The Employer Mandate in the Affordable Care Act

By Jack Blum

This is the first installment in a two-part story on the Affordable Care Act

The Affordable Care Act (ACA) will reshape a large portion of the American economy, and for employers, especially small and mid-sized businesses, the ACA's most significant provision is perhaps its employer mandate.

This mandate will require employers over a certain size to provide "affordable" health care coverage meeting certain "minimum essential coverage" requirements or face hefty fines. On January 2, 2013, the Internal Revenue Service (IRS) released its latest proposed rules on the employer mandate. While the IRS is still accepting comments on the proposed rules, it is anticipated that the final rules ultimately put into place will closely resemble the IRS's recent release.

Whether employers are committed to providing health insurance to all employees, or wish to avoid the employer mandate's costs altogether, they will need to navigate the mandate's considerable requirements.

As the employer mandate will play a significant role in the growth and hiring decisions of businesses across the country, it will be essential for employment and business planning attorneys to understand how and when the employer mandate applies.

Which Businesses Are Covered By the Employer Mandate?

One aspect of the employer mandate that may catch many off guard is that while the employer mandate does not come into effect until January 1, 2014, its initial applicability will be based on 2013 staffing levels. The employer mandate applies to any "applicable large employer," which is defined as an employer with over 50 full-time or full-time equivalent employees in the preceding year. Classifying full-time employees is straightforward: any employee who works more than 30 hours per week on average is full-time. Calculating the number of "full-time equivalent" employees is a little trickier.

To reach this figure, an employer must total the aggregate number of hours worked by every non-full-time employee in a given month and divide by 120. So, for example, two employees working 15 hours per week add up to one "full-time equivalent." The total number of full-time and full-time equivalent employees for each month is then averaged for the entire calendar year, and if that average is greater than 50, then the business is an "applicable large employer" and is subject to the employer mandate.

The main exception to the "applicable large employer" definition in the proposed regulations is for seasonal businesses that only exceed 50 full-time and full-time equivalent employees for 120 days or less in a given year. The IRS has not yet fully defined "seasonal employees" but it appears from the proposed rule that some agricultural workers and holiday retail workers will fit solidly within the definition.

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The proposed regulations also allow the IRS to consider employers owned by the same parent company or ownership group, as well as closely-affiliated service companies, as part of a controlled group. If the combined group is an "applicable large employer," then each employer within the group is considered an "applicable large employer member," and each is subject to the mandate regardless of how many employees actually work for each individual company. Therefore a group of companies owned by a single investor, or small group of investors, are all subject to the mandate even if no company individually has 50 full-time or full-time equivalent employees.

Who is Considered an Employee?

The proposed rules adopt the IRS's traditional "control" test for determining whether a worker is an employee. If the employer controls not just the end product of what the worker does, but also how the worker does it, then the worker is probably an employee. The classification of a given worker as an "independent contractor" rather than an employee is immaterial to the worker's status, and misclassification can in fact lead to liability under both federal law and the Maryland Workplace Fraud Act.

That is not to say that the definition of "employee" for purposes of the employer mandate is without exemptions.

Sole proprietors, partners, and two percent or greater shareholders in S-Corporations are not considered employees. In addition, workers leased from a staffing agency are not considered the lessor business's employees. The IRS has indicated, however, that the final rules will contain an anti-abuse provision for the use of leased employees, so employers should be wary of aggressively using leased employees to attempt to avoid the employer mandate.

How are Each Employee's Hours of Service Calculated?

The classification of an employee as "full-time," as well as the employee's contribution to the employer's "full-time equivalent" figure, is based on the employee's

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Wrongful Discharge in Maryland

By David B. Applefeld

Maryland follows the "employment-at-will" doctrine, which means that the employer-employee relationship can be terminated by either party, at any time, for any reason or for no reason at all.

However, there are two exceptions to this doctrine.

The first applies when the employment is subject to an express or an implied contract for a fixed duration (i.e. a five-year contract). The second applies when an "at-will" employee is terminated in clear violation of a public policy or for exercising a protected right.

In 1981, Maryland's Court of Appeals first recognized the existence of a public policy exception to the employment-at-will doctrine in response to a certified question from the United States District Court for the District of Maryland. *Adler v. American Standard Corp* involved a management employee who alleged that he was terminated for reporting improprieties in his employer's operation.

In response to Adler's claim, the United States District Court certified the following questions to the Maryland Court of Appeals: Does Maryland recognize a cause of action for abusive discharge; and, if so, did Adler's allegations state a claim under Maryland law?

The Maryland Court of Appeals responded by recognizing an exception to the employment-at-will doctrine. The Court concluded that a cause of action for "abusive discharge" may be maintained by an at-will employee who can demonstrate that "the motivation for the discharge contravenes some clear mandate of public policy."

Maryland defines "public policy" as a "principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good."

Maryland's courts have taken a narrow view of what constitutes "public policy," and have been reluctant to judicially create otherwise undeclared sources of public policy as a basis for maintaining a wrongful discharge action.

In *Parks v. Alpharma, Inc.*, 2011, the Maryland Court of Appeals explained:

"We have always been aware, however, that recognition of an otherwise undeclared public policy as a basis for a judicial decision involves the application of a very nebulous concept to the facts of a given case, and that declaration of public policy is normally the function of the legislative branch. We have been consistently reluctant, for example, to strike down voluntary contractual arrangements on public policy grounds."

Some examples of public policy mandates that have been found to be legally sufficient in supporting a wrongful discharge claim include:

- Reporting a criminal activity such as child abuse to law enforcement when under a legal duty to do so. (See *Bleich v. Florence Crittenton Serv.,* 1993.)
- Refusing to submit to a polygraph examination. (See *Moniodis v. Cook,* 1985.)
- Refusing to engage in "quid pro quo" sexual activity. (See *Insignia Residential Corp. v. Ashton*, 2000.)
- Filing a worker's compensation claim. (See *Ewine v. Koppers Co., Inc.*, 1988.)
- Exercising a constitutional protected right such as the first amendment. (See *De Bleecker v. Montgomery County*, 1982.)

To plead a cause of action for wrongful discharge in Maryland, a plaintiff must specifically allege that he or she was terminated for efforts to fulfill a statutorily prescribed duty, or for a failure to engage in illegal activity, or for exercising a protected right.

The plaintiff also must plead with particularity the source of public policy that was allegedly violated, and how the termination violated the law. Vague or conclusory factual allegations are legally insufficient to support the claim.

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"hours of service." Hours of service are defined as every hour for which the employee is entitled to payment, regardless of whether the employee is actually paid for that time. This includes paid leave, such as vacation and sick leave, but not unpaid leave.

For hourly employees, the calculation must be based on the actual number of hours worked, since the employer presumably has a precise figure available. For non-hourly employees, the employer can choose whether to use the employee's actual hours, or the equivalencies of 8 hours per day or 40 hours per week. These equivalencies cannot be used if they do not generally reflect the employee's actual hours of service and would understate an employee's hours of service so as to cause the employee to lose full-time status. For instance, if an employee works three 10-hour shifts per week, meeting the 30 hour threshold, the employer cannot use the daily equivalency to credit the employee with only 24 hours of service. Similarly, an employee working two 70-hour weeks per month, and no hours in the other two weeks, cannot be credited with two 40-hour weeks through the weekly equivalency.

Which Employees are Entitled to Coverage?

Another area of potential confusion is that while the employer mandate's application takes into account hours worked by non-full-time employees through the full-time equivalency calculation, the mandate only requires that full-time employees and their dependents be provided coverage.

There is no requirement to provide coverage to employees who work less than 30 hours per week. Each employee's full-time status is continually tested by a "look back" calculation of the employee's hours of service over recurring "standard measurement periods," which can be anywhere between three and 12 months. The length of these measurement periods is selected by the employer, but must be applied in a relatively standard manner across broad categories of employees.

If an employee qualifies as full-time during a measurement period, then the employee must be provided coverage during a subsequent "stability period" of at least six months and no shorter than the length of the measurement period, even if the employee's status changes during the "stability period."

The employer mandate also does not require that new employees be provided health coverage immediately. If a new employee is reasonably expected to work full-time, for instance an employee hired on a standard 9-to-5 schedule, then health coverage does not need to be provided until the end of the third month of employment. If the employer does not provide coverage by the end of the third month, however, then the employer can be held liable for the first three months, notwithstanding the fact that the employer was not otherwise required to provide coverage during that period.

If the employer cannot reasonably forecast whether the employee will average 30 hours of service per week, then the employer can examine the employee's hours over a three to 12 month "initial measurement period" to determine whether the employee is full-time and eligible for coverage. If the employee is ultimately eligible, however, then coverage must be provided for a "stability period" beginning no later than the last day of the first calendar month following the anniversary of the employee's start date. So, an eligible employee starting on January 3, 2014 would have to be provided coverage no later than February 28, 2015.

The employer mandate's requirement that employers constantly measure employees' hours of service over various measurement periods, and then provide coverage for stability periods linked to those measurement periods, will likely cause a major headache for many employers.

The proposed rules set out different measurement and stability periods for different situations and types of employees, and these periods are often of varying lengths and overlapping. Employers that do not provide coverage to non-full-time employees will need to be organized and maintain complete records in order to track their employees' hours of service to comply with the employer mandate's requirements.

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treatment for depression.

Even if you are not suffering from a mental health illness, regular exercise can reduce sadness, stress, tension, and anger. Exercise can also improve your confidence and can prevent illness.

Exercise outside when you can. It has been shown to be very helpful in reducing anxiety and sadness. Exercising out in nature can be both energizing and soothing at the same time. It can calm the mind and senses.

Be patient. It can sometimes take several weeks to really feel the improvement. It's important to stick with it and choose exercises that are more strenuous to elevate your heart rate and increase blood flow. The good news is that some studies have shown that even short bursts of activity, as little as eight minutes, help individuals feel better. This is good especially if you don't have time to spend hours at a gym.

Be creative, try something new, and mix it up to add variety to your workout and keep it fun.

Find exercises that allow you to vary the intensity within your workout. For example, if you like to bike, start off biking slowly and then increase and decrease your speed throughout your workout. This challenges you on a cardiovascular level.

So don't just think about exercise as a way to tone up or lose weight. Exercise causes natural chemical changes in your body that improve your mental health and your physical health. Whether you like to bike, run, walk, swim, kayak or rock climb set a goal and start exercising. Ultimately you will feel better.

LAP offers *free*, *confidential* counseling. Jim Quinn, LAP Director, can be reached at (443) 703-3041 or jquinn@msba.org. Lisa Caplan, Program Counselor, can be reached at (443) 703-3042 or lcaplan@msba.org.

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