GROWERTALKS

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Healthcare: Some Answers, But More Questions

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The U.S. Treasury Department and Internal Revenue Service (IRS) have published final regulations on employer requirements under the Affordable Care Act (ACA). The rules generally reflect what the Obama Administration had suggested throughout the nearly four-year process, adopting many of the previously outlined mechanisms by which the employer provisions of the law would be enforced. But a number of outstanding issues of significant consequence to the green industry were only partially addressed, with the result of a mixed bag for employers who wish to implement business plans with certainty.

In the August 2013 edition of *GrowerTalks*, we examined enforcement delays previously announced by the IRS and provided some context to understand why the Administration had opted to delay the employer mandate until January 2015. Though many believed the delay to be politically motivated, neither the final regulations for employer requirements nor the employer reporting mechanism were yet finalized. As of February 10 and March 6, respectively, that is no longer the case.

Yet the final employer regulations adopt a soft, “phase-in” approach that was not sought by advocates in the business community. Unlike the previous delay, it’s hard to look past low enrollment numbers in the exchanges, unanticipated shifts in the employer-employee benefits paradigm and coverage renewal deadlines occurring in the midst of a mid-year election cycle to conclude that there was not at least some political motivation behind this implementation strategy. So what does this mean?

Employer “relief” in 2015

The final employer regulations include several elements of “transition relief,” intended to further ease the ACA compliance burden on businesses next year:

Enforcement delay for “mid-size” employers: For 2015, employers between 50 and 99 full-time equivalent (FTE) employees will not be subject to the ACA’s employer mandate penalties under certain conditions. Mid-size employers will have until January 1, 2016 before penalties take effect, so long as they certify to the IRS (through large employer reporting) that they have maintained their workforce, their aggregate hours of service and any previously offered health coverage.

In short, so long as an employer with fewer than 100 FTEs has not reduced the size of their workforce to less than 100, reduced the hours they provide to employees or changed anything regarding their health benefits coverage prior to February 10, 2014, they have another year before they become subject to ACA penalties. Any such changes made after February 10 would eliminate this option.

Percentage of employees offered coverage eased: Prior to the final rule, Treasury had determined that large employers would be considered compliant with the law if they made an affordable offer of coverage to 95% of their full-time employees. For 2015 only, a large employer would not be subject to any penalties if they offer affordable coverage to at least 70% of their eligible full-time workforce next year. The 95% offer requirement will return in 2016 and beyond.

Determining large employer status for 2015: Similar to the proposed rules, employers are permitted to calculate their ACA business size based on a period of at least six consecutive months as chosen by the employer in calendar year 2014 rather than the entire 2014 calendar year.

This is a critical element of relief for seasonal green industry employers at or near 100 FTEs (including seasonal employees/hours). Selecting the “right” six months and proper application of the seasonal exception might make the difference between being considered a large employer that’s subject to the mandate or a small employer.
Additional elements of transition relief include:

Tax Penalty Reduction: In 2015, large employers that are subject to the employer mandate will be permitted to subtract their first 80 employees when calculating their potential ACA excise tax liabilities. Beginning in 2016, employers will only be permitted to subtract their first 30 full-time employees.

Dependent Coverage: Large employers are aware that they must offer coverage to both their employees and dependent children up to age 26 in order to comply with the law. The final rule delays the requirement to offer dependent coverage until plan year 2016.

“First-Time” Large Employers: The final regulations include a permanent rule that provides relief for an employer’s first year as a large employer. Small employers (50 FTEs or less) that didn’t previously offer coverage would not face penalties so long as they offer coverage to eligible full-time employees by April 1 of the year that they become a large employer.

“Seasonal” compliance nightmare brewing
Seasonal employers in the green industry (and other similarly situated industries) should be very concerned about how seasonality was contemplated in the final employer regulations. Prior to publication of the final rule, advocates pressed Treasury and the IRS for more clarity with regards to how seasonal employment would be treated under the ACA. Unfortunately, the end result was translucent at best.

For many reasons, owners hear the phrase “seasonal exception” and believe that seasonal employees don’t count towards determining their ACA business size or qualify as a full-time employee that would trigger employer mandate penalties. Neither is true. Treasury and the IRS held back on addressing how seasonality would be treated under the ACA until the final rule. Now that the final rule has been issued …

Calculating Business Size: Businesses must include the hours of service performed by seasonal employees when determining their business size under the ACA. If a seasonal employee averages 30 hours/week during a particular month, as with a year-round employee, you would count the seasonal worker as a full-time employee for that month. Similarly, businesses must include all of the hours worked by seasonal employees that do not meet the full-time standard as part of the monthly equivalent hours calculation as they would with year-round, part-time employees.

Only if you complete the initial yearly calculation, determine you are a large employer AND your workforce exceeds 50 FTEs in four or fewer months can you then go back and apply the limited “seasonal exception” (removing “seasonal workers” as defined by the final rule). If your workforce exceeds 50 FTEs in five or more months, you’re a large employer and subject to the ACA’s employer mandate penalties.

Determining Seasonal Employee Full-Time Status: Almost all of the attention paid to the ACA’s definition of full-time employee has focused on the 30 hour/week standard. Unfortunately, almost no attention has been given to the beginning of the definition, which reads: “with respect to any month, an employee that averages 30 hours of service per week.”

Simply put, the letter of the law passed by Congress states that ANY employee (meaning: year-round OR seasonal) that meets the 30-hour/week full-time standard in any given month would be considered a full-time employee. Thus, a large employer would be required to make an offer of coverage to that employee or face a tax penalty.

The final rule issued by Treasury and the IRS was a genuine attempt by the Administration to mitigate the effects of the law on small seasonal employers. But the regulation provided far more ambiguity than certainty. For example: For the purposes of determining full-time employee status, the term “seasonal employee” was defined as “an employee in a position for which the customary annual employment is six months or less.”

That definition differs significantly from the definition of “seasonal worker” to determine your business size. For the purposes of determining your business size, a “seasonal worker” was defined as “a worker who performs labor on a seasonal basis as determined by the Secretary of Labor.” The definition is a reference to the Migrant and Seasonal Workers Protection Act and does not include a numerical standard.

The fact sheet accompanying the final rule states that seasonal employees (less than 180 days) would “generally” not be considered full-time employees. However, the actual language contained in the final rule never specifies, in certain terms, the circumstances in which a seasonal employee would be considered full-time or not.

One definitive outcome in the final rule was the determination that temporary guest workers, specifically employees on H-2A or H-2B visas, are considered employees with legal status and subject to an employer offer of coverage if they meet the ACA’s full-time standard.

For seasonal industries such as ours, anything less than bright lines and crystal clear rules are unacceptable. No business can afford hundreds of thousands of dollars in penalties for non-compliance, inadvertent or otherwise. Congress’s failure to consider non-traditional employment when drafting the law coupled with the

inability of regulators to rewrite the law pose a significant threat for the IRS to play “GOTCHA!”

To that end, SAF has formed an advocacy coalition for the purpose of compelling Congress to address seasonality within the context of the ACA. Attendees at SAF’s 34th Congressional Action Days in March 2014 already made significant inroads in Washington, educating members of Congress on potential seasonal issues and concerns.

Stay tuned. There’s a fight brewing and it soon may be your turn to act. **GT**

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