Affordable Care Act isn't just for US companies

US inbounds and their employees can also be hit by its requirements and penalties

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In brief

The Patient Protection and Affordable Care Act, or the Affordable Care Act (ACA), imposes new requirements and related penalties for both individuals and employers regarding health insurance coverage. The ACA was signed into law on March 23, 2010, with phased effective dates for its many provisions. Some of the most significant provisions affecting individuals became effective on January 1, 2014, while the most important employer-related provisions have been deferred an additional year to 2015. The law has implications for foreign individuals on assignment to the US and for foreign companies doing business in the United States.

We provide broad highlights of some of the ACA requirements and penalties that could apply to globally mobile employees and their employers. Although not all requirements are yet fully in effect, US inbound companies must take some proactive steps *now* to prepare.

In detail

What is the Affordable Care Act?

Although the ACA has been an all-consuming concern for US companies, it may be cruising below the radar of many US inbound companies on the assumption that it doesn't apply to them. That could be a costly assumption.

Under the ACA, employers face significant penalties (sometimes called the 'pay or play' provisions or the 'employer mandate') if they fail to offer healthcare coverage to their full-time employees or if the coverage offered is not affordable. And the rules don't just apply to US companies, they apply to businesses employing US citizens and residents as well as foreign nationals working in the US.

Here's what you need to consider

The ACA generally requires individuals to maintain health coverage (called 'minimum essential coverage' or MEC). If not, they face a tax penalty payable on filing their individual US federal income tax return. Under the ACA, insured coverage, governmental coverage such as Medicare, and certain employer-provided coverage are considered MEC. This requirement is referred to as the 'individual mandate'.

Who must meet the individual mandate?

Foreign nationals working in the US

The individual mandate applies to US citizens and permanent residents. It does not apply to nonresident aliens.

However, many foreign nationals on assignment in the US do become residents for tax purposes, and therefore, will be subject to the MEC requirement unless another exemption applies.

Assignees working in the US may satisfy the individual mandate if they are covered by an employer plan, as employer-sponsored coverage generally is deemed to be MEC. For this purpose, any self-insured coverage is MEC, as is insured coverage provided by a US insurer. Recent US Internal Revenue Service (IRS) guidance opens the possibility that coverage under a foreign insured plan for expatriates may also qualify as MEC, satisfying the individual mandate for foreign employees working in the US. To meet this exemption, the plan must be provided by an insurance company that is regulated by a foreign government, the plan sponsor must notify the participants that the coverage is intended to be MEC, and the sponsor must also file an annual report about the plan and the individuals covered with the US Internal Revenue Service (IRS).

US citizens living abroad

Generally, US citizens living abroad are subject to the MEC requirement. However, a US citizen who has a tax home outside the US and is a bona fide resident of a foreign country or countries during an uninterrupted period that includes an entire tax year or who is present in a foreign country for at least 330 full days during a period of 12 consecutive months will be deemed to satisfy this requirement. Because of this exception, many US assignees working abroad for extended periods will be deemed to have MEC and need not take further action to avoid the penalties.

However, questions may arise if it is not clear that the individual will satisfy these requirements at the onset of the assignment, and for individuals who will be abroad for shorter periods.

The recent guidance mentioned above would apply to US expatriates as well as to foreigners on assignment in the United States. So, where the plan sponsor provides insured coverage for US citizens working abroad through an insurer regulated by a foreign government and complies with the notice and reporting requirements of the ACA, these participants may be deemed to have MEC.

ACA requirements and penalties for employers

Under ACA beginning in 2015, an 'applicable large employer' is subject to penalties if it fails to offer 95% of its full-time employees (and their dependents other than spouses) the opportunity to enroll in MEC under an eligible employer-sponsored plan (the 95% test). For 2015 only, the first year of the employer mandate's applicability, the 95% test has been reduced to a 70% test; as long as at least 70% of the employer's full-time employees are offered coverage in each month, no penalties will be assessed for that month.

Meaning of 'applicable large employer'

An applicable large employer is one that employed at least 50 full-time and full-time equivalent employees during the preceding calendar year. This requirement has been delayed one year for employers with fewer than 100 full-time employees, so employers with between 50 and 99 full-time employees will first be subject to the employer mandate in 2016. For this purpose only, the hours of service of part-time employees are taken into account in determining the number of full-time equivalent employees. For example, 40 full-time employees employed 30 or more hours per week on average, plus 20 half-time employees employed 15 hours per week on average are equivalent to 50 full-time employees.

The 50 full-time equivalent employee test (100 for 2015) is determined across a controlled group. For example, a US parent entity and its wholly owned subsidiary, or a US subsidiary with a foreign parent, would both be combined to determine if the threshold is met. Only hours of service that relate to services for which the individual receives US-source income are counted, however; global employers will not take into account employees living and working outside the US who do not have US-source income.

Determination of full-time employees

A key step is determining what employees qualify as full-time (e.g., reviewing how many hours they work) for purposes of the 50 or 100-employee threshold as well as for identifying the employees to whom coverage must be offered, and for determining the amount of any assessable penalty.

A full-time employee is one who works on average at least 30 hours a week in a month. IRS guidance includes optional administrative safe-harbors for identifying full-time employees. These permit an employer to choose a measurement period of three to 12 months during which to measure their employees' hours of service, followed by a stability period during which those employees who worked on average 30 hours a week during the measurement period will be offered coverage. If the employer uses such a

safe harbor, no penalties will be assessed during the stability period even if an employee who would otherwise be considered to be full-time obtains a subsidy on an exchange. Strict rules apply to the application of these safe harbors; employers may not selectively use them on different groups of employees unless the group is within one of the authorized categories, which include salaried employees, hourly employees, union employees and non-bargaining employees, and employees in different states.

Hours of service for which an employee receives foreign-source income are not considered, so employees who do not receive US-source income are generally not deemed to be full-time employees, and are not required to be included in determining whether the employer meets the 95% test, nor be offered coverage. However, under certain safe-harbor methods, employers may identify full-time employees as those who work on average 30 hours a week during a measurement period and then treat those employees as full-time employees for the duration of a following stability period. In such a case, it may be possible that a US employee working 30 hours a week during a measurement period who goes on assignment abroad would still be treated as a full-time employee during the subsequent stability period. Under final regulations, special rules may apply to employees who transfer employment between domestic and foreign employers who are members of a controlled group so that inbound employees may be treated as new employees in some cases and outbound employees may be treated as terminated if the foreign position is expected to continue indefinitely. The global employer will need to track such employees to make sure it does not inadvertently trigger penalties for failure to offer coverage.

Employer mandate or pay or play penalties

Penalties apply if the employer fails to offer coverage to its full-time employees and their dependents, defined as children up to age 26, but not spouses. In order to give employers time to redesign plans where they currently offer self-only coverage to their employees, no penalty will be assessed during the 2015 plan year solely on account of a failure to offer coverage to dependents for that plan year, as long as steps are being taken to offer coverage to dependents.

The annual penalty imposed on an applicable large employer that fails to offer coverage to at least 95% of its full-time employees is $2,000 times the number of full-time employees (less 30, allocated across the controlled group), assessed monthly for any month in which coverage is not offered as required. Under a transition rule, the 30-employee exclusion is increased to 80 for 2015 only. Alternatively, if the coverage that is offered does not provide minimum value or is not affordable for any employee who then receives subsidized coverage on an exchange (established to assist individuals in meeting the individual mandate), the annual penalty is $3,000 for each such employee. This latter penalty is also assessed monthly.

The employer mandate and associated penalties were to be effective beginning on January 1, 2014, but they have been delayed a year until January 1, 2015. Related reporting to the US government and individuals for the 2015 year will be due early in 2016.

Reporting requirements

Applicable large employers are required to report to the IRS information about the health coverage they have offered employees as well as monthly information concerning each employee's coverage for themselves and their dependents, and to furnish related statements to employees. This reporting requirement will be effective with respect to coverage provided in 2015 with reporting first due early in 2016; compliance for 2014 is voluntary.

Applicable large employers are subject to the reporting requirements, whether they offer insured or self-insured coverage, or no health coverage at all. The reporting requirements apply to each member of an aggregated group. Each member with full-time employees is responsible for the IRS filing and furnishing statements with respect to its employees. A reporting entity may designate another entity, such as a third-party administrator or another member of its controlled group, to prepare the returns and statements with respect to its full-time employees. Whether an employee is a full-time employee is determined based on the IRS rules for the employer mandate penalties. Disregarded entities are subject to the reporting requirements.

The takeaway

What to do today

Employers and global mobility program professionals should begin to analyze these rules, which will become effective for most employers in 2015, and consider proactive actions with respect to needed process changes and potential penalties that could be on the horizon. Inbound companies in particular need to consider the numbers of employees with US source income they will have, and how and whether to offer health coverage to these employees and their dependents. Decisions must be made now about methods of counting hours of service and how to identify full-time employees for 2015, what to communicate to employees who may

be subject to the individual mandate, and designating the people to be responsible for compliance and reporting with respect to the employer mandate and associated excise taxes. Such decisions may be made in conjunction with benefit plan designand coverage decisions, perhaps including changes in the coverage that is offered to various categories of globally mobile employees in order to avoid potentially significant penalties.

The authors would like to thank Clyde McCarter.

Let's talk

For a deeper discussion of how this issue might affect your business, please contact:

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