IS MY BUSINESS A "LARGE EMPLOYER" UNDER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT?

By Cheryl L. Mullin

Congratulations on your expansion! You've hit your development milestones. You've hit your revenue milestones. And you're now responsible for the happiness and well-being of fifty employees. What does that mean with respect to health care? This article discusses the legal obligations of a multi-unit business owner under the Patient Protection and Affordable Care Act ("PPACA").

What was the issue?

Since World War II, employer-sponsored insurance has been the leading source of health insurance in the United States, covering about 159 million nonelderly people.[1]

From 1999 to 2011, however, increases in average health insurance premiums and workers' contributions to health care premiums significantly outpaced increases in both workers' wages and inflation:

- Workers' contributions to health insurance premiums increased 168%
- Health insurance premiums increased 160%
- Workers' earnings increased 50%
- Overall inflation increased 38%[2]

This affected employers' (particularly smaller firms') ability to offer coverage, and both employers' and employees' ability and willingness to participate in the cost:

What is the PPACA?

The PPACA is federal legislation focused on reducing the uninsured population and decreasing health care costs. Among other things, it:

- Requires most U.S. citizens and legal residents to have health insurance,
- Creates state-based health benefit "Exchanges" through which individuals can purchase coverage,
- Creates separate Exchanges through which small businesses can purchase coverage
- Requires employers to pay penalties for employees who receive tax credits for health insurance through an Exchange, with exceptions for small employers,
- Imposes new regulations on health plans in the Exchanges and in the individual and small group markets, and
- Expands Medicaid to 133% of the federal poverty level.

Focus on Health Reform, Summary of the Affordable Care Act, The Henry J. Kaiser Family Foundation available at https://kaiserfamilyfoundation.files.wordpress.com/2011/04/8061-021.pdf.

How does this affect large employers?

Large employers are expected to offer affordable health care to its employees; a large employer will be liable for an "Employer Shared Responsibility payment" if:

- The employer does not offer health coverage or offers coverage to fewer than 95% of its full-time employees and the dependents of those employees, and at least one of the full-time employees receives a premium tax credit to help pay for coverage on an Exchange, or
- The employer offers health coverage to all or at least 95% of its full-time employees, but at least one full-time employee receives a premium tax credit to help pay for coverage on an Exchange,

which may occur because the employer did not offer coverage to that employee or because the coverage the employer offered that employee was either unaffordable or did not provide minimum value. If an employee's share of the premium for employer-provided coverage would cost the employee more than 9.5% of that employee's annual household income, the coverage is not considered affordable for that employee. A plan provides minimum value if it covers at least 60 percent of the total allowed cost of benefits that are expected to be incurred under the plan.

What is a "large employer"?

A "large employer" is an employer with more than 50 full-time equivalent employees during the preceding calendar year. In order to determine whether an employer is a "large employer," both full-time and part-time employees are included in the calculation. "Full-time employees" are those working 30 or more hours per week.

[Author's Note – On January 8, 2015, the House of Representatives passed a bill that would define a full-time worker as one who works 40 hours a week, rather than 30 hours. There is companion legislation in the Senate that also is expected to pass. President Obama opposes the legislation.]

The number of full-time employees excludes those full-time seasonal employees who work for less than 120 days during the year. The hours worked by part-time employees (i.e., those working less than 30 hours per week) are included in the calculation of a large employer, on a monthly basis, by taking their total number of monthly hours worked divided by 120.

Am I a "large employer" if my businesses are owned through multiple entities?

Maybe. It depends on the number of common owners and the percentage of common ownership.

For purposes of the PPACA, you look first to IRS rules on "controlled group of corporations." IRC §414(b) defines these as: the parent-subsidiary controlled group (generally, corporations with a common parent possessing at least 80 percent of the stock, by vote or value), the brother-sister controlled group (corporations with common ownership), and the combined group (combination of the above).

IRC §414(c) extends the principle to non-incorporated associations (such as partnerships), stating that that, for certain tax purposes, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer.

IRC §414(m) defines the affiliated service group (basically, a group of businesses (basically, a group of businesses working together to provide services to each other or jointly to customers).

Tell me more about the brother-sister controlled group…

A brother-sister controlled group is a group of two or more corporations, in which (1) five or fewer common owners (a common owner must be an individual, a trust, or an estate) own directly or indirectly a controlling interest in each group and (2) have "effective control." Thus, it employs a two-part test, using the following definitions:

- Controlling interest – 1.414(c)-2(b)(2) – generally means 80 percent or more of the stock of each corporation (but only if such common owner own stock in each corporation); and
- Effective control – 1.414(c)-2(c)(2) – generally more than 50 percent of the stock of each corporation, but only to the extent such stock ownership is identical with respect to such corporation.

The IRS provides the following example of the brother-sister two-part ownership test:

Adams and Bell Corp are owned by four shareholders, in the following percentages:

Step One – Percentage of Ownership Test

Shareholder	Adams Corp	Bell Corp
A	80%	20%
B	10%	50%
C	5%	15%
D	5%	15%
TOTAL	100%	100%

To meet the first part of the test, the same five or fewer common owners must own more than 80% of the stock or some interest in all members of the controlled group.

In this example, the four shareholders together own 80% or more of the stock of each corporation, the first test is met, since the shareholders own 100% of the stock.

Step Two – 50% Ownership Test

Shareholder	Adams Corp	Bell Corp	Identical Ownership Percentage in both Corporations
A	80%	20%	20%
B	10%	50%	10%
C	5%	15%	5%
D	5%	15%	5%
TOTAL	100%	100%	40%

To meet the second part of the test, the same five or fewer common owners (i.e., the control group) must own more than 50% of each corporation, taking into account the stock ownership of each person only to the extent such stock ownership is identical with respect to each such corporation.

In this example, although the four shareholders together own 80% or more of the stock of each corporation, they do not own more than 50% of the stock of each corporation, taking into account only the identical ownership pin each corporation as demonstrated above.

In determining who "owns" an interest, IRS attribution rules apply. "Attribution" is the concept of treating a person as owning an interest in a business that is not actually owned by that person." Attribution may result from family or business relationships. Under IRC §1563, ownership interests of a spouse are attributed to the other spouse (with limited exceptions), ownership interests of minor children are attributed to the parent, ownership interests of a parent are attributed to a minor child, and in some instances, ownership interests of parents and grandparents are attributed to adult and minor children and vice versa. Partnership and corporate ownership interests are attributed proportionately to owners of more than 5 percent of the interest or stock.

Conclusion

Whether or not businesses are sufficiently related to each other be considered a single employer requires a fact-based analysis. While businesses operated through separate entities most likely will be considered a single employer for purposes of PPACA, joint ventures with different ownership will be respected as separate entities.

Mullin Russ Kilejian is a full service commercial law firm founded in 2003. The firm is nationally recognized in the area of franchise law, and provides legal services in the areas of corporate, tax, employment, trademark, technology, and commercial litigation.

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[1]Justin Ford Kimball, a Baylor University administrator, is credited with organizing the first hospital prepayment plan for Dallas teachers in 1929 which was the pre-cursor to Blue Cross. Later, the Stabilization Act of 1942 directed President Roosevelt to freeze wages and salaries in an effort to thwart post-war inflation. Consequently, employers began offering a range of fringe benefits, such as pensions, medical insurance, and paid holidays and vacations to attract and retain talent. These were not cash payments and, therefore, did not violate the wage ceiling. This is how employer-sponsored insurance and other fringe benefits became ingrained in American society and the U.S. economy.

[2] Kaiser/HRET Survey of Employer-Sponsored Health Benefits 1999-2011. Bureau of Labor Statistics, Consumer Price Index, U.S. City Average of Annual Inflation (April to April), 1999-2011; Bureau of Labor Statistics, Seasonally Adjusted Data from the Current Employment Statistics Survey, 1999-2011 (April to April).