



SMALL BUSINESS  
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## ***RIDING THE LARGE EMPLOYER BUBBLE***

Most small businesses are aware that the health care reform law included an employer mandate. In reality, there are two potential penalties that “large employers” may face – the shared responsibility penalty and the premium assisted-employee penalty. The shared responsibility penalty is assessed against large employers that do not provide health care benefits of a certain kind and value to all their full time employees. The premium assisted-employee penalty is assessed against large employers that do offer coverage but at least one of their employees seeks health care benefits through an exchange and receives premium assistance through the exchange.

The purpose of this article is not to review those penalties, the operation of the exchanges or premium assistance. The purpose is to provide a bit of a head’s up for those businesses that might be on the bubble of being considered a large employer for the purposes of the law.

Before going into the “head’s up,” I should note that how one counts employees for the purposes of calculating the penalties, if any, is different from the employee count

for determining whether your business is a large employer with those potential penalty exposures.

The basic process of determining whether one is a large employer includes three basic steps. It involves counting the full-time workers, adding in full-time equivalents for part-time workers, and subtracting seasonal workers.

A “large employer” under the law means, with respect to a calendar year, an employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year. The term “full-time employee” means, with respect to any month, an employee who is employed on average at least 30 hours of service per week.

Solely for purposes of determining whether an employer is a large employer under the law, an employer shall, in addition to the number of full-time employees for any month as determined above, include for such month a number for “full-time equivalent employees” determined by dividing the aggregate number of hours of service of employees who are not full-time employees for the month by 120.

An employer shall not be considered to employ more than 50

full-time employees if the employer’s workforce exceeds 50 full-time employees for 120 days or fewer during the calendar year, and the employees in excess of 50 employed during such 120-day period were seasonal workers.

The law allows the Department of Labor to define seasonal workers and therefore we do not know the full range of such workers yet. For the moment, the government has said, “use a reasonable assumption.” We do know the law specifies that two groups shall be included within the definition: workers covered by section 500.20(s)(1) of title 29, Code of Federal Regulations (which are certain agricultural workers) and retail workers employed exclusively during holiday seasons.

Here’s the head’s up. The two potential penalties take effect in 2014. The process of determining whether one is a “large employer” is a look-back process based the preceding year. As a result, an employer on the bubble might want to pay closer attention to the employee count in 2013. It is not what the employee count is on December 31, 2013 that matters. You will be looking over a period of time. What period of time?

The IRS has issued a notice providing guidance on the mechanics of the large employer calculation. It includes some "safe-harbor" methodologies upon which employers can rely. The notice is Notice 2012-58. The IRS notes that further regulations are likely to be issued but employers can rely on this notice at least through January 1, 2015. It can be found at <http://www.irs.gov/pub/irs-drop/n-12-58.pdf>

***NOT YOUR GRANDFATHER'S DEDUCTIONS***

It may have been a seminal moment in tax reform history. When Governor Romney spoke during the campaign of limiting taxpayers to a basket of deductions of a specific dollar amount, he may have provided the momentum to disengage various social and economic policies from the tax code. Specifically, we may find ourselves with a tax code that does not reward housing, retirement savings, or charitable contributions to the extent it does now. I am not suggesting here that this is bad or good but rather to alert you that you need to be prepared to understand what the ramifications might be for your business - some might be related to your tax return, some related to your customers' motivations.

The Simpson-Bowles Commission also made recommendations about the elimination or scaling back of those deductions. They referred to them by the technical term – “tax expenditures.”

Governor Romney was talking about personal deductions but there are some sizable business ones too. Direct expensing, which

allows a business to write off modest machinery investments in the year of purchase, is part of the tax expenditure classified as accelerated depreciation. In 1986, one of the tax expenditures on the chopping block was a popular one with small businesses – the investment tax credit.

Tax expenditures are defined under the Congressional Budget and Impoundment Control Act of 1974 as “revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability.”

What are the largest tax expenditures? According to the Tax Policy Center (for 2008 in \$billions):

Exclusion of employer contributions for medical insurance premiums and medical care	\$131
Net exclusion of pension contributions and earnings	117.7
Deductibility of mortgage interest on owner occupied homes	88.5
Accelerated depreciation of machinery and equipment	55.9
Deductibility of nonbusiness state and local taxes other than for owner occupied homes	49.1
Deductibility of charitable contributions	31.5
Deferral of income from controlled foreign corporations	30
Deductibility of state local property tax on owner occupied homes	29.1
Child credit	28.4

It would be pretty tough for the Democrats to concede any ground on the biggest tax expenditure just when health care reform is being implemented. Are other tax expenditures spared the axe? How big is the basket? Lots of interesting questions. For the time being, it is too soon to say even whether we will be traveling down this path at all. Stay tuned.

***HAPPY THANKSGIVING***

Happy Thanksgiving to all. We thank you for continuing support.