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Are you a large employer subject to play or pay?

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Beginning in 2014, "large employers" will be faced with the choice of offering their employees affordable employer-sponsored health care or paying a penalty.

The subject of this Part I of our three-part series "Whether to Play or Pay" focuses on whether employers are considered large employers subject to the play or pay rules under the Affordable Care Act.

Question 1: What is a "large employer" under the ACA?
Answer: A large employer is any entity that employs an average of at least 50 full-time employees - or combination of full-time and full-time equivalent employees - on business days during the preceding calendar year.

Question 2: How are affiliated or related employers treated to determine the 50 full-time employee threshold?
Answer: All entities under common control will be treated as a single employer in making the determination of large employer status. Therefore, "breaking up" an employer into a number of smaller entities with common ownership will not work to avoid status as a large employer.

For example, multiple car dealerships - organized as separate legal entities - owned by the same owner group will be treated as a single employer in determining if that employer employs 50 full-time employees or more.

Additionally, certain joint ventures and agency partnerships may also be caught in this net of affiliated entities under common control.

Question 3: Who is a "full-time employee" for purposes of ACA?

Answer: A full-time employee is determined on a month-to-month basis and is a person who is employed on average 30 hours of service or more per week.

Again, the entire affiliated employer group is considered so that employee X's 20 hours/week in subsidiary A and 20 hours/week in subsidiary B will result in one full-time employee for the "employer."

Question 4: Who is a full-time "equivalent employee"?

Answer: Solely for purposes of determining whether an employer is a large employer - i.e., 50 or more full-time employees - part-time employees are included in a calculation to determine the number of full-time equivalent employees, or FTEs. For each month, an employer would calculate the total hours of service - not to exceed 120 hours of service for any employee - for all employees who are not full-time employees and divide by 120. The result is the number of

FTEs for the month. FTEs are then added to the full-time employees for the month to determine the yearly average in order to test for the 50 full-time employee threshold.

Additionally, seasonal employees add complexity to these calculations and should be considered separately.

The FTE rules described here are solely for the purpose of determining whether an employer is a large employer, but FTEs - i.e., part-time employees - are not subject to any of the various pay or play penalties. For example, an employer may have 40 full-time employees who work 30 or more hours per week and 100 part-time employees who work 25 hours per week. That employer would be a "large employer" because of the FTE rule but would not owe any penalty related to the 100 part-time employees, although it would be subject to penalties if not offering affordable coverage to its full-time employees.

There are reported strategies among large restaurant chains to begin a reduction of employee work weeks to less than 30 hours so that many employees never achieve full-time status.

Although such a strategy is unlikely to relieve an employer from being considered a large employer and subject to the ACA's play or pay penalty requirements - due to the FTE inclusion for this purpose, the strategy may reduce the potential penalties since the penalties are only applied with respect to full-time employees.

The second part of this series will focus on how to identify full-time employees for purposes of calculation of the play-or-pay penalties. The third part will focus on the penalty calculation itself.

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