Affordable Care Act (ObamaCare) Is Here. Is Your Business Prepared?

By David W. Robinson, Esq.

Halloween has come and gone, but the fear of the Affordable Care Act ("ACA"), affectionately dubbed "ObamaCare," remains in the hearts and minds of many business owners. Given the current composition of Congress, it appears that the ACA is here to stay for at least the time being. This article will provide some useful tips to prepare for the days ahead.

Compliance starts now.

Although implementation of the "Play or Pay" mandate was delayed until 2015, some of the ACA's provisions are already in effect. For example, as of October 1, 2013, most employers are required to notify their employees about the availability of health insurance and subsidies to help pay for coverage. If you have not sent out this Notice, it should be done immediately. A template Notice created by the Department of Labor is available here: http://www.dol.gov/ebsa/pdf/FLSAwithplans.pdf. Additionally, the DOL's website provides many helpful tips for providing notice.

Additionally, as of January 1, 2014, compliance of health care plans begins in earnest. For example, plans with lifetime and annual caps and/or exclude pre-existing conditions will be out of compliance. Employers must act now to ensure than their plan complies with the provisions of the ACA provisions that become effective in 2014.

Assess whether you are a Large Employer.

Employers with 50 or more "full-time equivalent" employees (defined as "Large Employer") are required to provide affordable health insurance with minimum essential coverage by 2015 or pay a penalty. However, the calculation to demonstrate whether or not your company is a Large Employer is based upon average employee hours in 2014. Accordingly, employers need to start assessing now whether they are going to be a Large Employer and/or create a strategy on how to address this in 2014.

A full time employee is defined under the ACA as an employee who works an average of 30 hours a week. However, full time equivalents takes into account all part time employees by aggregating all employee's hours together and dividing the total by 120 to derive the total

number of full time equivalents. Accordingly, employers who have part time employees may still be considered a Large Employer.

Employers also need to assess whether "independent contractors" or "temporary" employees should be included as part of the calculation. Both the Department of Labor and the IRS have announced that addressing the misclassification of employees will be a high priority for their audit and enforcement activities. It is important, therefore, to determine if your company has any issues prior to 2014.

In addition, employers need to think hard about whether they can (or should) reduce employee hours in order to not qualify as a Large Employer. This strategy, however, is not as simple as just cutting hours. Both ERISA and Fair Labor Standards Act contain provisions that potentially could allow employees to challenge an employer's decision to reduce their hours to prevent coverage under a health care plan. This could create liability for the employee's damages and potentially non-compliance penalties under the ACA. Further, no legal precedent exists to provide guidance on how to properly execute this type of strategy, which will lead to lengthy and expensive lawsuits for the first employers who try to navigate these uncharted waters. At a minimum, legal counsel should be consulted before attempting an hours reduction strategy.

Make a decision on whether to offer a plan in 2014.

For small employers, offering a plan is optional. However, even for employers who want to offer health insurance to their employees, it may be more cost effective for both the employer and employee for the employer to not offer a plan. With the advent of the State Exchanges, employees may find cheaper rates than the employers offer through a group plan. Depending on the employee's household family income, an employee may also qualify for a Premium Tax Credit, which would substantially reduce the premium cost. However, if an employer offers a plan that meets the affordability test and provides minimum coverage value, its employees will not qualify for the Premium Tax Credit.

Thus, a business owner should weigh the overall cost for an employee to participate in the employer's plan verses what it would cost on the State Exchange. It could be a win-win scenario for all parties involved to not provide a plan. The employer would not have to provide costly health coverage to his employees and the employees will have access to a wider variety of less expensive health coverage. Additionally, the employer can share the costs savings with the employees in the form of pay raises or subsidies to further reduce their health insurance costs. At a minimum, a business owner should look at the State Exchange options when assessing the cost of providing insurance.

Good communication with employees is key.

No matter what a business decides to do, good communication with the employees is vital. Employers should keep in mind when communicating with employees that the ACA is just as confusing and scary to employees as it is to business owners. It is important that employers communicate to employees in a way that addresses their questions of "Why?", "How does this

effect me?" and "What do I need to do next?" preemptively. Employers should also be prepared to proactively address employee skepticism to the employer's plan of action.

Conclusion

Like all other employer mandates, ACA compliance will likely be a challenge for employers for the coming years. Business owners who act now will be better positioned to devise easier, cost efficient and more successful strategies to address these challenges.

If you have any questions or concerns regarding compliance with the ACA or any other employment matter, please contact David at dwr@riw.com.

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