

## Legal Alert

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### Next Steps for Employers under the Affordable Care Act

Employers expecting the U.S. Supreme Court to strike down some or all of the Patient Protection and Affordable Care Act (“Act”) will be either disappointed or pleased. Which camp you fall into depends on a wide variety of factors including whether you recognize the underlying needs the Act attempts to address, whether you believe that providing health insurance benefits is a critical factor in attracting and retaining a high caliber workforce, or your politics. (The individual mandate was a Republican idea that originated at the conservative Heritage Foundation in 1989. In Congress, Republicans twice introduced health care reform legislation that contained an individual health insurance mandate.)

Employers who do nothing to prepare for additional steps in the implementation of the Act hoping for repeal are not facing reality. Regardless of how the elections in November come out, the Act is not going away any time soon. In addition, regardless of who is in power in Washington, the Act will be tinkered with at the edges, but the various provisions of the Act interact with each other in fundamental ways. The protections provided to insureds such as coverage for pre-existing conditions, free preventative care, and no lifetime limits are only palatable to the health insurance industry because of the individual mandate that will cause insurance companies to collect more premiums from a relatively healthy population that is currently underinsured (25-40 year olds).

So, it is now time for employers to understand the fundamentals of the Act and how those factors will apply to their particular circumstances. Given the breadth of the Act, this short primer cannot address even some of the intricacies of the Act; just some highlights. For your particular situation you should consult your attorney, your insurance agent and your accountant.

#### The Employer’s Role in Insurance Reform

First, there is no requirement under the Act that employers offer health insurance benefits to their employees. Starting in 2014, for employers with less than 50 employees, nothing compels them to offer health insurance coverage. There is no penalty for the failure to do so. (The economic reality is that employers with less than 50 employees are what most of us think as small business. When Washington speaks of small business, it includes businesses with up to 500 employees.) For employers with less than 25 employees with an average annual wage of less than \$50,000, a sliding scale tax credit has been available since 2010 if they purchase health insurance for their employees.

For employers with 10 or fewer employees with average annual wages of less than \$25,000, a full tax credit is available as long as the employer pays at least 50 percent of the total premium.

Large employers, those with 50 or more employees, that do not offer coverage to full time employees may be subject to a penalty, if at least one full time employee purchases health insurance through an Exchange and receives premium assistance in doing so. The penalty is \$2,000 for each full time employee employed. As stated previously, this system goes into effect in 2014.

The Exchange concept will be implemented on a state-by-state basis. If a state fails to set up an Exchange, the federal government will do it for the state. The purpose of an Exchange is to establish a large enough risk pool so that individuals who cannot afford standard health insurance will have a lower cost market to obtain the mandated coverage. Premium assistance will be available on a sliding scale depending on income.

Large employers also must meet minimum insurance requirements in order to avoid tax penalties. If the coverage provided has a premium that exceeds 9.5 percent of the employee's income, or the plan's share of the costs of benefits provided is less than 60 percent, the employer may be penalized. This minimum coverage requirement is imposed because generally if an employer offers health insurance coverage, its employees are not eligible for federal assistance to purchase from an Exchange. However, if the employer sponsored coverage falls below the minimum for affordability and value, then the employees can use the Exchange.

If a large employer fails to offer the minimum coverage and any full-time employee purchases coverage through an Exchange and receives premium assistance, the employer pays a penalty, which is the lesser of \$3,000 annually for each employee receiving assistance or \$2,000 annually for each full-time employee.

What is a full-time employee under the Act? An employee who averages 30 or more hours per week. To calculate the number of full-time employees, an employer must include full-time equivalents. This calculation requires taking the number of hours worked in a month by all part-time employees and divide by 120. Part-time employees are not included in calculating penalties. When calculating penalties owed, the first 30 full-time employees are also subtracted.

### Should Employers Play or Pay?

As the Act's provisions go into effect, over the next several years, covered employers will calculate whether it is cheaper to continue to provide health insurance benefits, or pay the tax penalty. However, this decision has ramifications beyond just this monetary calculation.

Dropping health insurance coverage may have an adverse effect on morale. If competing employers in the relevant market are providing the required minimum coverage, it is going to make it more difficult to attract and retain top performers if you do not provide coverage as well. Just as employers are often pressured today to provide health insurance benefits despite the cost, that will not change as the penalty provisions under the Act start to become effective.

### Changes due in 2013

Employers need to be aware of two provisions of the Act that go into effect in 2013. Starting in 2013, there will be a \$2,500 limit on contributions to flexible spending accounts. Also starting in 2013, employers have to report the cost of employer-sponsored health coverage on Form W-2s.

### Summary

The Patient Protection and Affordable Care Act will make significant changes in the way employers interact with the health insurance industry and the health care system. The best approach now is to be prepared. Contact your attorney so that you can be ready to make the best choices for your company.