HEALTH CARE LAW: CONTENT FOR SRAs

Title: Health Care Law: Next Steps for Restaurateurs
Date: Jan. 22, 2013

Questions? Denise Roach, droach@restaurant.org or Michelle Neblett, mneblett@restaurant.org

****

Big health care changes are headed your way soon, if the Obama Administration's plans proceed as expected in implementing the 2010 health care law.

The most significant changes under the landmark 2010 health care law hit businesses in 2014, when employers of 50 or more full-time-equivalent employees will be required to either offer qualifying health plans to full-time employees and their dependents or shell out per-full-time-employee penalties for failing to offer a plan or failing to offer a plan that meets certain standards.

Employers need to get familiar with the fine print of the law now. The law is complex, and each regulatory proposal adds new layers of complexity while also providing some additional flexibility. Some implementing regulations have not been released, and most regulations affecting employers aren't in final form yet. But employers can use the proposed regulations in place now to plan for 2014.

Some large employers confronted with decisions may find that the law is more workable than they anticipated. Others may find the law imposes costs and administrative burdens that could make it easier for a business to opt for paying penalties instead of offering health coverage.

Either way, getting ready for the law takes a lot of advance planning – including time with tax advisors, insurance brokers, payroll providers and key staff -- to understand the impact of the law and think through your options for implementing it in your business.

There's little time to wait. Important changes start taking effect as soon as March 2013, when the health care law requires employers to begin providing employees with information about new government Health Insurance Marketplaces (also known as "exchanges") that on Oct. 1 are supposed to start signing people up for 2014 coverage. These marketplaces – some operated by states, some by states working jointly with the federal government and some by the federal government alone -- are designed to be one-stop shops where some small businesses and people who don't get coverage through their employers can shop for insurance.

While some dates and deadlines may slip, the law is moving forward, and employers need to understand what lies ahead.

The National Restaurant Association has been working since the law was enacted to highlight the restaurant industry's compliance challenges, and continues to press regulatory agencies for answers and maximum flexibility for employers as the rules are written. The NRA continues to urge Congress and the

White House to address the provisions that have the greatest impact on employers' ability to create jobs.

The NRA keeps its members updated on new developments at its Health Care Knowledge Center at Restaurant.org/Healthcare, including ongoing information as federal agencies, Congress and states take further steps on health care.

***** TOP 10 STEPS TO TAKE NOW**

1. **Don't assume you're too small to be covered by the employer mandate.** Most restaurant operators understand the law requires employers with 50 or more full-time-equivalent employees to offer "minimum essential coverage" to their full-time employees (and their dependents) or face potential penalties. However, many employers with more than one business entity don't realize that they might need to consider their employees as one group. That could push you over the 50-FTE threshold.

2. **Consult your tax advisor.** If you're part of business that has multiple entities, contact your tax attorney or accountant to ask about whether you need to combine all employees to figure out whether you're covered by the employer mandate.

3. **Know your workforce.** The new law requires a series of calculations to see whether you're covered by the law's employer mandate and if so, which employees must be offered health care coverage. Know your workforce: How many full-time employees do you have? What are the hours worked by part-time and seasonal employees? Although you are not required to offer benefits to part-time employees, their hours (and those of seasonal employees) are included in the calculation for determining whether you meet the 50-FTE threshold for the employer mandate. The answers to these questions will help you better understand the potential impact of the law on your business.

4. **Consult your insurance broker.** Consider whether you should make any changes to your current health plan(s). Your broker will be able to help you determine more options as regulatory agencies release more rules.

5. **Learn what the law will require of employees.** The law requires almost all Americans to obtain insurance starting in 2014. Tax penalties for individuals who fail to obtain coverage for 2014 start at $95 a year, or 1 percent of a person's taxable income, whichever is greater. Employees with incomes between 100 percent and 400 percent of the federal poverty level (currently $11,170 to $44,680 for a single person, or $23,050 to $92,200 for a family of four) may qualify for premium tax credits or cost-sharing reductions to buy coverage on an exchange in their state. If a full-time employee qualifies for premium tax credits to buy a plan on an exchange because the can't get affordable coverage at work, the employer faces potential penalties – so employers need to be aware of how employees may interact with exchanges.

6. **Develop a strategy to talk about the health care law with employees.** The law requires most employers to provide basic information for employers about how to access the new exchanges, who qualifies for tax subsidies to help them buy insurance, and more. Your employees might look to you for answers to their questions about the health care law in general. It is wise to think

about how you will explain the impact of the law on them and your business.

7. **Understand your state exchange.** States have the option of setting up their own exchange, running a joint exchange with the federal government, or deferring the obligation to the federal government entirely. No matter what path your state chooses, be sure state officials hear from business owners to make sure exchanges work for employers.

8. **Evaluate your payroll and I.T. capabilities.** Starting Jan. 31, 2015, employers covered by the employer mandate will be required to report extensive information to the IRS and their employees about their health plans, full-time employees and their dependents. You'll likely need to pull information from your payroll system, plan documents and other sources. Consider the processes that will be needed to aggregate this information.

9. **Tell your story to your elected officials.** Because of the labor-intensive nature of the restaurant workforce, the restaurant our industry is impacted by the law like almost no other. Help lawmakers understand how the law affects you.

10. **Stay abreast of new developments at Restaurant.org/Healthcare.**

******* ARE YOU COVERED BY THE EMPLOYER MANDATE?**

OVERVIEW: The health care law's employer mandate – the requirement that employers offer coverage to full-time employees and their dependents or face possible penalties -- covers "applicable large employers" (also referred to here as "large employers"). An applicable large employer is defined as a business that employed an average of at least 50 full-time-equivalent (FTE) employees on business days during the preceding calendar year.

SEPARATE ENTITIES

Q: If two or more companies have a common owner or are otherwise related, are their employees combined for purposes of determining whether they employ enough employees to be subject to the employer mandate?

A: Yes. The IRS will apply its longstanding "common control" standard -- found at Internal Revenue Code § 414(b), (c), (m) and (o) – in these situations. Under this standard, companies that have a common owner or are otherwise related generally are combined together for purposes of determining whether or not they employ at least 50 full-time-equivalent employees. If the combined total meets the 50-FTE threshold, then each separate company is subject to the law's employer mandate, even those companies that individually do not employ enough employees to meet the threshold. Businesses should consult with their tax advisors about specific circumstances.

CALCULATION

Q: How do I calculate whether my business meets the 50-FTE threshold?

A: You need to look at each of the preceding 12 months to determine the average number of full-time equivalents you employed over those months. (You can use a period as short as six months in 2013 to calculate your status for 2014 – see below question on "transition year.")

Calculate whether you meet the threshold as follows:

Step 1: For each of the 12 months an employer must look back and determine how many employees (including seasonal employees) averaged 130 hours or more in a calendar month. That will be the number of full-time employees you employed during that month.

Step 2: Next, the employer must add together the hours of all other employees (including seasonal employees), but not count more than 120 hours per person. The total hours worked by all others is then divided by 120. That determines a full-time-equivalent number for your non-full-time employees.

Step 3: Next, the employer must add the number of full-time employees to the number of equivalents, to get the total number of full-time-equivalent employees.

Finally, the employer must:

- Repeat the process for each of the remaining 11 months
- Add each of the 12 numbers together
- Divide by 12 for the average annual full-time-employee-equivalent number. That is the number that employers must use to determine whether an employer is considered an applicable large employer.

If the total number of full-time-equivalent employees is 50 or higher, the employer is subject to the mandate. If the number is below 50, the employer is not considered a large employer subject to the mandate, but is subject to other provisions of the law.

Note: If your workforce exceeded 50 FTEs for less than 120 days or four calendar months, and if the employees in excess of 50 during those months were seasonal employees, you may qualify for a "seasonal employee exception" from the employer mandate. The IRS offers more details in its regulations.

TRANSITION YEAR

Q: When do I do the calculation to see if I'm subject to the employer mandate in 2014?

A: For employers who are on the edge of the 50-FTE threshold, the IRS allows employers to measure their workforce for any six consecutive months in 2013 --- rather than the full 12 months -- to determine if they had 50 or more full-time-equivalent employees during that period. So, for example, an employer could use the period from Jan. 1, 2013, through June 30, 2013, and then have six months to analyze the results, determine whether it needs to offer a plan, and, if so, choose and establish a plan.

******* CHECKLIST FOR SMALL EMPLOYERS**

OVERVIEW: Employers who employ fewer than 50 full-time-equivalent employees in the previous calendar year are not subject to the law's employer mandate in the subsequent calendar year. These businesses are not required to offer health benefits to their employees and will not owe federal penalties if they fail to offer health benefits.

However, small employers are covered by other parts of the law:

- Small employers must provide required notice to all employees about exchanges starting March 1, 2013.
- Small employers may be eligible to buy insurance through a federal or state-run Health Insurance Marketplace.
- Small employers who offer health plans must comply with the 2010 health care law's insurance reforms. Your insurance company should this for you in your plan design.
- Small employers with health plans are also covered by other rules under the health care law, including nondiscrimination rules, the 90-day limit on maximum waiting periods, and restrictions on flexible savings accounts, health savings accounts and health reimbursement accounts. Like all employers that offer health plans, small employers must offer a "plain English" Summary of Benefits and Coverage to employees.
- Employers that file fewer than 250 W-2 forms a year must report the value of health care coverage on W-2 forms beginning in tax year 2013.

*******LARGE EMPLOYERS: GENERAL RULES**

OVERVIEW: Starting in 2014, applicable large employers – those with 50 or more full-time-equivalent employees — must offer "minimum essential coverage" to all full-time employees and their dependents. Large employers who fail to offer such coverage, or who offer coverage that is not affordable or of minimum value, may face penalties.

Large employers must follow other rules as well, including the insurance reforms outlined above for small employers. Large employers also face expanded reporting requirements, including new requirements requiring them to file returns with the IRS each Jan. 31 starting in 2015 with information on full-time employees and their dependents. And like almost all other employers, large employers will be required to notify employees of the existence of exchanges starting March 1, 2013, along with information about how to access the exchanges.

******* LARGE EMPLOYERS: WHAT KIND OF HEALTH PLANS MUST BE OFFERED?**

OVERVIEW: To fully avoid penalties, large employers must offer full-time employees and their dependents a health plan that's affordable and meets a minimum value standard. To be considered affordable, the employee's share of premiums for self-only coverage must not exceed 9.5 percent of their household income (see Affordability, below). To meet the minimum value standard, the plan must coverage at least 60 percent of the total allowed cost of benefits expected to be incurred under the plan.

MINIMUM VALUE

Q: How does an employer know whether its health plans provide minimum value?

A: The Treasury Department and the IRS still need to issue regulations spelling out how a plan meets the minimum value standard. These regulations will be important in shaping plan design and hence the cost of the employer's health plan. Most of today's workplace plans – with the exception of very bare-bones coverage -- are expected to comply with the minimum-value requirement. However, that will not be clear until regulations are issued.

Once minimum-value regulations are issued, employers will have a variety of ways to prove their plan meets the standard. The IRS and Department of Health and Human Services will make a minimum value calculator available online, for example. Employers can input information about the plan, including deductibles and co-pays, to find out whether the plan provides minimum value by covering at least 60 percent of the total allowed cost of benefits that are expected to be incurred under the plan.

******* <u>LARGE EMPLOYERS: WHICH EMPLOYEES MUST BE OFFERED COVERAGE?</u>**

OVERVIEW: To avoid penalties, large employers must make an offer of coverage to full-time employees (and their dependents).

DEFINITION OF FULL-TIME

Q: Which employees must receive an offer of health care coverage?

A: The health care law requires employers to offer full-time employees (and their dependents) the opportunity to enroll in a health benefits plan. Proposed IRS regulations define a full-time employee as a person who averages 30 "hours of service" per week in a given month. Hours of service is a broad category that includes each hour for which an employee is paid or entitled to be paid for their service, even if no work is performed. In calculating whether an employee has averaged 30 hours a week during a month, for example, the employer must count each hour for which an employee is paid, or entitled to payment, for periods during which no duties are performed due to hours worked and paid time for service such vacation, holidays, illness, incapacity, layoff, jury duty or leaves of absence. Employers can use 130 hours per calendar month as the equivalent of 30 hours per week.

FULL-TIME STATUS FOR EXISTING EMPLOYEES

Q: My full-time employees' hours can vary from month to month. How do I some stability in assessing their full-time status?

A: Determining full-time employee status on a monthly basis may cause practical difficulties, the IRS acknowledges. The problem is particularly acute if employees' hours vary from week to week or month to month, the agency said. This could "churn" some employees in and out of employer or exchange coverage from month to month, increasing costs for everyone. To address these concerns and give employers more flexibility, the IRS is giving large employers the option to determine each existing employee's full-time status by looking back at a measurement period of three to 12 months.

If the employer determines that an employee was employed on average at least 30 hours of service per week during this "standard measurement period," the employer treats the employee as a full-time employee during a subsequent corresponding stability period, regardless of the employee's number of hours of service during the stability period. The stability period would be at least six consecutive months or the length of the lookback period, whichever is greater.

If the employee did not work full-time during the lookback period, the employer would be permitted to treat the employee as a pat-time employee not a full-time employee during the subsequent stability period. Employers are permitted add an "administrative period" of up to 90 days between the lookback and stability periods to determine which employees are eligible for coverage and to notify and enroll employees.

FULL-TIME STATUS FOR NEW AND SEASONAL EMPLOYEES

Q: How can I determine the full-time status for a newly hired or seasonal employee if I don't think they will work 130 hours per calendar month?
A: Employers may know at the outset that a newly hired employee will be employed on average 30 hours of service a week. In these cases, to avoid any penalty, the employer must offer health care coverage to the employee at or before the conclusion of the employee's initial three calendar months of employment (i.e., the 90-day waiting period).

If, however, a new employee is a variable-hour or seasonal employee, and the employer can't reasonably determine if the employee will work full-time, the employer can use an "initial measurement period" of between three and 12 months to measure hours of service and determine the employee's full-time status . Employees determined to be full-time over this initial measurement period must be offered coverage during a subsequent corresponding initial stability period of at least six months, and no shorter than the initial measurement period. If the new variable-hour or seasonal employee is determined not to be a full-time employee during the initial measurement period, the employer is permitted to treat the employee as not a full-time employee during the stability period that follows the initial measurement period.

With certain limitations, the IRS will allow an administrative period of up to 90 days between the initial measurement period and the subsequent stability period to notify and enroll employees in coverage. If an employer chooses a 12-month initial lookback period, then the combined lookback and administrative periods cannot be more than 13 months plus a fraction of a month.

MORE INFORMATION

Q: Where can I get more details on how to measure the full-time status of my employees?
A: The IRS regulations on how to measure full-time status for many of your employees (lookback periods for existing employees, initial measurement periods for new variable-hour and seasonal employees, and

stability periods for all these employees) are complex, and address multiple scenarios. A link to the IRS's proposed regulations is available at Restaurant.org/Healthcare.

******* <u>LARGE EMPLOYERS: PENALTY SCENARIOS</u>**

OVERVIEW: Large employers covered by the law's employer mandate face two possible types of penalties:

a) Penalty "A": If a large employer does not offer any coverage, or offers coverage to less than 95 percent of his or her full-time employees, and any full-time employee uses a tax credit to purchase insurance on an exchange, the employer is liable for a $2,000 annual penalty times the total number of full-time employees, minus your first 30 full-time employees. This is the 4980H(a) penalty, named for the section of tax code that contains it.

b) Penalty "B": If a large employer offer coverage to full-time employees, but at least one full-time employee receives a premium tax credit to help pay for coverage on an exchange – either because the employer-provided insurance is not affordable or fails to provide "minimum value" -- the "4980H(b)" penalty applies. You'll face a $3,000 penalty for every full-time employee an exchange certifies as eligible for a premium tax credit to help them purchase insurance on an exchange. The payment is computed separately for each month. The amount of the payment for the month equals the number of full-time employees who receive a premium tax credit for the month multiplied by 1/12 of $3,000. Your liability in this scenario can never exceed the total penalty you'd pay for not offering coverage at all.

Q: How will employer payments be assessed?

A: An employer will be notified by the exchange and the IRS when an employee receives a premium tax credit. However, the IRS is developing a separate process for assessing penalties against employers that will involve the agency issuing a "notice and demand" for a year's worth of an employer's tax liability after the employer files required its required reports and the individuals file their income taxes.

Q: My business offers a non-calendar-year plan that starts in 2013 and runs into 2014. When am I required to begin complying with the employer mandate rules?

A: If you are a large employer who as of Dec. 27, 2012, maintains a non-calendar- year plan, you won't face penalties until the first day of your plan year beginning in 2014.

******* <u>LARGE EMPLOYERS: AFFORDABILITY OF HEALTH CARE COVERAGE</u>**

OVERVIEW: Large employers can face penalties if the coverage they offer to full-time employees is not affordable. As noted under Penalties, above, failing the affordability test can be costly for an employer. If a full-time employee goes to an exchange and the exchange certifies that an employer's plan is unaffordable for a particular employee and that the employee qualifies for a federal premium tax credit to help them buy insurance on an exchange, employers can be assessed $3,000 a year for each full-time employee that does this.

THE 9.5% RULE

Q: How does an employer know whether the coverage it offers is affordable?

A: If the employee's share of the premium for employer-offered coverage would cost the employee more than 9.5 percent of that employee's annual household income, the coverage is considered unaffordable for that employee. If an employer offers multiple health-care coverage options, the affordability test applies to the lowest-cost option available to the employee that also meets the minimum-value requirement.

Because employers generally will not know their employees' household incomes, employers can take advantage of one of the affordability safe harbors outlined in proposed regulations issued by the IRS in December 2012. Under the safe harbors, an employer can avoid a 4980H(b) penalty if the cost of the coverage to the employee would not exceed 9.5 percent of the wages the employer pays the employee that year, as reported in Box 1 of Form W-2, or if the coverage satisfies either of two other design-based affordability safe harbors based on the employee's rate of pay and the federal poverty line. Tip income is included in wages for the affordability calculation.

DEPENDENTS AND SPOUSES

Q: Are employers required to offer affordable health benefits to spouses and dependents?
A: The affordability test is based on whether the plan is affordable for the full-time employee for individual coverage. The offer of coverage does not have to be affordable to an employee's dependents; the affordability test is based on single-only coverage for the employee. An employer covered by the mandate is required to offer coverage only to full-time employees and their dependents; an offer of coverage is not required for an employee's spouse, since spouses are not considered dependents.

*******TIMETABLE FOR IMPLEMENTATION OF THE HEALTH CARE LAW**

2013

• Notification to employees. Starting March 1, 2013, employers must inform all current employees and any new hires about the existence of Health Insurance Marketplaces in their states and how employees can access it. The Labor Department has indicated it will issue guidance and a template about how the information must be provided.

• FICA tax increases. Beginning in 2013, taxpayers with incomes over $200,000 (single) or $250,000 (married filing jointly) will pay increased Medicare taxes (3.8% on unearned income) and the Medicare Hospitalization Insurance tax (.9% tax increase for employee).

• Flexible spending accounts limited. Beginning in 2013, employees' contributions to flexible spending accounts can be no more than $2,500.

• Exchange open enrollment. Beginning October 1, 2013, individuals and small businesses will be able to enroll in coverage purchased on the exchanges for plans beginning January 1, 2014.

2014

• Employer mandate. Employers with 50 or more full-time-equivalents must offer "minimum essential coverage" to all employees who average 30 or more hours a week in a given month, or potentially be liable for penalties.

• Individual mandate. The law requires most individuals to obtain health insurance coverage, through their employers, state exchanges, Medicaid/Medicare, or elsewhere, or face an annual tax penalty. In 2014, the tax penalty will be $95 for not obtaining minimum coverage or 1 percent of income, whiehver is higher.

• Health Insurance Marketplaces open. Each state must establish a Health Insurance Marketplace by Jan. 1, 2014, to provide affordable health care options to individuals and small group employers. If they choose not to, the Department of Health and Human Services will set up and operate one in that state. The exchanges are envisioned as marketplaces that will offer individual and small group plans that are administered by private insurance companies. It is anticipated that all restaurateurs will have a great deal of interaction with the exchanges in their states, even if they do not purchase coverage through the exchange, because of the reporting requirements in the law.

• 90-day waiting period. All group health plans are allowed up to a 90-day waiting period before offering coverage.

• Automatic enrollment. Employers with 200 or more full-time employees must automatically enroll their full-time employees into one of the plans the employer offers after the applicable waiting period. But the Labor Department says it won't have compliance guidance ready to go by 2014. The DOL says employers won't be required with this section of the law until regulations are issued.

• Exchange reinsurance fee. From 2014 to 2016 health insurers and self-funded plans will contribute to a fund that will be used to make sure the exchanges function properly. The fee is $5.25 a month per capita, or $63 in the first year. Health insurers are likely to pass this cost on to small employers.

2017

• Health Insurance Marketplaces grow. From 2014 to 2016, only individuals and small group employers are eligible to participate in the state exchanges; beginning in 2017, states may elect to allow large group plans (100-plus) to be sold on the exchange as well. States may also form regional exchanges.

2018

• “Cadillac” plans. Beginning in 2018, the law imposes a new 40 percent excise tax on the value of coverage that exceeds certain dollar thresholds. For 2018, the dollar thresholds for the excise tax are $10,200 for individual coverage and $27,500 for family coverage.