



## Health Care Reform – Special Edition

### Health Care Reform: The Unprotected Workers

#### LEGISLATIVE BRIEF

August 13, 2010

---

The major target of Health Care Reform (HCR), as applied to employer-provided health care benefits, is employers with 50 or more employees. The purpose of this Memorandum is to discuss the issues involving those employees whose coverage is not mandated.

#### The Mandate

For plan years beginning on or after January 1, 2014, employers with 50 or more full-time employees (including full-time equivalents) must provide comprehensive health insurance coverage (PPACA Section 1302(a)) which does not exceed the employer/employee cost-sharing limits required under PPACA Section 1302(c)(1) and (2). To access the Compilation of Patient Protection and Affordable Care Act go to:

<http://docs.house.gov/energycommerce/ppacacon.pdf>.

The law continues to define eligibility to include a work week of 30 hours or more and a maximum waiting period of 90 days, both effective for plan years beginning on or after January 1, 2014. Also in 2014, with the implementation of the Health Insurance Exchange (Exchange) employers with less than 100 employees may provide health coverage through the exchange on a voluntary basis. But what does the law say about those who are not the target of Health Care Reform?

#### The Situation

Some employers currently provide coverage for part-time employees, either as a result of a mandate such as Health San Francisco, or as a result of industry practice. Usually, part-time employees have a longer waiting period for eligibility, proportionately higher contributions, and, occasionally, more limited benefits, such as mini-meds. In the event that the employer loses grandfather status, these part-time programs may become discriminatory. They also may violate the annual limit rules under PPACA Section 1001(5), and its recently published Interim Final Rule. Additionally, there is some confusion regarding employer obligations toward seasonal workers and documented aliens.

## Discussion

### 1. Definitions:

- **Part-time Employees.** Any individual who works less than 30 hours per week in any month. We assume that in situations where employees routinely work at least 30 hours but who have brief periods working less than 30 hours, employers treat them as eligible for/participating in the employer's group health plans and thus will benefit from the mandate.
- **Seasonal Workers.** Any individual who works less than 120 days in the tax year. It is important to note that in calculating the 120 days, employers must include each day the individual works, regardless of the number of hours worked. Seasonal workers also include workers exclusively employed during holiday seasons or otherwise defined as "seasonal" under federal law.
- **Documented Aliens.** Any individual who is lawfully present in the United States and provides the necessary documentation. Federal law requires employers to employ only aliens with proper documentation of their right to work. Furthermore, they must be a resident of the U.S. for the full plan year.

### 2. The Counting Rules:

- **Small Employer Tax Credit.** To qualify for the HCR small employer tax credit, the employer must count all individuals working 30 or more hours, along with individuals working less than 30 hours on a percentage equivalent basis (hours worked/120 hours in one month). The rule allows employers to exclude seasonal works (less than 120 days during the tax year). The count does include part-time workers as well as documented aliens.
- **2014 Coverage Mandate.** Employers who employ 50 or more full-time employees (including full-time equivalents (FTE), in calculating FTEs, the employer must determine the hours worked by all individuals including part-time employees and documented aliens (but not seasonal workers) during the preceding calendar year and divide that number by 2080. If the work force exceeds 50 for 120 or more days in the preceding calendar year, then the employer must comply with HCR cost-sharing mandates effective in 2014. Please note: HCR only requires coverage for those who work 30 or more hours per week, upon satisfaction of the required waiting period.
- **Health Insurance Exchange.** Employers who employ less than 100 full-time employees including FTEs (excluding seasonal employees) may participate in the Exchange. Employers must use the same count methodology as above for 2014 Coverage Mandate. The employer also may provide support for coverage to individuals who work less than 30 hours through the Exchange.
- **Discrimination Testing.** For non-grandfathered plans, employers may exclude:
  - Employees with less than three years of service
  - Employees under age 25
  - Part-time or seasonal employees

- Union employees
- Employees (assumably documented) who are non-resident aliens

**3. 2011 Renewals.** Employers who currently offer coverage to part-time employees have some choices to make:

- **Non-mandated Group Health Coverage.** If the employer incorporates part-time employees into the coverage available to full-time employees, and that plan loses grandfathered status (possibly as a result of a substantial rate increase passed along in part to plan participants in excess of permissible amounts) then the plan becomes subject to non-discrimination testing. At present, absent new regulations, if the employer maintains a separate contribution schedule or a separate waiting period for part-timers, the plan may fail the non-discrimination test.

If the employer provides a separate plan for part-timers, such as a mini-med or a traditional plan with benefit limits, and if the plan loses grandfathered status, it, too, will be subject to non-discrimination testing. If the plan retains its grandfathered status, then it still must address the rules applicable to annual plan limits.

As we have stated previously, although mini-meds on their face appear to violate the annual limit rules in effect for plan years beginning on or after September 23, 2010, we expect Health and Human Services (HHS) to grant a waiver for such plans due to the potential of very high premium requirements or the potential loss of coverage availability to a large number of individuals. This may not be the case if it is a traditional medical plan with a less generous benefit design.

- **Mandated Coverage.** Employers subject to the rules of Healthy San Francisco, without regard to HCR rules, must provide all employees who work 8 or more hours per week with a health care benefit. Many employers cover employees who work 20 hours but less than full-time, under the regular group health plan and those working between 8 and 20 hours, either under a self-funded health plan or by making a contribution to the Healthy San Francisco program. In theory, a self-funded health plan, unless it has a rollover provision pursuant to [IRS Notice 2002-45](#), will fail the annual limit test under HCR since it is not a supplement to an underlying health plan.

**4. Other Matters.** Health Care Reform contains a number of rules regarding the premium relief available to documented aliens in the Exchange. Since individuals seeking coverage through the Exchange could be employees, they may impact an employer subject to the 2014 mandate by triggering excise taxes on employers who otherwise fail to meet the 2014 mandates.

---

Copyright © 2010 Alfred B. Fowler, Attorney at Law and Leavitt Benefit Services.

All Rights Reserved. Reprint with permission only. This Legislative Brief is general in its nature and is no substitute for legal advice or opinion in any particular case. [mike@abferisa.com](mailto:mike@abferisa.com)

*IRS Circular 230 disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice contained in this communication, unless expressly stated otherwise, was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax-related penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any tax-related matter(s) addressed herein.*