On January 1, 2014, The Affordable Care Act Goes Live. Are Your Clients Ready?

The Patient Protection And Affordable Care Act is one of the most complex pieces of legislation ever devised. In 2014 – when the bulk of its provisions become effective – the Affordable Care Act will establish a massive wealth shifting apparatus that will affect every individual and employer in America.

Though it will affect all employers to some extent, about one million businesses nationwide will face the brunt of the Affordable Care Act. Thousands of these businesses call the Twin Cities home.

The Affordable Care Act presents significant challenges for employers, including $2,000 in potential tax for each full-time employee, a plethora of new taxes, fees, and administrative burdens that will drive insurance rates higher, and a health care market in tumult where reliable information is scarce.

But there are also opportunities. As with any highly complex legislation, the Affordable Care Act is rife with exceptions, qualifications, and special treatment. Consequently, the Affordable Care Act favors employers that understand it and adjust their operations to minimize the burdens it imposes and maximize the advantages that it confers.

Currently, it appears that many smaller employers do not have the Affordable Care Act on their radar.[1] With the 2014 implementation of the Affordable Care Act drawing near, however, it is receiving increasing media attention. Counsel to employers can expect to begin receiving inquiries from their clients regarding whether and how the Affordable Care Act will affect them. Attorneys should, therefore, be prepared to assist their clients in developing strategies to maximize the opportunities of the Affordable Care Act and minimize the threats. Below we discuss a few of the most significant new provisions of the Affordable Care Act that will affect employers in 2014.

The Affordable Care Act: $2,000 in potential tax for each full-time employee; a plethora of new taxes, fees, and administrative burdens that will drive insurance rates higher; and a health care market in tumult where reliable information is scarce.

[1] For instance, a March 2013 survey of hundreds of small employers that had purchased insurance for employees found that over half fundamentally misunderstood the terms of the Employer Shared Responsibility Tax. *See* http://news.ehealthinsurance.com/_ir/68/20132/eHealth%20Spring%202013%20Small%20Bus%20Survey.pdf (retrieved April 10, 2013).

The Employer Shared Responsibility Tax: Complex And Potentially Expensive.

The Play or Pay Mandate – styled "Employer Shared Responsibility" under the Affordable Care Act – imposes a maximum Tax of $2,000 per full-time employee on large employers that do not offer affordable health coverage to full-time employees and their children.

Small employers are not subject to the Pay or Play Mandate. In each year that the Tax is effective, an employer's average number of full-time employees in the previous year will determine whether it is subject to the Pay or Play mandate. Consequently, employers would be wise determine now whether they will be exposed to potential liability for the Tax next year. Employers with fewer than 50 full-time employees in 2013 have no potential liability in 2014. Attorneys that counsel employers with workforces near the 50 full-time employee borderline should convey this information to their clients, as these employers will want to account for the effect of creating or avoiding potential Tax liability in their employment decisions this year.

Attorneys should be careful, however, to ensure that their clients understand how to properly calculate their full-time employees for purposes of the Tax, which includes the hours of part-time employees in the count of full-time employees. For instance, 2 employees working 15 hours a week count as 1 full-time employee. Consequently, many small employers like restaurants and retailers – who would not normally conclude that they have 50 full-time employees – may nevertheless be subject to this Tax.

Potential liability under the Employer Shared Responsibility Tax is significant. The Tax could be an administrative nightmare for some employers. And the facts that will determine whether an employer pays the tax in 2014 have already begun to accrue.

To avoid the Tax, large employers will generally need to *offer* health coverage to at least 95 percent of their full-time employees. But that does not mean that they must *pay* the entire cost of coverage. Employers will not pay the Tax if they require employees to pay some or all of the cost of coverage, as long as no employee's contribution toward the self-only portion of coverage exceeds 9.5 percent of the employee's income.[2] Employers are never required to contribute toward coverage for an employee's children, and they need not even offer coverage to spouses.

[2] An employer, for example, that offers a health plan with a premium of $250 per month for self-only coverage will generally need to contribute toward the premiums of its full-time employees that make less than $16 an hour, but will not need to contribute toward the premiums for employees that make more than $16 an hour.

This discussion of the Pay or Play Mandate covers merely the broad strokes; it is a very complex tax with caveats in its every aspect. The effect of the Tax on each employer will be very fact specific. A few things are clear, however. Counsel to employers should, therefore, begin working with their clients soon to determine whether and how to avoid the Tax.

Insurance Premiums Are Likely To Rise Under The Affordable Care Act – Employers That Can Expect Particularly Large Increases May Wish To Consider Self-Insurance.

The Affordable Care Act was intended to provide affordable health insurance to millions of uninsured, and to lower premiums for those – primarily the least healthy – that found health insurance premiums prohibitively expensive. In pursuit of this goal, the Affordable Care Act requires insurers to cover individuals without regard to pre-existing conditions, without regard to health, and with only narrow premium adjustment ranges for age and smoking. But the practical reality is that premiums were prohibitively expensive for some because the actual cost of care was prohibitively expensive. Insurers could not offer affordable insurance to those with unaffordable care costs without shifting those costs to others – principally healthy individuals and groups. The Individual Mandate and Pay or Play Mandate were designed to ensure that there were healthy individuals and groups onto which insurers could shift the costs of charging the unhealthy less than the cost of care. These provisions, however, were not enough. Thus the Affordable Care Act also institutes a bevy of government subsidies and cost shifting programs. Yet the subsidies and programs are themselves massively costly, so to defray these costs the Affordable Care Act created a number of additional taxes on insurers, the medical industry, and high-income individuals.

Although the average increase in premiums under the Affordable Care Act may be in the neighborhood of 30 percent, for an employer that has a healthier than average workforce – and that is accustomed to paying premiums that are proportional to the actual cost of care for those workers – the Affordable Care Act's premium stabilization programs could result in sticker-shock.

The taxes on insurers and the medical industry will be passed directly through to employers in the form of increases in premiums. According to a recent study by the non-partisan Society of Actuaries, the Affordable Care Act will increase insurance premiums in the individual market by an average of 32 percent when compared to prior law.[3] The same forces that operate in the individual market also affect the group market, where employers obtain insurance. Employers can, therefore, generally expect significant premium increases beginning in 2014.

3 *See* http://www.soa.org/NewlyInsured/(retrieved April 10, 2013).

In calculating average premium increases under the Affordable Care Act, the Society of Actuaries did not account for the cost-shifting programs, which the Affordable Care Act names “Premium Stabilization” programs. Generally, these programs will charge insurers covering healthy populations and pay that money to insurers covering unhealthy populations with the aim that each insurer has the costs of an insurer that covers a population with average health. These charges and payments could be massive. An insurer that covers a population that is 10 percent less expensive than average for a total annual cost of $10 million could receive an invoice from the Department of Health and Human Services for more than $1 million.[4] Naturally, an insurer expecting such a charge will pass it directly through via premium increases.

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Fortunately, the Affordable Care Act’s premium stabilization programs and many of its taxes do not apply to self-insured health plans. Employers faced with enormous premium increases may, therefore, be interested in self-funding their health plans. Their attorneys should be prepared to advise them on that change.

The Affordable Care Act Favors Employers That Prepare For It.

Health care reform is a massive undertaking with immense costs, much of which the government wants employers to bear. But the Affordable Care Act is so incredibly complex that there are very few employers for whom large increases in health care costs are inevitable. Employers that invest time and energy into understanding the implications of the Affordable Care Act will find that they have myriad options for reducing or eliminating the cost increases wrought by health care reform. And with the government pouring money into the health care system, some employers may find that they are able to actually reduce their absolute costs. Attorneys that provide counsel to employers should expect to receive questions, and should prepare to respond.

[4] *See*, http://cciio.cms.gov/resources/files/riskadjustment_whitepaper_web.pdf (retrieved April 10, 2013).

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Anderson, Helgen, Davis & Nissen, PA is a full-service law firm located in Minneapolis, MN. Our attorneys have extensive experience in the areas of Employee Benefits and Labor & Employment law and also practice in the areas of general business law and litigation. If you would like more information regarding the subject of this AHDN Client Update, or if you have any legal needs, please contact Anderson, Helgen, Davis & Nissen or any of our attorneys at:

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