Employers Must Take a Multipronged Approach to ACA Compliance

James P. Anelli

At 2,409 pages when passed by Congress in 2010, the Patient Protection and Affordable Care Act (PPACA, also referred to as the Affordable Care Act, or ACA) is one of the broadest statutory enactments of the past 50 years. Although multiple government agencies—including the IRS, the US Department of Labor, the US Department of Health and Human Services, and the US Treasury Department, to name a few—are already actively overseeing various aspects of the ACA, it is nonetheless true that the country is still in the initial stages of this process. To call it a dynamic process, moreover, would be quite an understatement; as enacted by Congress, huge sections of the ACA are taking shape through regulatory guidances and legislative rulemaking rather than by set statute. As a result, federal agencies continue to issue new regulatory decrees regarding the dos and don'ts of ACA implementation on a monthly, if not a weekly, basis.

Under the heading “ACA Regulations and Guidance,” the Department of Labor’s website offers a long list of informational links—21 at last count—with technical-sounding titles such as “Affordable Care Act Nondiscrimination Provisions Applicable to Insured Group Health Plans,” “Automatic Enrollment, Employer Shared Responsibility and Waiting Periods,” and “Value-Based Insurance Design in Connection with Preventive Care Benefits.” For employers, staying abreast of these complex and rapidly evolving regulations is a critical, albeit daunting, task. A particularly challenging aspect of this is the tendency for information already released in prior guidances to change based on public commentary and other factors. Indeed, this has already occurred several times in 2013 and is likely to happen repeatedly as the regulatory framework grows and evolves.

HIGH STAKES FOR EMPLOYERS

Precision vis-à-vis compliance is critical as well, given the high stakes involved. ACA-regulated employers face not only the threat of fines from federal agencies, but also the constant threat of lawsuits from opportunistic plaintiffs’ attorneys who are keen on exploiting companies’ missteps with regard to ACA compliance. An example of companies’ missteps is slashing the number of full-time employees on the payroll to avoid the headaches and expense associated with the ACA, hoping such moves go unchallenged.

Although the exact response of regulatory agencies to this is still an open question, it is virtually a given that plaintiffs’ attorneys will be keen on putting together class actions in which groups of employees say, essentially, “You cheated us out of our health-care coverage by unfairly reducing our hours; we deserve restitution.” Break or even bend one of the many ACA rules, in other words, and
the company stands a chance of getting sued, whether by the government or by one or more plaintiffs’ firms.

It should be noted, moreover, that the need for precise ACA compliance is not something that should be considered a future task. Although the employer responsibility component kicks into gear on January 1, 2014, employers should already be well under way with initial execution of their ACA compliance plans. Indeed, parts of the act beg immediate action.

WHAT COMPANIES ARE AFFECTED

When it comes to the types and sizes of employers affected by the ACA, one could divide the business world into three broad categories:

1. Employers that are clearly covered by the act. (Because the ACA applies to companies that have 50 or more full-time employees or their equivalents, one could argue that any firm with approximately 75 full-time employees or more would be covered without a doubt.)

2. That large grouping of companies with between 25 and 75 employees for which ACA coverage may be triggered. (In some cases, the number of employees may dip under 50 but then go over 50 at certain times of the year. For those businesses in particular, ACA compliance will involve a prolonged process of regulatory scrutiny, and a real learning curve.)

3. Companies that are clearly not covered by the ACA, such as firms with 25 or fewer full-time employees.

Employers who have not yet looked at the ACA in detail may be surprised at the complexity of the terms in this all-encompassing statute. Even some of the basics, in fact, are more convoluted than they might seem at first glance. Regarding employer-mandate penalties, for example, the overarching framework seems simple enough. In a nutshell, it is that penalties kick in when an employee either is not covered by insurance or is being covered by insurance that is so expensive the employee feels the need to go to a government exchange to get a credit. And yet the actual definitions involved—with, for example, the minimum amount of coverage employers are required to provide—are not yet clear. Even the definition of “full-time employee” is not what one might think.

COUNTING FULL-TIME EMPLOYEES

Employers large enough to be covered by the ACA are subject to what the IRS euphemistically calls “shared responsibility,” and, predictably, their lack of compliance with the ACA will result in the “shared-responsibility penalty payment.” These employers must cover all full-time employees, not part-time ones, but what the government means by “full-time employees” calls for further explanation. In fact, regulators use the terms of “FTE” or “FT employees” to refer not to 50 actual human beings but to the sum of a complex calculation involving the hours of both full-time and part-time workers, along with a raft of complicating caveats, qualifiers, and convolutions. Indeed, the complexity is such that companies arguably have just two
Employers Must Take a Multipronged Approach to ACA Compliance

Employment Relations Today DOI 10.1002/ert

options when it comes to crunching their FTE numbers: either bring in trained attorneys or other experts who have spent long hours mastering these minutiae, or simply assume that the company is covered by the ACA and move forward by offering employees some form of ACA-compliant health-care coverage.

With regard to the government’s FTE calculation, one is reminded of a famous quote from Niels Bohr, the Nobel Prize–winning Danish physicist, who once said, “Those who are not shocked when they first come across quantum theory cannot possibly have understood it.” At first glance, the FTE calculation seems straightforward enough, but after a little digging into the aforementioned twists and turns, it quickly becomes complex enough to be likened to the federal tax code. In certain situations, for example, an employee could be deemed as part-time even though he or she was working more than 40 hours a week. Likewise, someone who works less than 30 hours a week could also be classified by the government as a full-time employee. As with quantum mechanics, it would all depend on the perspective of the observer: Did the employee work fewer than 30 hours a week during the government’s “measurement period”? Or was she working fewer than 30 hours a week during the so-called “stability period” that follows? Bear in mind, after all, that the number of full-time employees, including seasonal employees, for each calendar month is to be calculated using data from the measurement period that occurred during the preceding year. Thus, it is this year—2013—that will determine whether employers need to provide insurance in 2014. Employers’ actions today with regard to hiring and firing, in other words, could have a major impact on their operations tomorrow.

(In fact, the government will provide certain safe harbors for 2014 so long as the employer can show fewer than 50 FTEs for a period of six consecutive months in 2013.)

Some further points to consider regarding FTEs:

- In determining whether a company has 50 or more FTEs, the IRS has provided several complicated look-back tests that generally use a six-month test in 2013 and then a 3-to-12-month test thereafter.
- Special rules are being proposed for employees that do not track their time, but these rules, at the time of this writing, had not yet been finalized. Nonetheless, initial indications are that these rules will consider whether such employees are expected to work more than 30 hours per week.
- All types of employers are affected: for-profit, not-for-profit, and governmental.
- Foreign-based employment does not count, unless the employer does not consider income paid to be foreign-based.

**EMPLOYEES VS. INDEPENDENT CONTRACTORS**

Issues related to employees versus independent contractors add even more complexity to the mix. Under the ACA, an employee means an individual who is an employee under...
the IRS's common-law test, such that many independent contractors could be employees entitled to coverage if the employer has the requisite number of employees, when including such common-law employees in the total amount of FTEs. Expect a continuing focus by the IRS and the states on scrutiny of companies' labeling of various workers as independent contractors. These can be difficult issues for employers to sort out alone; the common-law employee standard, for example, includes 20 different characteristics and is a vague and complex analysis.

**PROVIDING MINIMUM ESSENTIAL COVERAGE**

Another critical definition under the ACA is what constitutes so-called minimum essential coverage. This is coverage under an "eligible employer-sponsored plan," which the proposed Treasury rule defines generally to mean coverage under:

1. A group health plan, whether insured or self-insured, including coverage under a federal or nonfederal governmental plan;
2. An employer-sponsored retiree health plan;
3. Certain government programs, such as Medicare, Medicaid, or the Children’s Health Insurance Program (CHIP) and TRICARE; or
4. Coverage in the individual insurance market, including a plan offered by an exchange.

This concept is important since it determines whether an individual is going to be penalized under the ACA for not having health-care insurance.

**PENALTIES AND POTENTIAL CHALLENGES FOR NONCOMPLIANCE**

Two sections of the Internal Revenue Code merit attention here because they require employers and insurance providers to file specific information regarding the health-care coverage provided. Section 6055 is applicable to providers of minimal essential coverage, and Section 6056 is applicable to large employers and insurance providers. The filings under these sections require detailed information on the individuals covered, dates of coverage, the employer maintaining the plan, the portion of the premium maintained by the employer, waiting periods, monthly premiums, lowest-cost plans, and more.

Failure by the employer to provide minimum essential coverage results in a penalty of $2,000 times the number of full-time employees minus 30. So if an employer had 100 full-time employees, the penalty amount would be $2,000 times 70 (100–30), or an annual penalty amount of $140,000, and will be nondeductible to the employer; the penalty will increase each year based on the national average premium increase—a number that will be based on the increase in premiums over a “bronze” level of coverage (under the ACA, the four levels of coverage—bronze, silver, gold, and platinum—are based on certain actuarial values). And unfortunately for employers, this level could substantially increase as a result of the ACA's employee-friendly, guaranteed-issue health-care coverage provisions. Importantly, penalty rules are
Employers Must Take a Multipronged Approach to ACA Compliance

Employment Relations Today  DOI 10.1002/ert

Summer 2013

for employee totals at the entire company, including any and all subsidiaries if sufficiently related as determined by the aggregation rules under IRS Code Section 414.

Earlier this year, the IRS announced that 95 percent compliance is sufficient for now. The idea was not to say to employers, “This is a green light to deny coverage to 5 percent of your full-time workforce.” Rather, it was to give employers some honest margin for error as these complex regulations continue to evolve.

It is also noteworthy that minimum essential coverage for an employer-sponsored plan must extend to employees’ children up to age 26, but apparently not to spouses unless they are deemed dependents. The government has also instructed employers to ask their employees to fill out a template before those workers attempt to get a subsidy from a federal exchange. This should help employers get a better handle on what is happening with coverage at the company but will require them to be involved in the exchange process.

But even if an employer does offer minimum essential coverage, penalties can accrue. Suppose a company does provide this coverage, but the cost of this coverage exceeds 9.5 percent of a group of workers’ W-2 take-home pay. And suppose, in addition, these employees choose to go to a federal health-insurance exchange to get a premium tax credit; then a penalty will be imposed of $3,000 per year multiplied by each full-time employee who receives such a tax credit from an exchange. For example, a company with 100 full-time employees, 20 of whom get a subsidy, would create an employer penalty of $60,000 per year (or $5,000 per month) if this is not “corrected.”

A related but somewhat confusing concept is minimum value, which requires an employer’s health plan to pay for at least 60 percent of the expected costs of coverage, the so-called bronze level of coverage. There are now calculators that are being introduced to help employers determine whether they are in compliance. This will generally involve analyzing copays, deductibles, and related cost factors. If an employer fails to offer minimum value to its full-time employees (remember, part-timers are not covered, even though their hours are a factor in the calculation of FTEs), then a similar $2,000 penalty will be imposed for each employee who obtains a tax credit at an exchange.

WHISTLEBLOWING, RETALIATION, AND CLASS-ACTION LAWSUITS

As mentioned, there are many ways a company could get into trouble and face litigation related to the ACA. Indeed, challenges could be filed against virtually anything not covered by the employer, but particularly for what workers label “essential health benefits.” Plaintiffs’ attorneys might challenge the employer’s use of grandfather status to avoid the act or, alternatively, use federal regulations like the Employee Retirement Income Security Act (ERISA), the Public Health Service Act (PHSA), or the Fair Labor Standards Act (FLSA) to challenge any workforce restructuring that seems intended to dodge ACA coverage requirements. Even companies’ internal and external reviews or use of state exchanges could come under fire.

For its part, the government will certainly be looking closely at employers’ filed notices related to details such as the summary of benefits and coverage or the required 60-day plan-modification notices. Naturally, these notices must be submitted in particular ways, with specific information included, or else the company may be slapped with a violation.
Also included in the ACA are whistleblower provisions to protect employees who alert the government to employer compliance failures, and these are listed below:

- An employee who has been discharged or discriminated against as a result of blowing the whistle on an employer’s lack of compliance with ACA coverage rules can file a complaint under Section 2087(b) of Title 15 U.S.C.
- Retaliation must be related to the employee’s assistance in an investigation into the employer’s failure to comply with requirements of Title I (of the ACA), or to the employee’s refusal to participate in any activity said employee reasonably believed to be in violation of Title I.
- The employee has 180 days from the violation to submit the complaint to OSHA and within 90 days of OSHA’s determination, or 210 days after filing the original complaint, the employee may file the civil action.

Whistleblower cases that end up in federal court can result in considerable damages for the employer, up to and including all back wages, injunctive relief, and other litigation costs.

- Employer retaliation is broadly defined: job reassignment, failure to promote, pay reduction, and so on.

The ACA amends and incorporates ERISA and FLSA, among other workplace statutes. ERISA, of course, prohibits employers from engaging in conduct intended to interfere with the attainment of benefits. Ordinarily, claims based on ERISA will be collective actions: Let’s say ABC Co., which employs several hundred people, incorrectly believes it has a grandfather exemption to the ACA. In this case, the plaintiff side would file a claim on behalf of “John Doe” as well as all similarly situated employees at the company.

Thanks to the ACA, such class-action lawsuits may loom larger for employers this year or next. After all, while the denial of benefits by itself does not prove intent, such violations may be easier to show, particularly if they come on the eve of the ACA taking effect, because they will appear to be an obvious attempt to deny benefits. Indeed, private plaintiffs could use both ERISA and FLSA to force ACA requirements that have been infringed due to restructuring. Whistleblower cases that end up in federal court can result in considerable damages for the employer, up to and including all back wages, injunctive relief, and other litigation costs.

The industries that may be at most risk of ACA-related litigation include hospitality, retail, and nursing homes, all of which are starting out with low rates of health-care coverage relative to other sectors of the economy.

EMPLOYERS BEWARE

Clearly, failure to understand and prepare for the ramifications of the changes wrought by the ACA could lead to a host of negative
Employers Must Take a Multipronged Approach to ACA Compliance

Employment Relations Today DOI 10.1002/ert

outcomes for employers, including costly penalties, missed tax credits, time-consuming and expensive litigation, lost opportunities for employees, and other adverse consequences. As a result, companies should waste no time in determining exactly how the ACA's extensive mandates might affect their operations, taxes, regulatory compliance plans, and more. With the ongoing implementation of ACA, after all, a new era for US employers is not "on the horizon"—it has already begun.

NOTES


James P. Anelli is a Newark, New Jersey–based shareholder in LeClairRyan and leader of the national law firm’s Affordable Care Act Team. For more than 20 years, Anelli has focused his practice on the representation of management in employment discrimination and labor litigation, including representing management in grievances, arbitrations, and unfair labor practices. He regularly provides counsel to corporate clients regarding compliance with state and federal employment requirements and designing effective personnel policies, and the development, design, and implementation of employee benefit programs. He also regularly provides employment and labor consultation to BioPharma companies and represents them in a wide range of employment litigation. He may be contacted at james.anelli@leclairryan.com.