

“OBAMACARE”: Strategies Employers Should Consider Adopting Now

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The implementation of the Affordable Care Act (ACA), sometimes referred to as “Obamacare,” is in process. The law’s provisions began rolling out in 2010 and most aspects will be fully implemented by 2014.

Perhaps the most anticipated and controversial part of ACA is the so-called individual mandate, also referred to as the “pay or play” provision. Under that provision, employers with over 50 employees, who fail to provide health benefits, will be penalized \$2,000 per employee. The 50 employee threshold is 50 full-time equivalent employees. Two part-time workers (who each work at least 15 hours/week) equal one full-time employee. Once the 50 employee threshold is met, the employer may be penalized for all uncovered employees beyond 30.

The pay-or-play aspect of ACA is prompting several employer strategies, many with the goal of avoiding penalties. These strategies are, ironically, an unintended consequence of ACA, whose goal is to create more employer-based health coverage for individuals. Because of the escalating costs of health care and health insurance, many employers are devising strategies to avoid covering employees, thus reducing overhead costs, while at the same time avoiding ACA’s penalties.

One strategy being used by employers who are at or near the threshold of 50 employees focuses on headcount. Employers can avoid penalties by reducing their workforce, or the number of full-time equivalent (FTE) employees. For example, if Company X has 55 full-time employees, it could avoid ACA by reducing its workforce by 6 employees, or making 12 employees part-time (i.e., 43 full-time plus 6 FTE’s), or doing a combination of the two.

Small businesses may also accomplish a workforce reduction without losing capacity by outsourcing job functions or using independent contractors instead of employees. Those using this strategy must ensure that purported independent contractors meet the IRS test for such. If employers misclassify a person as an independent contractor who is actually an employee, the employer would be penalized under IRS laws for failure to withhold and under ACA if the misclassified employee(s) put the employer over the 50 employee threshold. The IRS is increasing audits and enforcement of employers on the issue of independent contractors, so caution is in order.

A second strategy applies to larger employees who cannot, or choose not, to reduce their workforce below 50. While those employers have to insure full-time employees, they do not have to insure part-time or “seasonal” workers. Part-time employees typically work less than 30 hours per week. “Seasonal” workers work less than a specified number of hours during the

calendar year or other 12 month period. While the employer still has to provide health insurance to all full-time workers beyond 30 employees, it does not have to pay for seasonal or part-time employees, regardless of the number.

On December 28, 2012, the government issued little noticed regulations explaining how employers determine full-time, part-time or seasonal employees. Although this rule does not go into effect until early 2014, it provides that if an employer averages 50 or more employees during 2013, it will be subject to ACA's provisions, including penalties. Accordingly, how employers structure their workforce now could affect whether ACA applies to them in 2014. Many employers do not know the clock is ticking with regard to employee count.

A third strategy is for employers to calculate whether it costs them less to pay ACA's penalties than to provide employee health benefits. Some companies reportedly are choosing to pay rather than play.

Whether employers should adopt these strategies is a matter that social scientists and politicians can debate; such is above this writer's pay grade. Arguments can be made both ways, but employers who are struggling to stay competitive and solvent may choose to adopt strategies that take the sting out of Obamacare.