reform law will persist on the campaign trail. Although a full repeal of the ACA will be no more feasible in 2016 than it was in 2015, the race for the White House and control of the next Congress will determine the political future of the ACA. Congress's delay of the Cadillac Tax and the repeal of the automatic enrollment provisions are testaments to the fact the significant aspects of the law can indeed be changed.

Finally, as Congress debated legislation altering the ACA, open enrollment on the ACA exchanges for 2016 was underway. Many consumers faced price increases for purchasing plans on the ACA exchanges as concerns about the risk pool of enrollees rose. Despite the law's penalties for individuals who fail to obtain health coverage, there might not be a sufficient number of healthy and young enrollees in the ACA plans. In this event, the cost of the ACA plans—if they continue to be offered—will, as many opponents of the law predicted, rise further. It may be this dynamic more than congressional action that will dictate the fate of the ACA in 2016 and beyond.