Employer mandate delay: Key considerations for employers

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As large employers were less than six months away from the January 1, 2014, *play or pay* requirements under the Patient Protection and Affordable Care Act (ACA), the federal government made a surprise announcement just before the July 4 holiday. On July 2, the Assistant Secretary for Tax Policy at the U.S. Treasury announced[1] that full implementation of Sections 6055 and 6056 of the ACA would be delayed until 2015. As these sections of the ACA are necessary to collect information on an employer's offer of minimum essential coverage to enforce the employer mandate, the suspension of Section 4980H penalties for large applicable employers (employers with 50 or more full-time equivalent employees) was also announced. Formal guidance from the IRS on the delay of Sections 6055 and 6056 and the suspension of Section 4980H penalties[2] was released on July 9.[3] The Assistant Secretary and IRS guidance indicate that the transition relief "will provide additional time for input from employers and other reporting entities in an effort to simplify information reporting consistent with effective implementation of the law."

This healthcare reform briefing explores the potential implications of the suspension of the Section 4980H penalties to employers. Additionally, key immediate healthcare reform considerations for employers outside of the Section 4980H penalties are discussed.

IMPACTS FROM THE EMPLOYER MANDATE DELAY

Penalties: How big is the compliance hurdle for employers?

From our experience providing the Milliman healthcare reform strategic impact study to several hundred employers across the nation, meeting the compliance standards to avoid penalties under Section 4980H may require making new classes of employees eligible for coverage or reconsidering employee contributions for coverage. The failure to make these changes could result in significant penalties. However, these plan adjustments are generally not a huge financial burden to an employer.

While many employers are unlikely to have major ACA compliance issues, ACA compliance costs for employers do not fit into a *one-size fits all* box. There are certainly cases, such as in staffing, retail, and service companies, where the potential cost of penalties may be even greater than the cost of offering minimum essential coverage that is affordable and meets the 60% actuarial value requirement. Many of these employers are currently not offering comprehensive health insurance benefits to the majority of full-time employees. These employers were likely facing substantial increases in healthcare cost due to the employer mandate. It is likely that these employers were in the process of one or more of the following actions:

- Redefining health plan eligibility to be compliant with the ACA
- Tracking monthly hours of employees classified as *variable* or *seasonal* employees
- Potentially managing the percentage of the workforce working 30 or more hours per week to reduce the number of employees that would be considered full-time under the ACA rules
- Considering major plan design changes to mitigate estimated cost increases under the ACA

The delay in the Section 4980H penalties will allow these employers to not make wholesale changes to their group health plans until

THE INDIVIDUAL MANDATE AND EMPLOYER MANDATE DELAY

Some have questioned whether the individual mandate should be delayed, given the employer mandate delay. However, the employer mandate delay does not change an employee's eligibility for Medicaid or the premium subsidies in the insurance exchanges. To the extent an employer fails to offer minimum essential coverage, offers coverage that does not meet the minimum value standard or that is unaffordable to the employee, and to the extent that the employee's spouse also does not have an offer of qualified[6] employer coverage (affordable and meeting minimum value), the employee's household will be eligible for the exchange premium subsidy tax credit in 2014 (and beyond), subject to qualifying income. The ACA will treat employees who do not have access to employer-sponsored coverage because of the mandate delay in 2014 in an identical manner to employees without access to qualified employer coverage after 2014.

1 Mazur, Mark J. (July 2, 2013). Treasury Notes: Continuing to Implement the ACA in a Careful, Thoughtful Manner. U.S. Department of the Treasury. Retrieved July 10, 2013, from http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner-.aspx.

2 Please see page 3 for overview of ACA requirements under Sections 6055 and 6056 and Section 4980H penalties.

3 Johnson, K. Notice 2013-45: Transition Relief for 2014 Under §§ 6055 (§ 6055 Information Reporting), 6056 (§ 6056 Information Reporting) and 4980H (Employer Shared Responsibility Provisions). IRS Office of Associate Chief Counsel, Tax Exempt & Government Entities. Retrieved July 17, 2013, from http://benefitslink.com/src/irs/notice2013-45.pdf.

calendar-year 2015, if desired. However, some management or plan design changes may have already started implementation and cannot be delayed or reversed.

Penalties: A risk-free chance to terminate coverage in 2014?

From a purely financial viewpoint, it may be advantageous for an employer to terminate coverage in 2014 without penalty, but it may create significant administrative and employee retention issues. For the majority of employers, terminating coverage even in the event of the permanent removal of the employer *play or pay* penalties is undesirable because of unfavorable employee impacts.

Additionally, while open enrollment in the exchanges is scheduled to begin on October 1, there may be hiccups with exchange enrollment processes and other administrative functions that frustrate employees who formerly had a well-managed group health plan. Some employers who would benefit financially from terminating coverage (even with penalties), along with having employees who would qualify for generous subsidies in the exchanges, may not consider terminating coverage in 2014 because of the uncertainty surrounding the exchanges.

Preparing for 2014: What does an employer still need to consider?

The delay in employer reporting requirements and Section 4980H penalties may give a false impression that employers will not be impacted by the ACA in 2014. However, there are several ACA requirements that must be met this fall or in 2014 that may impact plan costs, employee communication strategies, and benefit designs, including:

- The removal of plan annual limits
- Caps on out-of-pocket maximums for non-grandfathered plans
- The transitional reinsurance fee (estimated at $5.25 per member per month)
- Maximum 90-day waiting period
- Potential cost increases from the health insurer assessment
- Adjusted community rating for small employers

Failure to comply with group health plan requirements may result in penalties under Section 4980D. The following paragraphs provide additional discussion around several major issues for employers to consider in the upcoming months.

In 2014, out-of-pocket maximums cannot exceed $6,350 for single coverage or $12,700 for family coverage for non-grandfathered plans. Additionally, annual limits cannot be imposed on essential health benefits. If a plan design with a first-dollar deductible of $6,350 is entered into the Center for Consumer Information and Insurance Oversight (CCIIO) minimum value calculator,[4] an actuarial value of 60% is indicated. Therefore, unless a non-grandfathered employer offers a *skinny plan* (which may not cover a large number of essential health benefits), offering a plan below 60% actuarial value may be difficult in 2014. In a roundabout way, most non-grandfathered plans that intend to offer health coverage in 2014 may have to meet the minimum value rule (60% actuarial value).

Under Section 1512 of the ACA, employers are required to provide an *exchange notice* to existing employees by October 1, 2013. The exchange notice requires the employer to inform employees of the existence of an exchange, whether or not the employer provides a minimum value plan, and that employees who no longer make a contribution to a sponsored group health plan will have additional taxable wages. As part of the model language provided by the U.S. Department of Labor, employers are requested to complete the *Employer Reporting Coverage Tool*, which requests information about whether the employer's plan meets the minimum value standard and the employee contribution for self-only coverage. It should be noted that, while sending the exchange notice is not optional, the Department of Labor indicates completing the coverage tool information is optional. We will not speculate on how this may impact an exchange's ability to verify whether or not an applicant has qualified employer-sponsored coverage.

For employers with variable hour or seasonal employees, tracking monthly work hours should have started prior to the announcement of the employer mandate delay. Employers who have variable hour or seasonal employees and have not started tracking employee hours should start immediately. Employers with these tracking systems functioning in 2014 will be able to test reporting functions that will be required in 2015. Additionally, beginning a measurement period for variable hour or seasonal employees in October 2013 will allow for a 12-month measurement period and a 90-day administrative period to be applied in the determination of whether employees qualify as full-time on January 1, 2015. Employing the maximum length measurement period may reduce the number of employees that will be considered full-time on January 1, 2015, which would be due to regular employee turnover.

Employers that negotiate multiyear group benefit contracts with employees or unions that begin in 2014 will likely need to ensure that the benefit contract is ACA-compliant throughout the length of the contract, even if the Section 4980H penalties do not apply in 2014, unless plan changes can be made prior to 2015. For contracts that may extend through 2018, particular consideration should be given to the potential impact of the excise tax on high-cost *Cadillac* plans.

Prior to the July 2 announcement, transition rules were put in place for employers that did not have calendar-year plans. For these employers, compliance with the employer responsibility requirements

4 Centers for Medicare and Medicaid Services (April 11, 2013). Minimum Value Calculator. CMS-9980-F: Standards Related to Essential Health Benefits, Actuarial Value, and Accreditation. Retrieved July 10, 2013, from http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/mv-calculator-final-4-11-2013.xlsm.

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PENALTY OVERVIEW FOR SECTIONS 6055, 6056, 4980H, AND 4980D

Sections 6055 and 6056 are intended to be used to determine if an employer was subject to any penalties under Section 4980H. Assuming an employer had at least one employee qualifying for a premium tax credit in the exchange, Section 4980H(a) would assess a $2,000 penalty for each full-time employee in 2014 (less a 30-employee exemption) if a large employer did not offer minimum essential coverage to at least 95% of its full-time employees. Section 4980H(b) would assess a $3,000 penalty in 2014 for each full-time employee who received a premium subsidy tax credit in the insurance exchange. Section 6055 requires an employer maintaining a group health plan to report the following information:

- Identification information (name, address, employer identification number)
- Employees and dependents receiving minimum essential coverage under the plan during the calendar year
- For each covered employee, the dates for which an employee was covered under the plan
- The portion of plan premium paid by the employer
- Other information as may be required by the Department of Labor

Under Section 6055, this information for the reporting year must be furnished to the appropriate government agency by January 31 of the following year.

Section 6056 requires that applicable large employers report the following information:

- Identification information (name, address, employer identification number)
- Certification of whether the employer offers full-time employees and dependents the opportunity to enroll in minimum essential coverage
- Length of any enrollment waiting period
- Months for which coverage was made available
- Monthly premium for the lowest-cost option under each enrollment category
- Actuarial value of the plan
- Number of full-time employees for each month during the calendar year
- Employees and dependents who were enrolled in coverage in a given month
- Other information as may be required by the Department of Labor

Section 4980D enforces penalties for noncompliance with Code Chapter 100 group health plan requirements, which include the 90-day waiting period limit, cost-sharing limits, coverage of essential health benefits, and other provisions mandated by the ACA. The penalty for noncompliance is generally $100 per day per affected individual. Employers are required to self-report compliance failures using Form 8928.

was not necessary until the first day of the plan year beginning in 2014. However, it is unclear whether these transition rules will be pushed forward to 2015. Employers with non-calendar-year plans may still need to make plan adjustments beginning in 2014 to maintain compliance on January 1, 2015. Future guidance on this issue should be tracked closely.

For small employers, 2014 will introduce adjusted community rating to the fully insured group market. Insurers will only be allowed to rate small groups on the basis of member age (limited to a 3:1 age ratio), tobacco usage, and geography. Currently, most states allow underwriting that permits rating by group health status. Insurers and benefit advisors in the small group market should prepare groups for significant premium rate changes in 2014 with the introduction of adjusted community rating to the market. While much attention has been given to the *rate shock* or *rate joy* phenomenon in the individual market, premium rate volatility may also have a significant impact in the small group market.[5]

CONCLUSIONS

While the employer mandate delay gives employers another year, they cannot afford to be complacent. Certain immediate actions are required for 2014. An employer sponsoring a group health plan that chooses to delay planning for 12 months may fail to offer a compliant group health plan, resulting in penalties under Section 4980D. Even without the Section 4980H employer penalties, some employers may experience cost increases materially above normal healthcare trend from the aggregate effect of ACA cost drivers. On the communications front, employers should be prepared for a wave of questions related to healthcare reform from employees this fall. Additionally, proposed regulations on the employer reporting requirements are scheduled to be released later this summer, which should provide employers the ability to test reporting systems for calendar-year 2014 coverage. Other changes to ACA employer regulations should be carefully monitored during this transition period.

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5 Please see http://center-forward.org/wp-content/uploads/2013/05/AFA-Centerforward-Leave-Behind.pdf for more information on potential small group rate volatility based on Milliman research.

6 Qualified coverage must have an actuarial value of at least 60%. The cost of self-only coverage of the lowest-cost plan that is at least 60% actuarial value cannot exceed 9.5% of an employee's household income.