Healthcare Reform And Seasonal Guest Workers

Insights
7.02.13

Many employers are eagerly watching the U.S. Congress as it debates comprehensive immigration reform legislation. However, employers of foreign workers need to be aware of another comprehensive reform already enacted—the Affordable Care Act ("ACA").

As discussed in a previous post, the U.S. Internal Revenue Service ("IRS") is currently in the process of finalizing its regulations implementing the ACA's "pay or play" employer obligations, or more commonly, the "Employer Mandate." The Employer Mandate, which becomes effective January 1, 2015*, generally requires "large" employers to offer their full-time employees (and their dependents) the opportunity to enroll in "minimum essential coverage" under an eligible employer-sponsored healthcare plan or face a tax penalty.

The definition of "full-time employee" is not limited to U.S. citizens. Rather, the primary determination for purposes of the Employer Mandate is based on hours worked by employees for U.S.-source income under the Internal Revenue Code. Thus, U.S. employers of foreign workers must take them into account for purposes of the Employer Mandate.

This can be particularly tricky for employers of temporary foreign workers, such as seasonal guest workers in the agricultural industry under the H-2A visa program. "Full-time employees" are employees who are employed on average 30 or more hours per week with respect to any month (or 130 hours of service in a calendar month), provided the compensation for those hours constitutes U.S.-source income. A seasonal worker may fall under the definition of "full-time employee," and thus may expose his or her employer to liability should that employer fail to offer requisite coverage.

An employer may ask how it is expected to determine whether a newly-arrived seasonal guest worker should be classified as a full-time employee given the variable nature and hours of the work and the fact that the workers are constantly in flux and often leave the country in-between seasons. The IRS's proposed regulations permit the use of "look-back" measurement periods for purposes of determining whether a seasonal worker satisfies the requirements to be considered a full-time employee. Under this "look-back" analysis, if a new seasonal worker has on average at least 30 hours of service per week during an initial measurement period, the employer must treat the employee as a full-time employee during the corresponding stability coverage period that begins after the initial measurement period has ended.

Agricultural guest workers are, by their very nature and legal status, temporary, seasonal workers. This makes the analysis much more difficult. Under the proposed regulations, employers may use up to year-long measurement and stability periods to determine full-time employee classifications. In so doing many, if not virtually all, guest workers will never remain employed by their employer for a full measurement or stability period. Even if the employer used shorter measurement and stability periods, many guest workers would still not remain employed for full periods.

Further complicating things is a "break in employment" provision, which lays out that a certain period must elapse before an employee may again be considered a "new employee" following a termination and re-hire or other resumption in service from an absence from that employer. The reasoning behind the provision is to attempt to prevent employers from manipulating the system by intentionally terminating and then rehiring employees for purposes of restarting waiting periods and measurement periods. However, for guest workers in the agricultural workers, breaks in employment are dictated by growing seasons, employer needs, and visa restrictions, not for purposes of evading the Employer Mandate.

A number of agricultural interests have requested clarification, delays in implementation, and various exemptions from the IRS regarding guest workers and the Employer Mandate, raising the difficult issues discussed above and many others. It remains to be seen if the IRS will address such concerns in its final regulations.

Meanwhile, comprehensive immigration reform legislation will also likely have implications for employers and the Employer Mandate. The bill that recently passed the Senate drastically alters the nation's immigration laws, including replacing the H-2A visas and instituting a new "non-immigrant agricultural worker" program. It also adds a "blue card" system for undocumented workers' path to citizenship. Some in the U.S. House of Representatives have declared the Senate's bill "dead on arrival." However, given current political realities, it is likely some form of a comprehensive overhaul of the U.S.'s immigration laws will ultimately pass this year.

As a result, employers of guest workers subject to the Employer Mandate should be watching both Congress and the IRS closely in the upcoming months. The Employer Mandate becomes effective in less than half a year, and clarification in this area is very much needed.

* On July 2, 2013, the Obama Administration issued guidance delaying the effective date of the Employer Mandate from January 1, 2014 to January 1, 2015.