Employee Benefits Series

5 Most Common ACA Mistakes and How to Avoid Them

Marshall & Sterling
GROUP BENEFITS

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MISTAKE #1

Paying for Employees' Individual Health Insurance Policy Premiums

Arrangements under which an employer uses its funds to directly pay the premium for an individual health insurance policy covering an employee—or reimburses an employee for some or all of the premium expenses incurred for an individual health insurance policy—are **employer payment plans**.

Regardless of whether the employer treats the money as pre-tax or post-tax to the employee, employer payment plans are generally considered group health plans that **do not comply** with the Affordable Care Act (ACA). Such arrangements may be subject to a **$100 per day** excise tax per applicable employee (which is $36,500 per year, per employee) under the federal tax code.

How to Avoid: Increasing an employee's compensation, without conditioning the payment of the additional compensation on the purchase of health coverage (or otherwise endorsing a particular policy, form, or issuer of health insurance), is generally **not** considered an employer payment plan and is therefore permissible. Due to the potential for significant penalties and the complexity of the law in this area, employers with a cash (or payroll practice) option are strongly advised to consult knowledgeable benefits counsel to ensure full compliance with the law.

MISTAKE #2

Assuming All Employers Are Required to Offer Health Insurance

The law does not penalize small employers that do not offer coverage to their employees. **Only** applicable large employers (ALEs)—generally those with **at least 50 full-time employees**, including full-time equivalent employees (FTEs), in the preceding calendar year—may be liable for a "pay or play" penalty if they do not offer affordable health insurance that provides a minimum level of coverage to full-time employees and their dependents.

(As a reminder, transition relief delayed compliance with the "pay or play" requirements until 2016 for ALEs with 50 to 99 full-time employees (including FTEs) that certified that they met certain eligibility criteria. For ALEs with non-calendar year health plans, this transition relief continues to apply for any calendar month during the 2015 plan year that falls in 2016.)

How to Avoid: Employers should carefully calculate their average number of full-time employees and FTEs across the months in each calendar year to determine ALE status for the next year. In general, an employee is full-time for a calendar month if he or she averages at least 30 hours of service per week (or 130 hours for the month). The number of FTEs for each calendar month is determined by calculating the total number of hours of service for that month for all employees who were not full-time (but not more than 120 hours of service for any employee) and dividing that number by 120. Special counting rules apply for seasonal workers.

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MISTAKE #3

Not Considering Common Ownership When Determining Applicable Large Employer Status

Applicable large employers (ALEs) are generally those with **at least 50 full-time employees**, including full-time equivalent employees (FTEs), in the preceding calendar year. Companies that have a common owner or are otherwise related generally are combined and treated as a single employer for purposes of determining ALE status. If the combined total meets the threshold, then each separate company (called an ALE member) is part of an ALE and is subject to "pay or play" and the corresponding ACA employer information reporting provisions —even those companies that individually do not employ enough employees to meet the ALE threshold.

Note: The rules for combining related employers do not apply for purposes of determining whether a particular company owes a "pay or play" penalty or the amount of any penalty (that is determined separately for each ALE member). Similarly, the employer information reporting requirements are applied separately to each ALE member comprising the ALE. Each ALE member is liable for its own information reporting, and is not liable for the information reporting of any other entity in the controlled group comprising the ALE.

How to Avoid: When counting full-time employees and FTEs to determine ALE status, employers must consider their affiliation with other related companies. Determining whether the combined employer rules apply to a particular company for purposes of "pay or play" and the employer information reporting requirements is very complex, and employers are strongly advised to consult knowledgeable benefits counsel to ensure full compliance with the law.

MISTAKE #4

Assuming Employers Must Offer the Same Coverage to All Employees

Under current law, distinctions among groups of similarly situated employees may be permitted if they are based on bona fide employment-based classifications consistent with the employer's usual business practice—for example, full- and part-time employees. Classifications cannot be based on health factors or protected classes such as age, sex, disability, or genetic information.

The IRS has delayed the requirement in the ACA that fully insured group plans comply with rules "similar" to the rules prohibiting discrimination in favor of highly compensated individuals (currently applicable to self-insured plans). However, health benefits offered as part of a cafeteria plan (a plan which meets specific requirements to allow employees to receive certain benefits on a pre-tax basis) generally will be subject to the nondiscrimination requirements of Internal Revenue Code section 125 related to highly compensated participants and key employees.

How to Avoid: Ensure that similarly situated individuals are treated equally. Also, confirm that health benefits offered as part of a cafeteria plan satisfy the section 125 nondiscrimination requirements.

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MISTAKE #5

Thinking Only Large Employers Need to Comply With ACA Information Reporting Requirements

There are two types of reporting entities subject to the ACA information reporting requirements:

- **Forms 1094-C and 1095-C Reporting Entities**: Applicable large employers (ALEs)—generally those with **50 or more full-time employees,** including full-time equivalent employees (FTEs), in the preceding calendar year—are required to report information to the IRS and to their full-time employees about their compliance with "pay or play" and the health care coverage they have offered using Forms 1094-C and 1095-C.
- **Forms 1094-B and 1095-B Reporting Entities**: Non-ALE self-insuring employers that provide **minimum essential health coverage** are required to report information on this coverage to the IRS and to covered individuals using Forms 1094-B and 1095-B. (Self-insuring employers that are ALEs will satisfy their reporting obligations using Forms 1094-C and 1095-C.)

ALEs with **fewer than 100 full-time employees** (including FTEs) that qualified for transition relief from the "pay or play" provisions in 2015 (and, for employers with non-calendar plan years, for the months in 2016 that are part of the 2015 plan year) **are still subject** to the Forms 1094-C and 1095-C reporting requirements for the 2015 calendar year and beyond with respect to their full-time employees. As part of the "pay or play" transition relief, such employers were required to certify on their 2015 transmittal Forms 1094-C that they met the applicable eligibility criteria.

How to Avoid: All employers should determine if they are a reporting entity (and what type) to understand which forms must be filed and furnished.

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