Healthcare reform compliance rules are complex

Here's what steps employers should be taking now

By Judy Boyette

On July 2, the Treasury Department announced that implementation of two key components of the new healthcare reform law — known as the Patient Protection and Affordable Care Act — applicable to employers will be delayed until Jan. 1, 2015.

Consequently, the need to offer coverage to full-time employees or pay substantial penalties will not take effect until 2015. The healthcare information reporting requirements associated with the new required coverage also will not take effect until 2015.

While this is welcome news, there is a notice requirement for employees that must be implemented before Oct. 1, 2013. There are also other steps that will need to be taken soon if seniors housing employers want to have an annual open enrollment period in the fall for medical coverage to be provided in the next calendar year.

Notice of Exchange Opportunity must be provided to employees before October 1, 2013

Employers are required under the Affordable Care Act (ACA) to notify employees of health coverage options available through healthcare exchanges whose open enrollment period begins Oct. 1, 2013. The U.S. Department of Labor issued temporary guidance and a temporary model notice to help employers comply with this requirement.

Beginning Jan. 1, 2014, individuals and small businesses can enroll in health coverage through government-run health insurance exchanges.

The new healthcare law requires that employers subject to the Fair Labor Standards Act (FLSA) provide to each of their employees, and to all new employees, a written notice regarding the availability of coverage under the exchanges.

The FLSA generally applies to employers that employ one or more employees who are engaged in, or produce goods for, interstate commerce. Information on the applicability of the FLSA to an employer can be found on the Department of Labor's website.

The temporary guidance issued by the Department of Labor makes clear that employers must provide this notice to all employees, regardless of eligibility for any employer-sponsored benefits.

The Department of Labor has issued two model notices that employers can use to satisfy this notice requirement. One model is for employers who do not offer a health plan, and the other model is for employers who offer a health plan for some or all of their employees. The model notices can be found on the Department of Labor's website.

Since open enrollment for purchasing health insurance coverage through an exchange begins Oct. 1 of this year, employers are required to provide the notice to current employees by that date. Beginning Oct. 1, employers also are required to provide notice to all new employees within 14 days of an employee's start date.

The notice may be provided by first-class mail or, alternatively, it may be provided electronically if the Department of Labor's electronic disclosure safe harbor requirements are met.

Employers are permitted to use the model notices to satisfy their notice requirements and rely upon the temporary guidance until the Department of Labor promulgates regulations or other guidance.

Is your business subject to healthcare reform employer requirements?

In addition to the immediate requirement to provide notice to your employees of possible coverage under an exchange, under the ACA your operations will be subject to the employer-shared responsibility rules (called "pay or play") if you are a large employer.

Whether your seniors housing business will be considered a large employer in 2015 depends on whether your business employed an average of 50 or more full-time equivalent employees in the prior year.

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She has advised employers, including many in the seniors housing business, on compensation and benefits including tax, regulatory, fiduciary responsibility, financing, and organizational integrity issues for more than 25 years.

If your business is considered by the IRS to be under common control with other employers, then the employees for all those employers are added together. If that aggregate number is more than 50, then all the employers are covered, even if they do not individually have 50 employees.

For this purpose, part-time employees must be counted to determine your total full-time equivalent employees. There also are special, complicated rules for counting seasonal employees.

Once you determine if you employ 50 or more employees and are subject to the new rules, you will need to decide if you want to pay or play. If you opt to play, you must offer qualified health coverage to 95 percent of your full-time employees and dependent children up to age 26 and ensure that the cost of self-only coverage does not exceed 9.5 percent of income for the employee.

If you don't meet the rules for offering coverage or playing, you will be assessed penalties under the tax rules for failing to offer the required health coverage, which would be referred to as paying.

For purposes of providing the required coverage, "full time" generally means that the employee works an average of 30 hours per week, or 130 hours per month. There are a number of legislative proposals to increase the requirement from 30 to 40 hours, but to date no change has been made to this standard.

Determinations for 2015 are based on hours worked during a prior measurement period of one to 12 months (with a subsequent maximum 90-day administrative period before coverage begins).

If you want to retain calendar-year medical coverage elected during a several week open enrollment period in the fall, then under current proposed rules you will need to begin tracking hours for your employees this fall.

The Internal Revenue Service (IRS) is scheduled to provide final rules on pay or play, but there is no indication of when the IRS will issue this guidance.

What do you need to do to keep an annual open enrollment period?

To keep a fall annual open enrollment period, under current proposed rules you will need to begin a 12-month measuring period this fall. The diagram on page 59 is an example of this type of rolling annual measurement period, which is followed by an administrative period during which the full-time employees identified as eligible for coverage for the following calendar year elect whether to be covered for that year.

How much could the penalties be for a seniors housing business?

There are two possible penalties that can apply to an employer under the ACA. The first is the larger penalty, referred to as the "A Penalty," which applies if an employer fails to offer required health coverage to its full-time employees and their eligible dependents as determined under the ACA rules.

To avoid the A Penalty, you must offer minimum essential coverage to at least 95 percent of your full-time employees and their dependent children under age 26 (offering coverage to spouses is not required).

If you don't provide that minimal essential coverage, you can be assessed the A Penalty of $2,000 per year for every full-time employee (minus an arbitrary reduction of 30 from the number of full-time

employees which is provided under the ACA).

This penalty tax is triggered when one full-time employee of the employer receives subsidized health insurance from a health insurance exchange.

Even if a large employer offers minimum essential health coverage to 95 percent of its full-time employees and their eligible dependents (and thereby avoids the A Penalty), the employer may still be assessed the B Penalty.

You could be liable for the B Penalty if the coverage that is offered is either not "affordable" or of "minimum value," as defined under the ACA. In that case, you must pay $3,000 per year for each of your full-time employees who receives subsidized health insurance from a health insurance exchange.

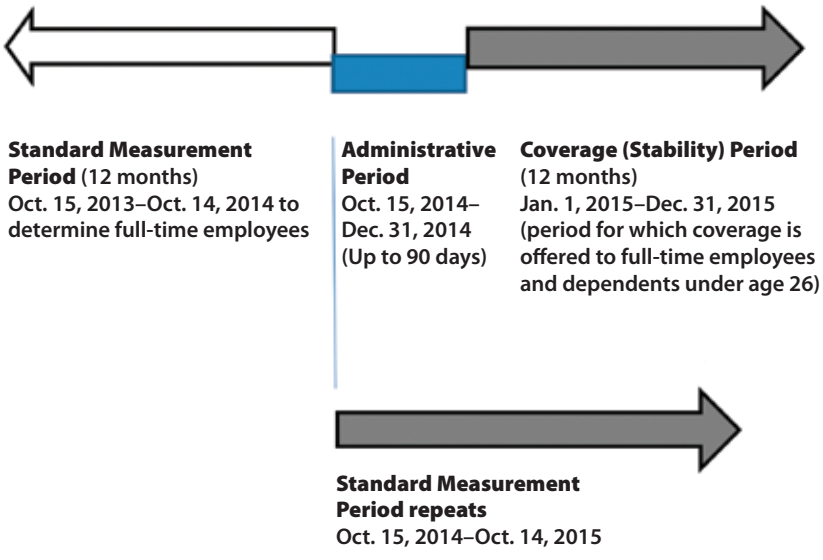
The employer will never pay more under the B Penalty than it would have paid under the A Penalty.

A simple example will illustrate why a recent survey indicated that compliance with healthcare reform is the biggest concern of most of the businesses surveyed.

Example: A Penalty

- Employer has 500 full-time employees (as determined under the ACA rules).
- Employer either does not offer coverage at all, or offers coverage to 450 employees and required dependents (only 90 percent, not 95 percent).
- One full-time employee receives subsidized coverage through an exchange.
- The penalty due to the IRS is calculated as follows: $2,000 x (500-30) = $940,000.

Example: How to measure full-time employees to keep annual open enrollment



Example: B Penalty

- Employer has 500 full-time employees (as determined under the ACA rules).
- Employer offers minimum essential coverage to 480 employees and required dependents (96 percent).
- Coverage for 30 employees (including the 20 to whom no coverage was offered) is not "affordable" and all receive federal subsidy through an exchange.
- The penalty due to the IRS is calculated as follows: $3,000 x 30 = $90,000.

These penalties may represent a significant tax liability for your seniors housing business. If you are attempting to avoid the penalties, or at least the A Penalty, determining whether or not 95 percent of your full-time employees (as defined by the ACA) and their dependents will be eligible for your healthcare program will be a critical task in the next year.

The IRS had expected to raise $13 billion from penalties collected from employers in 2013–2014. Of course, this will not happen for the coming year because of the delay. But revenue collection will begin in 2015, unless there is another delay or repeal of the law.

Therefore, it is important not only to capture the data that is needed for compliance on January 1, 2015, but also to capture information in a way that meets the IRS audit requirements. The new rules under healthcare reform are complex. The time to start planning for compliance is today. ■

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