PERSPECTIVE

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Will Firms Have To Buy Insurance For Summer Associates?

By Robert W. Wood

Call it Obamacare, the Affordable Care Act or the act. Love it or hate it. Either way, the changes start soon. And just about everyone in law practice will be affected one way or another.

On July 2, the Treasury Department announced it was delaying the mandatory employer and insurer reporting requirements until Jan. 1, 2015. The announcement does not affect the individual mandate. Most individuals will still be required to have health insurance or pay a penalty beginning on Jan. 1, 2014.

The first rule just about everyone is focused on is who can avoid the employer mandate entirely. This rule is simple, although not as simple as you might think. Definitions are key. What's more, the age-old independent contractor vs. employee classification issue is forever in the background.

You should be able to avoid complying with the act if you have 50 or fewer full-time employees. But how that figure is measured is key. If you have 50 or fewer full-time employees, you may or may not be currently providing health insurance. You may or may not be doing so in ways that already comply with the act. But if you're in this 50-or-fewer sweet spot, you're safe.

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That is, you will not be subject to a penalty for failing to provide affordable health insurance to your employees. What if you are close to 50 full-time employees? What does the act mean by full-time employees? This isn't so straightforward.

The act defines a "full-time employee" as someone who works 30 or more hours a week on average during a 1-month period. During the summer, what if your law firm has law clerks or summer associates? You don't have to count seasonal workers who work fewer than 120 days during the year.

However, nonseasonal part-time workers are counted. You add up their hours and divide by 120. The idea is that three part-time workers working 1/3 time add up to one full-time employee. These nonseasonal part-time employees count toward determining whether an employer crosses the 50-plus full-time employee line.

Fortunately, though, these same nonseasonal part-time employees don't count for purposes of the penalties. Your law firm or company might meet the 50-plus employee threshold because it has part-time employees. However, your law firm or company might still escape being subject to penalties for failing to provide insurance for those part-time employees.

Suppose you use temp agency employees who don't actually appear on your payroll? They are the problem of the temp agency (or the employee leasing firm). They don't count in your tally.

What about independent contractors? They aren't your employees, right? Yes and no. If your independent contractor classification *holds up*, these workers are not considered employees for this or for other purposes. That's the good news.

The bad news is that it is getting harder to handicap whether your independent contractor classification actually works and will withstand scrutiny. There is reason to believe the Internal Revenue Service will remain active in independent contractor reclassification efforts. In fact, more scrutiny is coming.

The IRS is currently offering a voluntary reclassification program to reduce the number of independent contractors everywhere. The program has not been very popular, presumably because it involves companies agreeing to give up on their independent contractor workers for the future. However, it is actually a fairly good deal.

Under the IRS program, you agree to *prospectively* treat your independent contractors as employees, and you pay a very small penalty. However, you avoid the potentially crippling liability for the past. All indications are that the IRS is not getting the groundswell of businesses it expected to come in under this program.

Especially with the act looming, if you have an existing cadre of independent contractors, beware. It is appropriate (if not downright necessary) to review how strong or how weak a case you have. You may need to retool your written agreement, how you differentiate your independent contractors from your employees, etc. Be realistic.

If you have 50 or fewer full-time employees not counting your independent contractors, but would have more than 50 full-time employees if they are recharacterized, you will have even more exposure in 2015. That's on top of what was already a possibly crushing burden. Fighting and losing a worker recharacterization battle can cripple a business.

Apart from the obvious incentive to have independent contractors rather than employees, another common idea is to split a business into several pieces, each of which has a limited number of employees. That way you can stay at or below 50 full-time employees for each company, right? Wrong. There is a controlled group test that aggregates commonly owned businesses.

If you are still reading and if your firm or company has over 50 full-time employees, what's next? Now you must determine if you are providing health insurance. If you are not, you pay a penalty of $2,000 for each full-time employee (minus your first 30 employees).

Thus, if you have 70 full-time employees, and don't provide health insurance, you calculate your penalty as follows: 70 – 30 = 40; 40 x $2,000 = $80,000. Technically, the penalty is triggered when any employee gets a tax credit or government assistance in obtaining health care. But that's a low threshold.

If you *are* providing insurance to some or all of your full-time employees, it's more complex. You must test if the insurance you provide is both affordable and adequate. "Affordable" means costing no more than 9.5 percent of the employee's household income.

If you are thinking that you can't determine this since you clearly won't know, you're right. Household income includes not only the employee's earnings (wages, tips and other compensation) but also the earnings of the spouse and dependents living in the same household who are required to file an income tax return. The earnings even include tax-exempt interest.

But the government has a few safe harbors that will obviate you having to ask your employees for all their income and tax records(!). Does the insurance cost less than 9.5 percent of the employee's Form W-2 wages for the year? If so, it's affordable.

Alternatively, does the insurance cost less than 9.5 percent of the employee's hourly wages multiplied by 130 hours per month? If so, it's affordable. Lastly, it is affordable if the insurance costs less than 9.5 percent of the federal poverty level for one person.

If the insurance you provide to your employees meets the affordable hurdle, you must still ask if the insurance is "adequate." A plan is adequate if the plan's actuarial value is at least 60 percent. You'll need someone to tell you this, as it involves actuarial values. Plus, the insurance must cover dependents under age 26. However, it is not required to cover the employee's spouse.

If you fail the affordable or adequacy hurdles, what happens then? For *each* employee that isn't being provided affordable *and* adequate coverage, you pay a $3,000 penalty (if the employee is receiving government assistance for purchasing health care). Again, that's a low threshold. However, this penalty is waived if you are providing affordable and adequate health insurance to 95 percent of your employees.

A lot to digest? The Affordable Care Act is here.

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