<u>THE AFFORDABLE CARE ACT – RAMIFICATIONS FOR EMPLOYERS OF SEASONAL WORKERS</u>

Who Is a Full-Time Employee?

We've all heard the stories – both pro and con – as to President Obama's primary push for universal and affordable health care. The Patient Protection and Affordable Care Act ("ACA") was signed into law on March 23, 2010. Certain provisions became effective almost immediately, while others, including employer requirements, have taken time to be phased in. It was scheduled to be fully active on January 1, 2014; but due to its complexity, numerous delays allowed the IRS, state exchanges, and employers to work through various "kinks"; certain requirements pertaining to employer responsibilities will not go into effect until January, 2015.

From an insured's standpoint (or those who could not obtain coverage), the ACA provides important changes in how insurance companies provide health coverage. For instance, insurance companies can no longer create lifetime or annual limits. There is now a prohibition on rescission of coverage, and an insurer cannot exclude coverage based upon an insured's preexisting condition or other health status.

In addition, the ACA creates a uniform standard for explaining coverage documents and definitions and requires an appeals process should claims be denied for any reason.

But, of course, the ACA goes much deeper. The primary thrust of the Act requires that affordable coverage be offered to each and every American. This occurs either through State or Federal insurance exchanges or, through an individual's employer. The latter depends upon several factors.

In its simplest form, the ACA requires large employers (any business entity with 50 or more full time employees) to offer affordable health insurance coverage to its full time employees. If such an employer fails to offer affordable coverage to its full time employees, then the employer may face penalties for the specific period, upwards of $2,000.00 per employee.

This law begs the question, then … <u>Who is a full-time employee?</u>

A full time employee is defined by the Internal Revenue Service ("IRS") as an employee who generally works at least 30 hours/week. For most of us, a full-time employee is one who works 9-5, Monday through Friday – 35+ hours/week. 7-8 hour days are the norm for most administrative and executive positions and/or those who are exempt such as professionals.

But how is this computed for seasonal workers or temporary workers? How is this computed for those who may work 30+ hours / week for 3-4 months, but who then stop working for a period before finding new work with the same company?

The IRS has come out with multiple clarification publications over the past 2 years in an effort to better explain the system to employers. It is important to understand that the Act places the onus on the employer to confirm whether his employee is deemed full time or part-time. Thus, the following is not mandated by the IRS; it is simply one method that the IRS recommends to properly make the determination.

A “variable hour” employee is one in which, based on the facts and circumstances at the date the employee begins providing services to the employer, it cannot be determined whether the employee is reasonably expected to work on average at least 30 hours per week. The most common example is a seasonal or temporary employee who works for several weeks, but then is ‘laid off’ until there is a further need for that particular employee’s services.

Under the look-back / stability period safe harbor method, an employer would determine each employee’s full-time status by looking back at a defined period of not less than three nor more than 12 consecutive calendar months. This “look-back” period may be determined by the employer and can be the calendar year (Jan-Dec) or any period in-between. It may even be created between months (March 15 – March 14th). If the employee were determined to be a full-time employee during the measurement period, then the employee would be treated as a full-time employee during the subsequent “stability” period. A “stability” period is a period of time not less than six consecutive months following the measurement period. Employers may also create what is known as an administrative period of not more than 90 days (3 months) to occur after the measurement period, but before the stability period takes effect. This administrative period may be required for the employer to determine who is qualified and to allow time to offer coverage and obtain employee enrollment in the plan.

If an employee were not determined to be a full time employee during the “measurement” period, then that employee would not be considered full-time over the next stability period, though a re-determination may occur when the stability period ends. At that time, the same “look-back” calculations would take place for the prior measurement period. If, at that time, the employee were deemed to be full-time, then the employee would be considered a full-time employee at the next stability period’s start.

In addition, an employer may administer differing measurement periods and stability periods, with respect to the following categories of employees: (1) collective bargained employees and noncollectively bargained employees; (2) salaried employees and hourly employees; (3) employees of different entities; and (4) employees located in different states.

An employer of seasonal or “variable hour” employees may create for each new hire, an initial measurement period of between 3-12 months; however, the stability period for such employees must be the same length as the stability period in effect for the employer’s on-going employees.

Once an employee has worked full-time for at least one standard measurement period, that employee is deemed an “on-going” employee. If a new hire, then, is considered variable at time of hire, the employer has the ability to place the employee into a measurement period of not less than three nor more than 12 months. Also, an employee’s probationary period may subject the employee to longer waiting times before being offered coverage.

This is important: If the employer does not offer coverage to any employee during the first three months (maximum allowed) of employment, the standard measurement period would begin on the first day of the fourth month, and then could continue for a set term to determine whether that “new” hire is deemed a full-time employee.

The foregoing is simply one “safe-harbor” method recommended by the IRS for employers to determine whether an employee is to be deemed full-time under the Act. The foregoing summary shows that employers must be diligent in the administrative side of offering health care coverage to their employees, and to create a systematic scheme that provides a firm-wide objective standard as to whether an employee is deemed full-time or not. If the IRS deems a part time employee, full-time, the financial implications could be enormous.

Abe G. Salen is a senior associate with The Wolf Firm, A law corporation, and has over 18 years of experience assisting clients with all facets of business and real estate legal matters. Mr. Salen has served as corporate counsel for businesses in various sectors, counseling such clients on day-to-day legal compliance issues. Mr. Salen represents many financial services entities in litigation throughout the State of California. Mr. Salen is admitted to appear before all courts in the State of California, as well as all US District Courts in California, and has represented clients from initiation through post-verdict appeal.