

Delay Of ACA Employer Mandate Opens Door To Relaxed Regs

By **Jeff Overley**

Law360, New York (July 03, 2013, 5:50 PM ET) -- The Obama administration's decision to delay until 2015 an Affordable Care Act requirement that large businesses provide health benefits could spur regulators and Congress to significantly relax the so-called employer mandate, even if prospects for full repeal of the controversial provision remain bleak, experts say.

In announcing the delay, the U.S. Department of the Treasury promised to use the extra time to "simplify the new reporting requirements" surrounding the types of coverage offered by large employers.

Going further, Congress could stipulate that only workers putting in at least 40 hours per week are entitled to medical benefits, as opposed to the 30-hour standard enshrined in the ACA. Bipartisan legislation introduced last month would accomplish that goal, likely easing the recordkeeping burden on corporations.

"If they were to raise the definition of full-time employee, that may in turn provide some stability," said Paul M. Hamburger, a member of the health reform task force at Proskauer Rose LLP.

With the 40-hour standard, companies could effectively assume that salaried workers qualify for benefits, and they would avoid much of the hassle that comes with closely tracking the hours clocked by other employees.

"It's really a fundamental shift in important business practices to move that needle down to 30, and it's disruptive to the way business is done," said Alden J. Bianchi of Mintz Levin Cohn Ferris Glovsky and Popeo PC.

The 40-hour legislation — known as the Forty Hours Is Full-Time Act — was introduced two weeks ago by Sens. Susan Collins, R-Maine, and Joe Donnelly, D-Ind. When they offered up the bill, they also sent a letter urging President Barack Obama to delay the employer mandate.

One key to the bill's fate is whether Republicans are willing to get on board. While they have bitterly opposed the ACA, they also have resisted efforts to improve the law, insisting instead on repeal.

Earlier this year, for example, GOP lawmakers brought forward a bill — the Helping Sick Americans Now Act — to redirect money to a cash-strapped program for people with pre-existing conditions from a preventive-care account many Republicans view as a “slush fund.” GOP leadership had to retreat, however, in the face of conservative opposition to any measure that could be seen as supporting the ACA.

In addition, Republicans have staunchly refused to approve more funding to spread awareness about health insurance exchanges, while simultaneously predicting the online marketplaces will fail and criticizing the Obama administration for trying to fill the void by soliciting private-sector donations.

Bianchi suggested this proposal could succeed, however, because corporations are lobbying fiercely behind the scenes.

“I’m told there’s a window there,” he said. “The business interests are killing these guys, urging their representatives on both sides of the aisle to make that change.”

Democrats could also prove difficult to win over, however, because many of them view providing health insurance as a corporate responsibility, at least for workers putting in a good amount of time at larger companies.

“I think it’s become a point of political pride on the behalf of the Obama administration,” said John J. McGowan Jr., a partner at Baker & Hostetler LLP.

Something that might appeal to both parties is that implementing a 40-hour standard would eliminate much of the incentive to cut worker hours, something many companies have explored as a way to duck the mandate.

Under the current framework, a worker whose hours are trimmed not only doesn’t get benefits, they also see take-home pay reduced. A fix could at least address the latter issue while allowing the employee to seek coverage — and government assistance — on a health insurance exchange.

“That seems to be a directly opposite effect of what was intended,” Christopher A. McMican, an employee benefits principal at Miller Canfield PLC, said of reduced hours. “It would be nice if they could think of something to figure that out.”

The impact on the ACA’s coverage isn’t seen as a big obstacle to overhaul of the mandate. The vast majority of large businesses already offer health benefits, and employer-based coverage is actually expected to decline because of the mandate, with those reductions being offset by expansion of Medicaid and enrollment through exchanges.

One barrier to any modification, however, could be cost. The employer mandate is expected to bring in \$140 billion in penalties over the next decade to help pay for subsidies to consumers, and any tweaks could be in trouble if they cut deeply into that haul.

The same is true to an even greater extent when it comes to repealing the mandate altogether, a prospect some ACA opponents are shooting for in the wake of the delay but which attorneys say is highly unlikely.

“This gives some time for the opposition to rally the troops, but I just really don’t see [repeal] happening,” McMican said, predicting that lawmakers and regulators instead will look at making the mandate “workable.”

While some ACA critics were crowing in the wake of the delay, experts cautioned against viewing the development as evidence of chaos and confusion surrounding health reform. Mostly it was an attempt to show flexibility, and the postponement was reminiscent of other benefit regimes that have had rocky debuts, including Medicare, the Employee Retirement Income Security Act and a nondiscrimination portion of the Tax Reform Act of 1986, known as Section 89, which was ultimately scrapped.

“It is very common for there to be administrative delay in changes to benefits law, and it is primarily because of the back-office work that goes into these kinds of plans,” said Andrea Bailey Powers, of counsel at Baker Donelson Bearman Caldwell & Berkowitz PC. “All of that is not done where you can turn on a dime.”

Moving forward, employers should use the extra year to “beta test” their recordkeeping software to make sure all their ducks are in a row, Powers said.

“It’s an opportunity to go ahead and have your system in better shape,” she said.

Also, they should keep in mind that the employer mandate reprieve doesn’t absolve them of numerous other new responsibilities about to take effect, including regulations touching on wellness programs, essential benefits and a maximum 90-day waiting period before granting coverage.

“A cautionary note to employers is, don’t forget entirely about all of your obligations under the Affordable Care Act beyond the employer mandate provisions,” said Ilyse Wolens Schuman, a shareholder at Littler Mendelson PC. “The Affordable Care Act has not been repealed, and employers still need to be cognizant of other changes that have not been delayed.”

--Editing by John Quinn and Richard McVay.

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