



U.S. Healthcare Reform, Foreign Employers, And Employers Of Foreign Workers

Insights

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Since the landmark 2012 U.S. Supreme Court decision in *NFIB v. Sebelius*, largely upholding President Obama's Patient Protection and Affordable Care Act (the "ACA"), the U.S. government has been moving full-steam ahead on implementation of healthcare reform mandated by the ACA. The ACA places a number of new regulations, restrictions, and requirements on employers, including U.S. companies employing foreign workers, and potentially foreign companies, depending on various factors, including those outlined below in this article.

The U.S. Internal Revenue Service ("IRS") is currently in the process of finalizing its Proposed Regulations implementing an aspect of the ACA known as the "employer shared responsibility" obligations, or more commonly, the "Employer Mandate." Beginning on January 1, 2015*, the Employer Mandate generally requires "applicable 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 based on the number of full-time employees receiving government-subsidized healthcare coverage.

Foreign companies may be subject to the Employer Mandate if they employed an average of 50 or more "full-time employees" during the preceding calendar year. "Full-time employees" are employees who are employed on average 30 or more hours of service per week within respect to any month (or 130 hours of service in a calendar month), provided the compensation for those hours constitutes U.S.-source income under U.S. tax laws. Excluded from the calculus are hours of work performed by employees to the extent the compensation constitutes foreign-source income under U.S. tax laws.

Thus, the definition of "full-time employee" is not limited to U.S. citizens, nor are companies exempt from these determinations solely based on their foreign status. Rather, the primary determination for purposes of the Employer Mandate is based on hours worked by employees for U.S.-source compensation.

The intricacies of the Employer Mandate quickly add up. For example, there are special considerations for closely-related entities (e.g., parent and subsidiaries), successor companies, new companies, multi-employer healthcare plans, etc. Similarly, the Proposed Regulations provide specific methods to determine an employee's "full-time" status. The analysis for this determination

can quickly become complicated based on issues such as lengths of measuring periods to determine an employee's "full-time" status, breaks in employment, and whether or not employees are "full time equivalent" employees, new employees, or seasonal workers.

In addition, open questions remain regarding treatment of temporary guest workers such as seasonal H-2A agricultural guest workers, for purposes of the Employer Mandate. During the formal comment period for the Proposed Regulations, several comments were submitted seeking a complete exemption for temporary guest workers for purposes of the Employer Mandate, or at least from specific provisions (such as from a special rule regarding treatment in breaks of employment).

2014 is quickly approaching. Employers, both foreign and domestic, should pay close attention as the IRS finalizes its regulations implementing the Employer Mandate. The formal comment period for the Proposed Regulations closed March 18. A hearing for public comments is scheduled for April 23. Following the public hearing, the IRS will then issue final regulations implementing the Employer Mandate.

* 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.