United States: Consider the Affordable Care Act's impact on globally mobile employees

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In brief

The Patient Protection and Affordable Care Act, commonly called 'Obamacare' or the 'Affordable Care Act' (ACA), was signed into law on March 23, 2010 but many of its most significant provisions became effective on January 1, 2014. The ACA imposes new requirements and related penalties for both individuals and employers regarding health insurance coverage. But how does the ACA affect globally mobile employees, e.g., those on a long-term assignment to the US or abroad, or who frequently cross borders on business travel? When do the ACA requirements stop or begin for both the assignee and the employer?

This article provides broad highlights of some of the ACA requirements and penalties that could apply to globally mobile employees and their employers under guidance released so far. The details of the ACA requirements are complicated and evolving. Although not all guidance has been finalized, global mobility professionals should think about taking some proactive steps now to prepare.

This alert has been revised to include guidance that was released on February 10, 2014.

In detail

The ACA has changed the healthcare landscape in the US, affecting individuals, insurers and employers, as well as the US federal and state governments. While many of the ACA provisions became effective beginning in 2010, some of the most significant reforms are first effective in 2014. These include, for example, new public exchanges or marketplaces where individuals can shop for healthcare coverage and penalties on individuals who do not have health insurance. Penalties on employers who fail to offer health coverage are slated to take effect in 2015.

ACA requirements and penalties for individuals

Individuals must generally maintain health coverage (called 'minimum essential coverage' or MEC) under ACA. If not, they face a tax penalty payable upon 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.

The annual penalty for failure to have health insurance in 2014 will be $95/adult and $47.50/child, up to $285 per family or 1% of family income if greater. The penalty increases each year until 2016 when it will be $695/adult and 347.50/child, up to $2,085 per family or 2.5% of family income if greater.

The maximum penalty in any year will be the national average premium on the exchanges for a basic level health plan covering the family. Penalties are assessed monthly for each

month without coverage. However, the penalty will not be assessed for short coverage gaps of up to three months.

Foreign nationals working in the US

The individual mandate applies to US citizens and residents. It does not apply to nonresident aliens. Many foreign nationals on assignment in the US become residents for income tax purposes and therefore will be subject to the MEC requirement unless another exemption applies.

US resident assignees may satisfy the individual mandate if they are covered by an employer plan, as employer-sponsored coverage is generally deemed to be MEC. For this purpose, any self-insured coverage is MEC, as is insured coverage provided by a US insurer. Recent 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.

US citizens and residents living abroad

Generally, US citizens and residents (e.g., green card holders) living abroad are subject to the MEC requirement. However, a US citizen or resident 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 taxable 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 the MEC 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 beginning of the assignment, and for individuals who will be working abroad for shorter time periods.

The recent guidance mentioned above would also apply to US expatriates and US residents working abroad. Where the plan sponsor provides insured coverage for US persons 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 the ACA, 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'). Note that, for 2015 only, penalties will not be assessed if the employer offers coverage to at least 70% of its full-time employees.

Meaning of 'applicable large employer'

An applicable large employer is one with at least 50 full-time equivalent employees during the preceding calendar year. For this purpose, the hours of service of part-time employees are taken into account in determining the number of full-time equivalent employees.

The applicable large employer test 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 50-employee threshold is met. Only hours of service that relate to services for which the individual receives US-source income are counted, so a global employer will not take into account employees living and working outside the US who do not have US-source income.

Under a special transition rule for 2015, employers with between 50 and 99 full-time equivalent employees will not be treated as applicable large employers until 2016 provided certain conditions are met.

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-employee threshold, as well as for identifying the employees to whom coverage must be offered, and determining the amount of any assessable penalty. Under the ACA, a full-time employee is one who works at least 30 hours per week.

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 offered coverage, nor are they included in determining whether the employer meets the 95% test.

Under certain safe-harbor methods, employers may identify full-time employees as full-time for the duration of a following stability period. In such a case, it might 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. Alternatively, a short-term business traveler in the US, including a non-resident alien, who does not average at least 30 hours a week during the measurement period, would not be considered a full-time employee during the subsequent stability period.

The global employer will need to track the hours of such employees and decide upon an appropriate strategy that may include certain measurement and stability periods, so as to not inadvertently trigger penalties for failure to offer coverage. The final regulations include special rules for employees who transfer between a US entity and a foreign entity within the same global employer, to avoid penalties if certain conditions are met.

Employer mandate or 'pay or play' penalties

The annual penalty imposed upon an applicable large employer that fails to offer coverage to at least 95% of its full-time employees (70% for 2015) is $2,000 times the number of full-time employees (less 30), for any month in which coverage is not offered as required. 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, the penalty is 1/12 of $3,000 each month for each such employee, including any employee receiving subsidized coverage who is among the up to 5% of employees (or 30% in 2015) who were not offered coverage at all.

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, and as noted above, an additional year for employers with between 50 and 99 employees. Related reporting to the US government and individuals for the 2015 year will be due early in 2016.

Other requirements for group health plans and associated penalties

Group health coverage must meet certain additional standards in the US, including ACA benefit mandates such as covering children up to age 26 and providing first-dollar coverage for certain preventive care, including immunizations, contraceptives, mammograms and prostate exams. Other requirements include not imposing exclusions for pre-existing conditions or any annual or lifetime dollar limits on essential health benefits, utilizing new claims procedures, and complying with new reporting (to the government) and disclosure (to plan participants) obligations. Many of these requirements are already in effect. Requirements for US-based group health coverage that predate ACA include rules under HIPAA (privacy of health information), COBRA (continuation of coverage following certain qualifying events), and mental health parity.

Excise tax penalties are imposed on group health plans that fail to comply with any of these requirements. In addition, the ACA imposes certain additional fees on insured and self-insured plans, including the PCORI fee beginning in 2013 and the transitional reinsurance program fee first payable late in 2014.

Penalty delay for expatriate health plans

The US government has extended the time for certain expatriate health plans to meet the ACA benefit mandates to December 31, 2016, and has said such plans are deemed to be MEC. The term 'expatriate health plan' means an insured group health plan in which enrolment is limited to primary insured persons for whom there is a good faith expectation that such individuals will reside outside of their home country or outside of the United States for at least six months of a 12-month period, and any covered dependents.

The government acknowledged that expatriate health plans may face unique challenges in complying with certain aspects of the ACA. For example, expatriate health plans may require additional regulatory approvals from foreign governments, and in some circumstances, domestic and foreign law may even conflict. This transitional relief for expatriate health plans was granted so that the US government can determine what further actions may be appropriate.

The takeaway

There are many nuances to the treatment of globally mobile employees that will require further analysis in light of the ACA and the evolving guidance from US governmental agencies.

Despite the recent regulations' delay and phase in of penalties that could give employers some breathing room, global employers shouldn't underestimate the efforts that will be needed to implement required administrative and health plan changes necessary to comply.

Employers and global mobility program professionals should begin to analyze the requirements of the ACA and consider proactive actions with respect to needed process changes and potential penalties that could be on the horizon. These actions include:

- determining whether the employer is an applicable large employer
- identifying full-time employees using ACA rules

- identifying US citizens and US residents for ACA purposes, considering the effect of any applicable tax treaty tie breaker provisions and elections to be treated as residents, as well as the treatment of part-year residents
- taking an inventory of health plans offered to globally mobile employees and determining which plans will likely be subject to ACA requirements
- identifying and tracking employees within the current assignee population who may be subject to ACA mandates, as well as frequent business travelers who may not be part of a formal mobility program
- identifying the person, group, or groups within the organization to be responsible for ACA compliance and related tasks, such as reporting to the US government, communicating with assignees, and developing mobility policies. This will most likely involve connecting HR, Legal, and Tax teams.

Let's talk

For a deeper discussion of how this issue might affect your business, please contact your HRS or IAS engagement team or one of the following professionals:

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