

The Affordable Care Act: Impact On International Assignments

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In 2010, the United States passed legislation which introduced sweeping changes to the landscape of US health care and imposed requirements for coverage. This legislation, which is commonly referred to as the Affordable Care Act ("ACA"), presents a myriad of complex issues related to internationally mobile employees.¹ In particular, as employers prepare to meet their 2015 year end ACA reporting requirements, special attention should be given as to how employees on assignment to or from the US should be reported.

As background, the ACA has two primary requirements for health care insurance coverage: the individual mandate, and the employer mandate. Although these two mandates are closely related, the requirements for each are unique and do not align precisely. In the simplest terms, the individual mandate requires that all US persons maintain



health insurance coverage throughout the year for themselves and members of their household. The employer mandate requires that large employers offer coverage to employees and their dependents.²

Overview Of ACA Requirements

In order to address the complications that an international assignment can add to ACA coverage and reporting, it is critical to understand the general concepts of the individual and employer mandates, including what constitutes an acceptable health care plan, which individuals and companies are subject to these requirements, when an exemption may apply, and the reporting requirements placed on large employers.

Minimum Essential Coverage

For a company to satisfy the employer mandate, it must offer its full-time employees coverage which is considered minimum essential coverage (MEC) and is deemed to be affordable to the individual. Coverage is deemed to be affordable when employee premiums do not exceed a certain percentage of income. This requires the employer to closely

monitor the cost of the plan and, in some cases, anticipated total wages of the individual.³ Similarly, individuals must maintain MEC to fulfill the individual mandate.

The definition of MEC is the same for both groups and includes:

- US-government programs;⁴
- Plans offered through state or federal exchanges;⁵
- Employer-sponsored self-insured plans;⁶
- Employer-sponsored insured plans;⁷ and
- Insured expatriate group health plans.⁸

Other types of health care coverage not listed above generally are not considered MEC, except for plans which have specifically applied to and received approval from the Secretary of Health and Human Services (HHS). As of July 2015, HHS has approved ten plans for MEC, including the Swiss National Health Insurance System.⁹

Applicable Individuals

Although the general rule that large employers must provide coverage to full-time employees seems consistent with the requirement that individuals must maintain coverage, there are disparities in who is considered an applicable individual for the purposes of both requirements, which can create confusion when trying to apply the two mandates concurrently.

Employers are required to provide MEC to full-time employees and their dependents, or face a penalty.¹⁰ The determination of who is considered a full-time employee requires a thorough analysis of the

hours worked by the employee, typically calculated by "looking back" to the prior year of service.¹¹ For the purposes of determining full-time status, only hours of service related to work performed in the US are included.¹² Therefore, an individual working outside the US would not be considered a full-time employee and the employer is not required to offer that individual coverage. When an employee transfers into or out of the US during a given year, using hours from the preceding year can produce odd results. For example, if a full-time employee transfers from the US to another country in January, the employer could be subject to ACA penalties for failing to offer the employee coverage that year even if the employee does not return to the US. To address this issue, the regulations include specific rules for international transfers which in many cases allow them to be treated as new hires.¹³

The individual mandate generally applies to all US citizens and residents, but does not apply to individuals who are nonresident aliens.¹⁴ Similar to the exclusion of non-US hours for the employer mandate, the individual mandate includes several exceptions for individuals who live outside the US.

The first is an exemption which applies to any month in which an individual is considered to be an "exempt noncitizen," which requires that the individual is not a US citizen and is not present in the US for at least one day during the month.¹⁵ Therefore, individuals who move into or out of the US during a given year will generally be able to qualify for an exemption for the months in which

they were not living in the US, provided they are not a US citizen.

There is also an exception for US citizens or residents residing outside the US, based on qualification for the foreign earned income exclusion.¹⁶ The foreign earned income exclusion is available to US citizens who have their tax home in a foreign country and are a *bona fide* resident of that country for an entire taxable year. It is also available to US citizens or residents who meet the physical presence test by remaining outside the US for 330 days in a rolling 365-day period, which can span multiple tax years.¹⁷ For any month in which an individual is eligible for the foreign earned income exclusion, that individual is deemed to have MEC for the given month. This treatment applies regardless of whether the individual chooses to claim the benefits of foreign earned income exclusion on the individual income tax return.

The individual mandate requires that coverage is maintained for the individual's entire household, which includes the taxpayer's spouse if filing a joint return and also any dependents. The final ACA regulations clarify that a dependent includes any individual who qualifies to be claimed as a dependent on the tax return, regardless of whether that individual is actually claimed.¹⁸

Reporting Requirements

The ACA requires that both employers and individuals report compliance with their respective mandates. Reporting for the individual mandate

takes place on the individual income tax return and began with the 2014 tax year. Individuals either indicate that they have full year coverage directly on the Form 1040 or, if they did not have full year coverage, complete an additional schedule to show months in which an exemption or penalty applies. If an individual does not have coverage or qualify for an exemption for any month, a penalty is calculated for that month, referred to as a shared responsibility payment.¹⁹

Beginning in 2015, large employers are required to provide a statement providing health insurance offer and coverage information to all full-time employees.²⁰ This reporting requires quite complex and detailed tracking of employees, offers of coverage, hours worked, and the cost of coverage. Employers must consider all of these factors and make determinations on how to accurately complete the forms using the proper codes, considering every month and every full-time employee, to satisfy the reporting requirements.

Employers are also required to provide a statement to any individual who enrolls in the employer's self-insured health plan, regardless of the individual's status as a full-time employee.²¹ For example, an individual working outside the US may not have any hours for purposes of being considered a full-time employee and, accordingly, the US employer may not be required to provide that individual with coverage under the employer mandate. However, if the US company chooses to offer coverage to that individual or his family through its self-insured plan

and any of them actually enroll in the plan, then the employer is required to report that coverage. This same rule applies to retirees, board members, or other non-employees who enroll in an employer's self-insured health plan.

Application Of ACA Requirements

As discussed above, the individual and employer mandates are complicated even in the purely domestic context. Employees on international assignments can present a variety of unique considerations. These complications arise for both assignments to and from the US.

The following examples illustrate how the ACA requirements apply to these mobile employees.

Permanent Transfer To The United Kingdom

Gary, a US citizen, transfers to the United Kingdom (UK) on a permanent basis on January 1 and begins employment with the local UK company, consequently ending employment with the US company. Similar to the other employees of the UK company, Gary receives health care coverage through the UK National Insurance system, a government-run plan. Gary qualifies for the foreign earned income exclusion under the *bona fide* residence test, but chooses not to claim the benefits of the exclusion on his return and instead claims a foreign tax credit for taxes paid to the UK.

What are Gary's individual ACA requirements? Absent application to and approval from HHS, the UK National Insurance plan will not qualify as

MEC. However, since Gary qualifies for the foreign earned income exclusion for the full year, he is deemed to have MEC for that period and is not subject to a shared responsibility payment.

What are the ACA requirements to Gary's employer?

Neither the US nor the UK company is subject to ACA reporting requirements. Gary is not considered a full-time employee since substantially all hours are worked outside the US, and neither Gary nor any member of his family enrolls in a self-insured plan of Gary's employer.

US Green Card Holder On Assignment In Brazil

Pam is a citizen of Argentina and a US Green Card holder. She is employed by a US company and is sent on a two-year assignment to Brazil beginning January 1. Throughout the year Pam has extensive travel back to the US and receives health insurance through an expatriate group plan that is fully insured. Pam is married with one child; her spouse and child remain in the US during her assignment and continue to receive coverage through the US company's self-insured plan.

What are Pam's individual ACA requirements? Although Pam is living outside the US for the full year, she is not eligible for the *bona fide* residence test of the foreign earned income exclusion as she is not a US citizen. She also does not qualify for the physical presence test based on her travel to the US during the year. Therefore, Pam does not qualify for an exception to ACA requirements and needs to maintain MEC to avoid a penalty. Pam's coverage

under the expatriate group health plan will qualify as MEC.

What are the ACA requirements to Pam's employer?

Even though Pam remains an employee of the US company, she is not considered a full-time employee of the US company for purposes of the ACA mandate because her hours of service primarily take place outside the US; therefore, the US company is not required to provide her or her dependent child coverage. Because the expatriate group health plan that Pam and her family enrolled in is fully insured, the insurance company (rather than Pam's employer) must issue Pam a statement of coverage.

Canadian Secondment To The US

Mary is a Canadian citizen who has not worked any hours in the US. On May 1, she starts a three-year assignment to the US. She remains employed by the Canadian company and is assigned to work for the US company. To avoid creating a permanent establishment of the Canadian company in the US, the Canadian employer enters into a secondment agreement with the US company. This agreement gives the US company control over Mary's activities while in the US. Mary's spouse and two children move to the US as well, but Mary does not claim her children as dependents on the return and does not apply for Individual Taxpayer Identification Numbers (ITINs) for them.

From January through April, Mary and her family receive insurance through the Canadian universal health care system. After their arrival in the US,

Mary and her family receive coverage from the US company's self-insured plan. Mary establishes US residency as of May 1 and files a dual-status arrival tax return.

What are Mary's individual ACA requirements? For the first four months of the year, Mary qualifies as an exempt noncitizen, provided she had at least one day outside the US in each month. She is not subject to the individual mandate for these months and will report the exemption on her tax return. Mary remains an exempt noncitizen for those months even if she chooses to make an election to file her return as a full year resident.

Mary is required to maintain coverage for her entire household for May through December, even though her children are not claimed as dependents on the return. The coverage she and her family receive from the US company is considered MEC. When reporting both the coverage and the exemption for her family, Mary should follow the instructions with the tax return for reporting coverage for individuals who do not have a social security number or ITIN. If Mary had instead remained on the Canadian government health care plan, this coverage would not be considered MEC and a penalty would be due.

What are the ACA requirements to Mary's employer?

Mary's employer is required to offer her affordable coverage for the period May through December. The determination which company is considered the common law employer for US purposes is

based on the facts and circumstances of the situation. In this case, the US company is determined to be Mary's common law employer and be subject to ACA information reporting requirements. The US company will issue Mary a statement reporting the coverage for her and her family; they will follow the instructions on the reporting form for reporting children with no social security number or ITIN.

Mexico Business Traveler

Adrian is a Mexican citizen with frequent business travel to the US. He spends approximately one week per month working in the US, but remains employed in Mexico and receives health care coverage from the Mexican company. Adrian is considered a US nonresident alien.

What are Adrian's individual ACA requirements? As a full year nonresident alien, Adrian is not subject to the individual mandate. In addition, there is no mechanism to report health care coverage, exemptions or penalties on the Form 1040NR.

What are the ACA requirements to Adrian's employer? Adrian is not considered a full-time employee of either the Mexican or US companies based on his hours of service; neither company is required to offer him coverage under the employer mandate.

Conclusion

As 2015 is the first reporting year for the employer mandate, nearly all large employers will face a variety of challenges in achieving compliance with the reporting requirements. These requirements are

complicated further for international employees and their employers; however, the issues are manageable with proper preparation and attention.

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ENDNOTES

- ¹ The Patient Protection and Affordable Care Act, Public Law 111-148, enacted on March 23, 2010, and the Health Care and Education Reconciliation Act, Public Law 111-152, enacted on March 30, 2010, are collectively referred to as the "Affordable Care Act."
- ² A large employer is generally defined as one which employed an average of at least 50 employees during the prior year. The rules regarding the counting of employees and service for purposes of this threshold are complex and are not addressed in detail in this publication. Consultation with a tax advisor should be sought if further guidance is needed.
- ³ Treas. Reg. §54.4980H-5(e)(2)(ii) provides a safe harbor definition for "affordability" in which coverage is deemed to be affordable if the employee's contribution does not exceed 9.5 percent of Form

W-2 wages from that employer. Other safe harbors are also available.

⁴ I.R.C. §5000A(f)(1)(A).

⁵ I.R.C. §5000A(f)(1)(C).

⁶ Treas. Reg. §1.5000A-2(c)(1)(ii) provides that an eligible employer-sponsored plan includes "a self-insured group health plan under which coverage is offered by, or on behalf of, an employer to the employee" without regard to where the plan is located.

⁷ Treas. Reg. §1.5000A-2(c)(1)(i)(B).

⁸ 79 Fed. Reg. 30,314, May 27, 2014; Expatriate Health Coverage Clarification Act, Public Law 113-235, enacted on December 17, 2014.

⁹ Centers for Medicare and Medicaid Services website: https://www.cms.gov/CCIIO/Programs-and-Initiatives/Health-Insurance-Market-Reforms/Downloads/MEC_PublicList_for-508_FINAL_07-10-15.pdf

¹⁰ I.R.C. §4980H.

¹¹ I.R.C. §4980H(c)(4)(A) defines a full-time employee

as one who works an average of 30 hours per week. Treas. Reg. §54.4980H-3 provides detailed instructions for determining full-time employees, including rules regarding the look-back period.

¹² Treas. Reg. §54.4980H-1(a)(24)(ii)(C).

¹³ Treas. Reg. §54.4980H-3(c)(4)(vi).

¹⁴ Nonresident alien within the meaning of I.R.C. §7701(b)(1)(B).

¹⁵ Treas. Reg. §1.5000A-3(c).

¹⁶ I.R.C. §5000A(f)(4).

¹⁷ I.R.C. §911(d)(1).

¹⁸ Treas. Reg. §1.5000A-1(c)(2)(i).

¹⁹ I.R.C. §5000A(b) requires that the shared responsibility payment is included with the Federal income tax return. I.R.C. §5000A(c) includes instructions for calculating the shared responsibility payment with further clarification provided in Treas. Reg. §1.5000A-4.

²⁰ I.R.C. §6056(a).

²¹ I.R.C. §6055(a) requires reporting by anyone providing MEC to an individual.