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# ObamaCare on the Horizon:

## The "Applicable Large Employer" Determination



By now, many Employers have a general understanding of what the Affordable Care Act (the "ACA" or "Act") requires. Employers generally understand: that the Employer Shared Responsibility ("Pay or Play") provisions apply to companies with 50 or more employees; that a 30 hour workweek is considered "full-time"; and that President Obama has "postponed" the penalty provisions of the Employer mandate.[1]

With these over-simplified understandings in mind (and without addressing their nuances, which will be further addressed and explained in later Articles), this Article will address the threshold determination that every Employer must make: whether it is an "applicable large employer" subject to the ACA's Pay or Play provisions.

**"Applicable Large Employer" Determination**

The ACA's Pay or Play provisions require certain "applicable large employers" to either offer qualifying health insurance coverage to its employees and dependents,[2] or be subject to an assessable penalty (which is not tax deductible). Accordingly, before an Employer is able to

[1] Please do not hesitate to contact a member of **HesseMartone, P.C.'s** Affordable Care Act Compliance Team if you have any questions about these or any other concepts relating to Employers' obligations under the ACA.
[2] Note that the offered plan must cover dependents, but "dependents" does not include one's spouse.

analyze whether and to what extent it may be subject to such penalties, it must first determine whether it is an "applicable large employer."

The Act defines an "applicable large employer" as "an employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year."[3] The Act further defines "full-time employee" to mean, "with respect to any month,[4] an employee who is employed on average at least 30 hours of service[5] per week."

However, solely for purposes of determining whether the Pay or Play provisions apply to a particular company, "full-time equivalents" are treated as "full-time employees." The number of "full-time equivalents" an Employer has is "determined by dividing the aggregate number of hours of service of employees who are not full-time employees for the month by 120." That is, for every 120 "hours of service" attributed to non-full-time employees in a particular month the Employer is deemed to have one additional "full-time employee."[6]

For example, if an Employer has 100 employees who are not "full-time," and the Employer paid those 100 employees for 4,800 "hours of service," the Employer would calculate the number of its "full-time equivalents" by dividing 4,800 (the hours of service attributed to its non-full-time employees) by 120 (the statutory number of hours of service performed by non-full-time employees constituting one full-time "equivalent"). In this over-simplified example, 4,800 divided by 120 equals 40; the Employer would therefore have 40 "full-time equivalents."

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[3] Importantly, the IRS' "common control" rules are applied to the ACA's Pay or Play determination of whether an Employer is an "applicable large employer," though the penalties are assessed on an entity-by-entity basis.

[4] While the Act defines "applicable large employer" in terms of the "preceding calendar year," the Act refers to an employee's categorization as "full-time," as well as the assessable penalties, in terms of months.

[5] Further note that the phrase "hours of service" includes certain paid time off and back pay awards in addition to actual "hours worked."

[6] Also note that 30 hours per week is considered "full-time" for purposes of the Affordable Care Act. Federal regulations have generally calculated this to be equal to 130 hours per month (52 weeks x 30 hours per week divided by 12 months = 130 hours per month); nonetheless, the calculation of full-time equivalents for purposes of determining whether an Employer is an "applicable large employer" is based on 120 hours of service in a month, presumably using the 30 hours of service per week figure and multiplying it by an assumed four-weeks-per-month.

To complete the analysis, and to determine whether it is an "applicable large employer," the Employer must add the number of "full-time equivalents" to the number of its "full-time employees." If that total equals or exceeds 50, the Employer is an "applicable large employer" subject to the ACA's Pay or Play provisions.

Thus, an Employer can generally determine whether it is an "applicable large employer" by following these three steps:

1. Count the number of employees who (for the relevant month) had an average of 30 "hours of service" per week – this is the company's base number of "full-time employees";

2. Excluding those employees, divide the total number of "hours of service" performed by all non-full-time employees by 120 – the resulting number represents how many "full-time equivalents" the company has; and

3. Add the base number of "full-time employees" from (1) to the number of "full-time equivalents" from (2) - if the number is 50 or more, the company is an "applicable large employer" subject to the Pay or Play provisions.

Having determined whether it is an "applicable large employer," an Employer may then begin to assess its options with respect to complying with the ACA, including analyzing the amount of assessable penalties, if any, it may be subject to under the Act's Pay or Play provisions.

For more information about the Affordable Care Act's impact on your Company and how **HesseMartone, P.C.**'s Affordable Care Act Compliance Team can help, contact Adam Doerr (adamdoerr@hessemartone.com), Abby Schwab (abbyschwab@hessemartone.com) or Andy Martone (andymartone@hessemartone.com).

Next Week: A look back at the rollout of the State Exchanges and delay of the Small Business "SHOP" Exchanges