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U.S. Health Care Reform – Should Foreign Entities Care?

By Rhonda D. Orin and Bridget Healy

As a result of the U.S. health reform laws, specifically the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010 (collectively “PPACA”), many non-U.S. entities with offices here, such as foreign corporations, embassies and international organizations, are left to wonder if they soon will be required to provide health coverage to their U.S.-based employees.

It’s a question that all foreign entities with a U.S. presence need to be asking. It’s also one that requires careful analysis. Even if PPACA does not impose obligations directly upon a foreign corporation, embassy or international organization, it can have that effect indirectly, as through the application of individual mandates upon that entity’s U.S.-based employees.

Notably, no provision in PPACA is exactly on point. PPACA does not state, one way or another, whether the law applies to health plans offered by foreign entities to their employees.

The question, though, can be answered indirectly, starting with the U.S. tax laws. As the reporting obligations of PPACA are to be implemented through filing requirements with the U.S. Internal Revenue Service (“IRS”), and the penalty provisions are to be achieved through the same approach, an analysis of whether PPACA applies to foreign entities lies within an assessment of their obligations to the IRS.

For some foreign entities, such as embassies and tax-exempt international organizations, it may be fairly clear obvious that U.S. tax laws do not apply. It necessarily would follow, therefore, that the reporting obligations and penalty provisions of PPACA could have no effect upon them. As a practical matter, there would be no vehicle for imposing the law upon entities who have no reporting or taxation obligations.

But that would not necessarily resolve whether PPACA could apply to the U.S.-based employees of those foreign entities. Even if the entity itself is not subject to PPACA, individuals who work there may still fall under its scope.

Here, the starting point would be before the U.S. tax laws – at the predicate question of each individual’s citizenship or residency status. Those answers would lead to the closely related questions of whether the individual pays U.S. income taxes and, if so, how much.

As a threshold matter, employees with diplomatic or consular status appear exempt from PPACA. As with the foreign embassies themselves, their exemptions would flow logically and necessarily from their exemptions from U.S. taxation and filing requirements.

The same reasoning would apply to employees who engage primarily in official activities for foreign governments while in the United States, provided that they have been recognized by the President, Secretary of State or a consular officer as being entitled to being treated as having diplomatic or consular status.

This analysis, however, would not extend to U.S. citizens or lawful permanent residents (holders of green cards) who are required to report their wages from foreign entities as taxable income. The fact that they work for foreign entities, and accordingly are subject to special provisions in the U.S. tax code, would not be enough to excuse them from the individual mandates of PPACA.

Such employees likely constitute “applicable individuals” under PPACA who are required to obtain “minimum essential coverage.” Like all “applicable individuals,” they could be subject to penalties for failing to do so.

To avoid paying such penalties, those employees would need to obtain coverage under “qualified health plans” – either through their foreign employers or otherwise. While regulations are expected to flesh out the parameters of when plans are “qualified,” §1302 of PPACA states that “essential health benefits” include:

- ambulatory patient services
- emergency services
- hospitalization
- maternity and newborn care
- mental health and substance use disorder services, including behavioral health treatment
- prescription drugs
- rehabilitative and habilitative services and devices
- laboratory services
- preventive and wellness services and chronic disease management; and
- pediatric services, including oral and vision care.

Even here, the analysis would not stop. A number of additional exemptions would need to be considered to decide if the individual mandates apply. Some of them may require careful thought, such as a religious exemption that is applicable only when the concept of insurance offends the tenets of a religious belief, such as a prohibition against gambling.

The answer of whether PPACA applies to foreign entities and to their individual is a complex one that requires a focused analysis. It definitely is not a “one size fits all.” Fortunately, however, there is time to decide. The reporting obligations of PPACA are not scheduled to commence until the filings for the 2011 tax year and the penalty provisions are not scheduled to take effect before January 1, 2014.

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