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Employers Catch Some Unexpected Breaks On ACA Mandate

By **Jeff Overley**

Law360, New York (January 24, 2013, 5:26 PM ET) -- The federal government's outline of how it will enforce the health reform law's mandate that large employers provide medical benefits contains unexpected revisions likely to make compliance easier, attorneys say, including a grace period, badly needed flexibility for parent corporations and a favorable method for measuring affordability.

One of the most well-received policies in rulemaking published earlier this month provides leeway to companies with non-calendar-year health plans, exempting them from the mandate's coverage and affordability provisions until their plans come up for renewal, as opposed to having to comply beginning Jan. 1.

The extra latitude is being provided in response to employer complaints that "the terms and conditions of coverage are difficult to change in the middle of a plan year," the Internal Revenue Service and U.S. Treasury Department explained. Also, the methods of determining whether employees are full-time workers entitled to health insurance would be complicated for companies with fiscal year plans, requiring them to determine hours worked for periods before the proposed regulations came out, the agencies said.

Alden J. Bianchi, head of the employee benefits practice at Mintz Levin Cohn Ferris Glovsky & Popeo PC, told Law360 that forcing businesses with fiscal year plans to revisit their policies part-way through the year "would just be really unsettling."

But the grace period, which applies to companies that had plans in place no later than Dec. 27, was a concession the federal government was in no way obligated to offer, Bianchi added.

"It makes sense. It's the right thing to do. But the IRS didn't have to go there," Bianchi said.

Corporations also are cheering a provision stipulating that while regulators will look at an entire company, subsidiaries and all, when determining whether a business has more than 50 workers and must provide benefits, they'll look at individual units when determining whether coverage and affordability requirements have been achieved.

That's an important development for huge corporations with dozens or even hundreds of subsidiaries, shielding them from massive financial penalties if a handful of their units don't fulfill the mandate's requirements. Some experts had feared that if one subsidiary failed to comply, penalties of roughly \$2,000 per employee would be calculated on the basis of every staffer at the entire company. Instead, penalties will be based only on employees at the noncompliant subsidiary.

Looking at the entire company would "not necessarily [be] reflective of how [human resources] decisions are made," said Kurt Lawson, an employee benefits partner at Hogan Lovells.

One scenario that comes to mind "is if you have a small [subsidiary] whose benefit packages are determined at some remote level and they are somehow missed," Lawson said.

Kate Saracene, employee benefits counsel at Nixon Peabody LLP, said the approach accommodates not just parent companies with subsidiaries but also private equity firms with portfolio companies, franchise operations in which one individual owns multiple stores and health systems that operate multiple hospitals.

In addition to allowing for mistakes, the proposal would let large companies decide on a case-by-case basis whether it's a better business decision to satisfy the mandate or just pay a penalty, Saracene said.

"This is really great news for employers," she said. "This new rule means that employer groups can separately evaluate for each member company whether it makes more sense for that member company to pay or to play."

In a third area, some observers were stunned by the federal government's decision to require that large employers extend coverage not just to full-time employees, but also to dependent children younger than 26 years old.

Amy M. Gordon, an employee benefits partner at McDermott Will & Emery LLP, called the decision a "shocker" because "in the past, in group health coverage, employers were never required to provide coverage to anyone."

For companies that already offer dependent coverage, it's not going to be a "huge imposition," but companies that just barely meet the definition of large employer could find compliance more challenging, Gordon said.

At the same time, the dependent coverage won't be subject to the same affordability restrictions that apply to the employee's benefits, so businesses won't necessarily be required to shoulder much cost.

"There is a very large consumer lobby that wants affordability to be determined on the basis of family coverage, [but] that would drive costs through the roof for employers," Bianchi said.

Priscilla Ryan, an employee benefits partner at Sidley Austin LLP, said the approach of IRS and Treasury is sensible because the multitude of ways in which companies structure family plans would make it hard to devise a workable affordability standard that goes beyond coverage offered to the employee.

"It would have been very difficult to draft rules to measure affordability by including the cost of dependent coverage," Ryan said.

One wild card, however, is whether employees in the long run will resent their companies in the event that insuring children is prohibitively expensive. Lawson said they're unlikely to be upset initially, but that attitudes could change over time.

"I think in many cases employees will say, as coverage is extended to adult children, thank you, it's nice simply to be able to cover the child," Lawson said. "But it's unclear what expectations will develop."

The same rulemaking document also included a widely praised decision to relax the coverage mandate, requiring that large employers extend benefits to at least 95 percent of full-time workers instead of 100 percent.

"I think overall these rules are very employer-friendly," Bianchi said. "It doesn't mean they're going to be easy. [But] I think the IRS has smoothed out some rough edges in a very admirable way."

--Editing by John Quinn and Richard McVay.

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