

Hidden Obamacare Bomb Set to Strike Small Businesses

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Think Obamacare doesn't apply to your small business? Think again.

The hidden bomb lies within the penalties employer health plans face if they do not comply with the "Market Reforms" of the ACA. These rules apply to every employer health plan, regardless of the size of the employer and the penalty is \$100 per employee, per day (up to \$36,500 per year, per employee).

The ACA defines a "group health plan" as a plan an employer created or contributed to to provide health benefits to their employees or their families. This broad definition encompasses just about every conceivable way any employer could provide health-related benefits to their employees. Unlike the Employer Mandate provisions of the ACA, these apply to all employers.

A few of the ways both small and large businesses can trigger ACA penalties are:

- Offering Employees Reimbursement for Individual Health Insurance versus the employer's group health plan
- Placing annual limits on benefits
- Having an excessive waiting time for new employees

Employers Offering the Option of Paying Cash Versus a Portion of Health Insurance Premiums

One common-sense way for employers to offer health benefits to employees has been to offer to pay a portion of the premium for enrollment in a group health plan, or to give the employee the option to be reimbursed with pre-tax dollars for purchasing individual coverage. These are often called "Employer Payment Plans".

In IRS Notice 2013-54, the IRS concluded that these Employer Payment Plans fell within the definition of a "group health plan" and are therefore subject to the rules for group health plans enacted under the ACA. One of these rules prohibits annual limits on essential health benefits, and the IRS has made it clear that an Employer Payment Plan is "considered to impose an annual limit up to the cost of the individual plan."

Any employer who still had this sort of arrangement in 2014 and beyond will be liable for the ACA penalty.

Annual Dollar Limits on Benefits

Placing any kind of annual dollar limit on health benefits is prohibited for all employer health plans. Thanks to the liberal interpretation of "benefits" by the IRS in Notice 2013-54, this is a very broad prohibition and every feature of an employer's health benefit

offering should be analyzed for whether it could be seen as creating a prohibited annual dollar limitation on benefits.

Excessive Waiting Time

The ACA prohibits group health plans from requiring a waiting time in excess of 90-days from the employee's beginning of employment. This requirement applies to employers of all sizes who have a group health plan.

Catastrophic Penalties Lie in Wait This Year

The consequences of operating a plan like this are catastrophic. The penalty imposed under IRC § 4980D is equal to \$100 per day, per employee for an annual penalty of \$36,500 per employee. This penalty is 1825% larger than the penalty imposed on large employers who simply fail to offer coverage at all (\$2,000 per year per employee).

To be clear, these requirements were left out of the IRS "transition relief" which extended employer compliance with the Employer Mandate to 2015.

Any business whose health benefits fail to meet all of these requirements in 2014 and beyond is, as of this moment, exposed to penalties of up to \$36,500 per employee. Meaning a business with only (3) workers could face penalties over \$100,000. In the recent headline-grabbing Hobby Lobby case, Hobby Lobby was facing a penalty of \$475 million dollars a year.

One final kicker to these penalties is that they are excise taxes and are therefore not deductible expenses, leaving the business to pay income tax the following year on the amount of the penalty.

The Good News

Employers who correct their plans in time can avoid the penalties. But employers have to make that correction within 30-days of the date they "knew or should have known" about the defects in the plan, so it's important to take corrective action quickly. Also the corrective action must be retroactive, going back to the date the violation began.

Even if an employer is outside the 30-day window, it is obviously critical to minimize the risk going forward.

Any business that has not assessed its health plan to ensure ACA compliance should get in touch with an ACA-savvy tax attorney right away.

About the author:

John H. Barkley is a Partner with Shustak & Partners, P.C. specializing in tax law, employer compliance with the Affordable Care Act, employment law, and corporate law.

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