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Obamacare and Seasonal Workers

Gray Reed & McGraw Legal Alert

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During the holiday season, many employers bring on additional workers, or "seasonal employees," to assist with increased customer demands. This year, employers should take note of the possible impact of the Patient Protection and Affordable Care Act ("Obamacare") on insurance requirements for these seasonal employees.

With proper structuring, employers will not be required to provide health care coverage for, or face fines related to, their seasonal employees – even if those workers provide more than 30 hours of service per week. Obamacare, which defines a "full-time employee" as someone who works 30 or more hours per week, requires that large employers cover their "full-time employees." However, the proposed regulations provide that seasonal employees do not, under certain circumstances, qualify as full-time employees.

Under Obamacare, determining which workers are considered full-time employees and whether seasonal employees should be included is important for two reasons:

1. The government defines a "large employer" as one that employs 50 or more full-time employees (note that Obamacare defines "full-time" as 30 or more hours per week) for more than 120 business days during the preceding calendar year. Such businesses are subject to the "employer mandate" in Obamacare, which requires the employer to provide health care coverage to its full-time employees (and their dependents, which includes children under 26 years of age but not spouses) or face penalties; and,

2. If an employer qualifies as a large employer, it needs to understand the impact of seasonal employees in determining which of its workers and their dependents must be offered health care coverage or for whom penalties are assessed.

Must employers include seasonal employees when determining "large employer" status?

An employer is a large employer — and therefore subject to the "employer mandate" – if it employed "an average of at least 50 full-time employees on business days during the preceding calendar year." However, where an employer's workforce exceeds 50 full-time employees for no more than 120 days (consecutive or not), and where the full-time employees in excess were "seasonal workers," the employer is not considered a large

employer and therefore is not required to provide health care coverage to any of its employees.

For purposes of determining whether an employer is a large employer, Obamacare and the proposed regulations do not define the term "seasonal worker." Instead, employers are instructed to refer to the Department of Labor's regulations. The proposed Obamacare regulations state that employers may use a reasonable, good faith interpretation of seasonal worker by analogizing to agricultural and retail workers. Pending the release of further guidance, employers may take the good faith position that its employees whose positions only exist during the September through December holiday months are seasonal workers and are, therefore, excluded from the 50 full-time employee calculation.

If an employer is a "large employer", must it provide insurance to its seasonal employees?

As discussed earlier, an employer with 50 or more full-time employees is considered a large employer and therefore must provide health care coverage to each of its full-time employees or face penalties. This employer mandate was originally scheduled to take effect on January 1, 2014, but IRS Notice 2013-45 postponed its implementation until January 1, 2015. It is currently unknown whether this means that all employers must comply with the employer mandate as of January 1, 2015, or whether employers with non-calendar year plans are given additional time to begin compliance. However, because of the look-back measurement system (discussed below) being implemented for determining full-time employee status, it is important for employers to take steps now to avoid possible penalties in 2015.

At this time, only *proposed* regulations have been issued to provide guidance on how employers are to classify workers as either full-time or part-time, and employers may use these proposed regulations as guidance until final regulations or other guidance are issued. Subsequent guidance will not affect employers retroactively, and to the extent future guidance is more restrictive than the proposed regulations, employers will be provided with sufficient time to come into compliance with the final regulations.

For workers who are brought in to work during the holiday months, the proposed regulations permit employers to adopt a look-back measurement system for determining whether the workers are full-time employees who must be offered health insurance. That system permits employers to implement an "initial measurement period" of up to 12 months to determine whether a seasonal employee has averaged 30 or more hours of service per week during that period. The look-back system can apply to temporary employees (as long as they are hired on a variable-hour basis) and to seasonal employees. The proposed regulations specifically permit an employer to treat seasonal employees as variable-hour employees even if the seasonal employees work full-time hours during their seasonal

employment. The proposed regulations include the example of a ski instructor hired to work from November 15 to March 15 and expected to work 50 hours per week. The example notes that, even though the worker would be expected to work in excess of full-time hours during his four-month period of employment, he would not be expected to average over 30 hours per week over a 12-month measurement period and thus would not have to be offered health insurance.

Moreover, the proposed regulations do not limit the time an employee may work as a seasonal employee, distinguishing a seasonal employee for this purpose from a seasonal worker who may be excluded from an employer's full-time employee total for up to 120 days (when calculating whether an employer is subject to the employer mandate). The preamble to the proposed regulations does note that the final regulations are expected to impose some time limit, although it may be as long as six months. However, the proposed regulations also provide that where an employee is re-hired, prior service must generally be credited, unless the period of unemployment exceeds 26 weeks.

During the 12-month "initial measurement period" to determine whether their seasonal employees are considered full-time employees, employers should take precautions to ensure their seasonal employees do not work an average of 30 hours or more per week when measured over that 12-month period. For example, if a seasonal worker provides 50 hours of service per week for 16 consecutive weeks, but is not reasonably expected to average 30 hours per week for the 12-month initial measurement period, then the seasonal worker's employer is not required to offer the seasonal employee health care coverage under its group health plan. It is also important that each seasonal employee have more than 26 consecutive weeks between the end of one year's seasonal work and the beginning of the next year's seasonal work.

Finally, while the preamble to the proposed regulations does note that the final regulations may allow workers to be classified as seasonal even if they work for as many as six months out of the year, the more conservative approach for employers (pending the issuance of final regulations on this issue) would be to avoid employing any seasonal employee for more than four or five months in any 12-month period.

How Obamacare applies to any employer's situation will be specific to that particular employer. We encourage all employers to contact Jason Luter at Gray Reed & McGraw to discuss any questions they may have at jluter@lrmlaw.com or 469-320-6076.