SHIPMAN & GOODWIN® LLP
COUNSELORS AT LAW

EMPLOYER ALERT

January 14, 2013

Early Planning and Action on Health Care Reform

The Obama administration has recently accelerated the release of guidance on how employers will be impacted by the Affordable Care Act (the "ACA"). As a result, we are now able to understand some of the steps that employers must take with only 12 months to prepare for some significant provisions of the ACA that are scheduled to go into effect in 2014. These provisions include what the ACA calls "shared responsibility for employers", which in effect means the possibility of monetary penalties for certain employers. Below is a summary of our current view of what employers should do in the coming months to prepare for the "shared employer responsibility" provisions of the ACA. In addition, there is a brief discussion of a notice employers are required to provide to their employees by March 1, 2013 (although this effective date may be postponed).

1. *Count Employees and Determine Whether You Qualify As An "Applicable Large Employer"*

Despite the enactment of the ACA, there is still no requirement that an employer offer health coverage or even a certain level of health coverage to its employees. However, effective on January 1, 2014 (or the first day of a fiscal year plan beginning in 2014 if later), if an employer does not offer coverage or an appropriate level of coverage, it may find itself subject to monetary penalties. Whether an employer is subject to possible penalties is, in the first instance, dependent on whether the employer employs at least 50 full-time employees, including "full-time equivalent" employees ("FTEs"). If the employer has 50 full-time employees, including FTEs, it is an "applicable large employer" and subject to the potential payment of penalties. This determination is made on a controlled group basis, meaning that all related entities are aggregated.

Full-time employees are those who work at least 30 hours of service per week in a month. To determine the number of FTEs an employer has in a month, the employer must add up all the hours of service in that month for employees who are not full time and divide the aggregate number by 120.

This calculation is made on a month by month basis using the payroll records from the preceding calendar year, although for 2014, you are permitted to use a shorter period – at least 6 months – within 2013. Once the monthly numbers are determined, they are added up and averaged. If an employer was not in existence in the preceding calendar year, the calculation is based on the number of full-time employees and FTEs

Authors

Kelly Smith Hathorn
(860) 251-5868
khathorn@goodwin.com

Gary S. Starr
(860) 251-5501
gstarr@goodwin.com

www.shipmangoodwin.com

reasonably expected to be employed during the current calendar year. There are special rules that prevent an employer from becoming an applicable large employer solely on the basis of seasonal employees employed for a period not exceeding 120 days.

For this calculation, leased employees and independent contractors are not included. However, we caution that establishing that someone who works for you is truly an independent contractor is not easy. The IRS has developed a 20-factor test for independent contractor status, and if you fail it, the penalties can be substantial.

2. *If You Are an "Applicable Large Employer"*

If an employer determines that it is an "applicable large employer," the employer must next determine how many of its employees are full-time employees. An employer will want to make this determination because the penalties that may result from being an applicable large employer will be based solely on full-time employees (i.e. those employees who average at least 30 hours actually worked per week, inclusive of overtime). This is a different calculation from the one to determine whether the employer is an applicable large employer. For this calculation, FTEs are not counted and the IRS has provided a different look back procedure.

If an employer does not offer coverage to at least 95% of its full-time employees and their dependents (or all but 5 if that is less than 95%), and at least one full-time employee receives assistance in the form of credits or subsidies to help purchase coverage through one of the health insurance exchanges (this will be addressed in future alerts), then the employer must pay a nondeductible penalty of $2,000 annually for each full-time employee, excluding the first 30 employees. For example, if an employer determines that it employs 60 full-time employees and does not offer coverage to at least 55 of them, the employer must pay a penalty of $2,000 x 30 or $60,000 annually, if at least one of its employees receives assistance to purchase coverage through an exchange. Again, note that the penalty calculation is based solely on full-time employees, and not on FTEs.

If an employer does offer coverage, the coverage must be *affordable* and offer *minimum value*. A plan is *affordable* as long as the premium for self-only coverage is less then 9.5% of household income. The ACA allows an employer to use an employee's W-2 income to make that determination. Note that spouse and family coverage is not considered in this calculation. A plan offers *minimum value* if the plan pays at least 60% of the total allowed benefits under the plan. (The IRS will be developing an on-line "calculator" to help an employer make this determination.)

If the coverage offered by an employer is not *affordable* or does not offer *minimum value*, employees will have the option of seeking subsidized coverage through one of the health insurance exchanges (if they meet certain income limits). If this occurs, the nondeductible penalty imposed on an employer is $3,000 for each full-time employee receiving such subsidized coverage, but it will never be more than the penalty that would apply if there was no coverage at all.

3. If You Are Not an "Applicable Large Employer"

If an employer employs fewer than 50 full-time employees (including FTEs), the employer can determine whether or not it will provide health coverage to employees and what the details of the coverage will be, without worrying about possible penalties. This is true even if the employer does offer coverage and the coverage is not affordable and/or does not offer minimum value. However, an employer with fewer than 50 full-time employees may want to consider whether it might reach that threshold in the near future before making any long term health coverage decisions.

4. Required Notice to Employees about the Exchanges.

Finally, regardless of the number of employees an employer has, the ACA requires all employers who are subject to the Fair Labor Standards Act to provide employees with a written notice about the existence of the state-based health insurance exchanges (the "Exchanges"). This notice must describe the consequences of purchasing insurance through the Exchanges, including the potential for tax credits or subsidies for coverage, and the loss of any contribution that the employer makes toward coverage in an employer-sponsored plan. Although this disclosure requirement is generally effective beginning on March 1, 2013, some in the industry have speculated that this date will be delayed. The Department of Health and Human Services has indicated that it plans to issue model notices.

Questions or Assistance?

If you have questions about this alert, please contact Kelly Smith Hathorn at (860) 251-5868 or khathorn@goodwin.com or Gary S. Starr at (860) 251-5501 or gstarr@goodwin.com.

This communication is being circulated to Shipman & Goodwin LLP clients and friends and does not constitute an attorney client relationship. The contents are intended for informational purposes only and are not intended and should not be construed as legal advice. This may be deemed advertising under certain state laws. © 2013 Shipman & Goodwin LLP.

One Constitution Plaza
Hartford, CT 06103-1919
860-251-5000

300 Atlantic Street
Stamford, CT 06901-3522
203-324-8100

1133 Connecticut Avenue NW
Washington, DC 20036-4305
202-469-7750

289 Greenwich Avenue
Greenwich, CT 06830-6595
203-869-5600

12 Porter Street
Lakeville, CT 06039-1809
860-435-2539

www.shipmangoodwin.com

SHIPMAN & GOODWIN LLP®

COUNSELORS AT LAW