

# The Affordable Care Act: What Businesses Need to Know

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It's here. Covering your ears and wishing it away hasn't worked – the health care exchanges are slated to be open starting this October 1st, 2013. The Affordable Care Act (ACA)(aka Obamacare) is going to start in 2014 having a wide impact on businesses — and businesses need to be thinking now about how they are going to deal with the new administrative and tax/penalty burdens. NOTE: these penalties discussed apply not only to businesses but also broadly to all employers – including government entities (federal, state, local or Indian Tribal government) as well as nonprofit organizations (even those exempt from federal income taxes).

I want to focus in this article on one key aspect for business – what happens to businesses that do and do not provide insurance for their employees. NOTE: Helping me immeasurably in this analysis is the invaluable work of the nonpartisan Joint Committee on Taxation in a recent report on implementation of the ACA as well as a report by the Congressional Research Service on employer penalties under the ACA. For those who want to know more detail – this is where to start.

## 50 Is The Number

Today's number is 50. A business that has 50 or fewer full-time employees is not subject to a penalty for failing to provide affordable health insurance to its employees. So, now the questions – what is “full-time?” – full-time is defined as working thirty-hours a week (or more) on average during a one-month period.

In determining whether you hit the 50 plus mark — employers do not count seasonal workers (think Christmas, Summer, etc.) who work for less than 120 days during the year. However, part-time (non-seasonal) workers are counted up on an aggregate basis to determine whether the 50 full-time threshold is crossed (in general, dividing aggregate hours worked – if paid hourly — by 120).

A key to understand – while part-time employees count toward whether an employer is over 50 – part-time employees do not count for purposes of the penalties discussed below. For example, you could have an employer meet the 50-plus employee threshold thanks to it employing part-time employees — but the employer does not have to pay any penalties for failing to provide insurance for those part-time employees.

Do independent contractors or rented employees (example Kelly Services) count for the 50? No. However, this may come as a surprise that you aren't the first business that has thought of the idea of having workers be independent contractors to avoid the penalties. The IRS is quite alive to this issue and we spend a lot of time at alliantgroup defending businesses who are in the soup with the IRS on independent contractor issues (best advice: get your ducks in order before the IRS comes knocking).

Lastly, there is a controlled group test. In a nutshell – you can't divide up your business into separate entities (but keeping common ownership) as a workaround for avoiding the 50 person employee limit. NOTE: while beyond this short piece, in brief, you can treat each entity separately for purposes of the penalties imposed that are discussed further below.

## **You Are Over 50 Full-Time Employees**

### **One question – do you provide health insurance to those full-time employees?**

No. If the answer is no, you are not providing health insurance, the response under the ACA is straightforward – get out your checkbook and write a \$2000 penalty (to be indexed to the rise of health insurance costs annually starting after 2014) for each full-time employee (minus your first thirty employees). For example, you have one hundred full-time employees, you do not provide insurance,  $100 - 30 = 70$ ;  $70 \times 2k$  is \$140,000. Mail to the IRS a check made out to the U.S. Treasury for \$140,000. NOTE: the penalty is triggered when at least one employee gets a tax credit or government assistance in obtaining health care – which would seem to be a speed-bump in most cases.

Yes, you are providing insurance to your full-time employees (or at least some of your employees). Perhaps counterintuitive, the ACA is more burdensome for employers who do provide insurance to their employees – let me introduce you to Dante's Beatrice who will be your guide to the two circles of hell – “affordable” and “adequate”.

First, is the insurance you are providing affordable? Affordable is defined as costing no more than 9.5% of the employee's household income. What is household income? Household income includes not only the employee's earnings (wages, tips and other compensation) but also the earnings of the spouse and dependents living in the same household who are required to file an income tax return. The earnings include foreign income as well as tax-exempt interest. The problem – employers won't have access to the information on an employee's household income.

In response, the regulations have created three safe harbors for employers. Employers meet the affordable test if the insurance costs less than 9.5% of the employee's W-2 wages for that year (not really a big help, but ok). The second safe harbor is if its 9.5% of an employee's hourly wages multiplied by 130. Finally, if the insurance costs are less than 9.5% of the federal poverty level for one person.

Second, is the insurance you are providing adequate? A plan is considered to provide adequate coverage if the plan's actuarial value (meaning the share of the total allowed costs that the plan is expected to cover) is at least 60%. CRS suggests this should be the case for most employer-sponsored plans. In addition, the insurance provided must cover dependents (under age 26) but is not required to cover the employee's spouse.

Finally, then for each employee that isn't being provided affordable and adequate coverage that than receives a credit/assistance from the federal government to purchase health insurance (which, in short, is pretty broad) the employer is subject to a \$3,000 penalty (adjusted annually similar to the 2k penalty above) per employee who is

receiving government assistance for purchasing health care. However, this penalty is waived if the employer is providing affordable and adequate health insurance to 95% of its employees (the 95% test or substantially meet test – is created by regulation, not in the statute).

A lot to get through. Here is a quick example, which might help. XYZ Corp. has 100 full-time employees and provides health insurance. It is determined that while the insurance meets the adequacy test (the 60% test); the insurance costs do not meet the affordability test for 20 of XYZ Corp.'s, employees that receive lower salaries. All 20 employees apply for and receive government assistance to purchase insurance. The 20 employees are too great for XYZ Corp. to benefit from the 95% test and therefore XYZ Corp. must pay a \$3,000 penalty for each of the 20 employees — \$60,000. NOTE: the penalty paid by XYZ Corp. cannot exceed the penalty XYZ would have paid for providing no insurance at all (thanks for small favors). The penalty is calculated on a monthly basis pro rata.

Reporting requirements. It wouldn't be the government if you didn't have reporting requirements. According to CRS, the Department of Labor will be requiring employers to provide employees written notice of 1) the existence of an exchange, including services and contact information; 2) the employee's potential eligibility for premium credits and subsidies for health care; and 3) the employee's potential loss of any employer contribution of the employee purchases a plan through an exchange. Beginning in 2014, large employers will have reporting requirements regarding their fulltime- employees to the Department of Labor, including name, address, ein, whether adequate and affordable insurance is provided, etc. and then there is the IRS reporting ...

## Planning Ahead

Business owners need to be thinking and planning now about how they want to respond to the ACA – and particularly to potential penalties. Further, businesses need to begin having someone on staff (or outsourcing) that will be responsible for compliance with ACA and all the paperwork and reporting requirements. Quite frankly, this discussion should include your CPA. In speaking before a number of CPA firms I am struck how much uncertainty there is about their role in regards to their clients – despite the fact that the ACA at the end of the day involves a great deal of interaction with the IRS. Time to unplug your ears and face the music of ACA.

<http://www.forbes.com/sites/deanzerbe/2013/06/17/the-affordable-care-act-what-businesses-need-to-know/>

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