Affordable Care Act
Held Unconstitutional by Federal Trial Court

A federal trial court in Texas (Texas v. U.S., 2018 WL 6589412) (N.D. Tex. 2018) recently found that, beginning in 2019, the Affordable Care Act (ACA) is unconstitutional. Several states (including Texas) challenged the constitutionality of the ACA's individual mandate after the Tax Cuts and Jobs Act (TCJA) reduced the penalty for failing to have minimum essential coverage (the shared responsibility payment) to zero beginning in 2019. The states argued that, based on the U.S. Supreme Court's holding in National Federation of Independent Businesses (NFIB), the individual mandate was unconstitutional unless permitted under Congress's power to tax; because the mandate will no longer trigger a tax in 2019 when the shared responsibility payment produces no revenue, it cannot be sustained by the taxing power. They also argued that the mandate could not be severed from the rest of the ACA, so the entire ACA should be struck down. The federal government agreed with the challenging states that the mandate was unconstitutional, so other states were permitted to intervene. The intervening states argued that the individual mandate was still constitutional after the TCJA under Congress's powers to tax and to regulate interstate commerce, and that it was severable from the remainder of the ACA.

The Texas trial court held that the individual mandate is unconstitutional because it cannot be read as triggering a tax when the shared responsibility payment is zero. And according to the court, the mandate was an impermissible regulation of interstate commerce under the reasoning of NFIB. The court also held that the mandate could not be severed from the rest of the ACA, noting that the ACA's text states multiple times that the mandate is essential and the keystone of the law. In addition, the court reasoned that under the U.S. Supreme Court's decisions in NFIB and King v. Burwell (which upheld the ACA's premium tax credit), the mandate was not severable from the rest of the law. Because upholding the ACA in the absence of its "signature provision" would change the effect of the law as a whole, the court declared the ACA's remaining provisions inseverable from the unconstitutional individual mandate and therefore invalid.

It is important to note that the Texas court did not issue an injunction halting enforcement of the ACA, and the ACA remains in full force and effect while the trial court decision is appealed. HHS has confirmed that the decision is not a final judgment and that HHS "will continue administering and enforcing all aspects of the ACA." Thus, employers must continue to adhere to the ACA while this case works its way through the courts.

Reducing Employee Hours to Avoid ACA Mandate

Ultimately Cost Employer $7.4 Million

When the Affordable Care Act (ACA) was initially passed, some employers made statements suggesting they would cut employee hours below 30 hours per week to avoid ACA mandates. Those type of statements came back to haunt Dave & Buster's, a restaurant chain. In late December 2018, Dave & Busters agreed to a $7.4 million settlement with a class of employees who claimed their hours were cut to avoid the ACA employer mandate.

As background, the ACA employer mandate, which went into effect in 2015, required employers with 50 plus full-time or full-time equivalent employees to provide a certain level of health coverage to their full-time employees to avoid potentially paying penalties to the IRS. In the Dave & Buster's case, employees alleged that their previously full-time schedules (thirty hours a week or more) were slashed to avoid the employer mandate, and that employees lost the limited health care coverage they previously had. Employees brought suit under Section 510 of ERISA, which makes it unlawful to retaliate against employees for exercising rights under a benefit plan or to interfere with a participant's right to a benefit under a plan.

In the lawsuit, Dave & Buster employees pointed to statements made in employee meetings, where company managers said that the ACA mandate could cost the company more than $2 million, and that to avoid those costs, Dave & Buster's planned to cut employee hours below 30 hours per week. Employees also presented evidence that their hours were in fact cut. After a judge refused to dismiss the lawsuit, Dave & Buster's agreed to pay $7.4 million to settle the lawsuit. The settlement must still be formally approved by the court, but the judge has indicated tentative approval.

The settlement is a good reminder to employers that although the future of the ACA is somewhat unclear, it is currently in effect. Reducing employee hours to avoid ACA requirements can ultimately cost a company much more than complying with the ACA.

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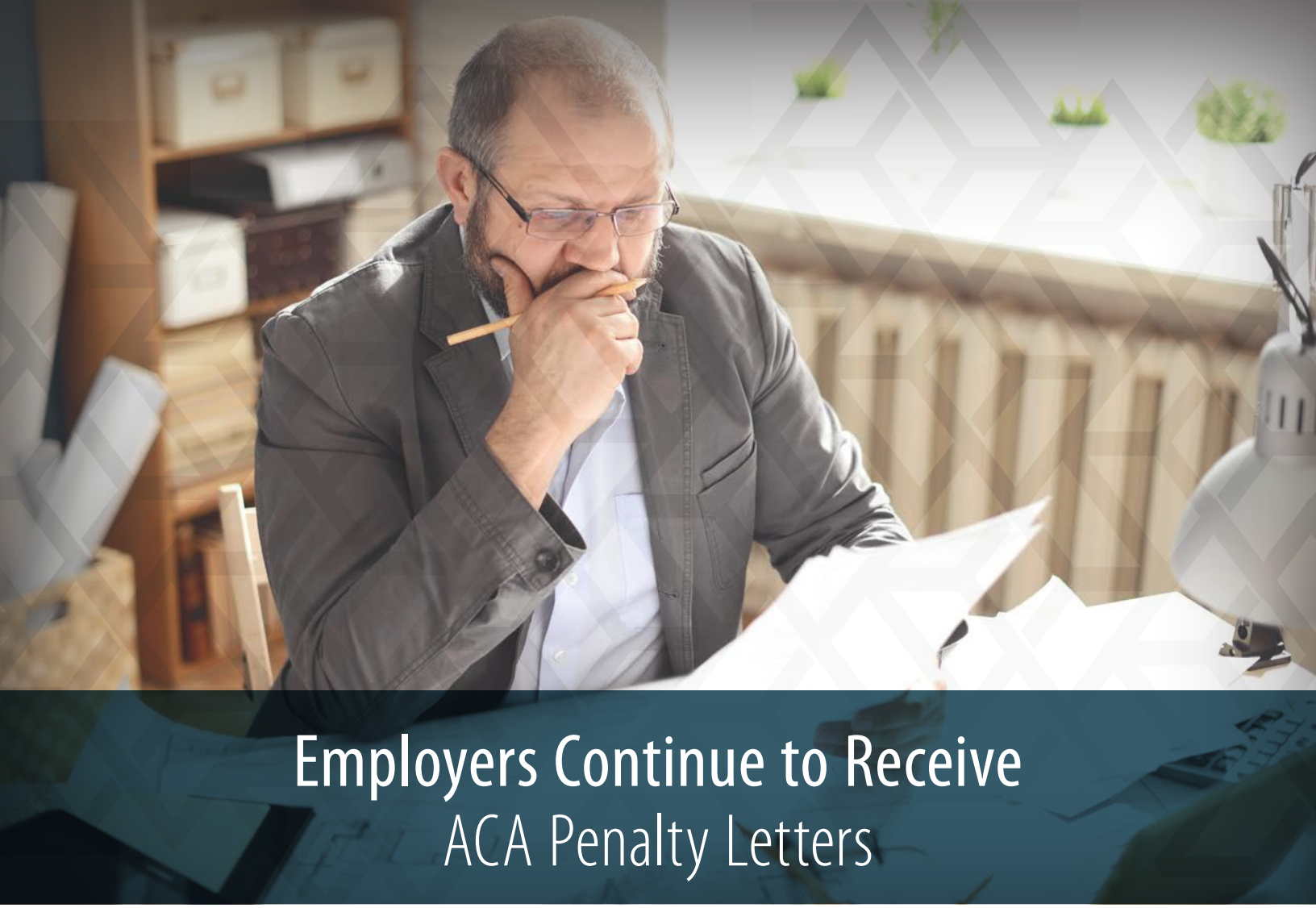

Employers Continue to Receive ACA Penalty Letters

Despite the uncertain future of the Affordable Care Act (ACA), employers continue to receive ACA penalty assessments via Internal Revenue Service (IRS) Letter 226-J. Although letters addressing the 2015 calendar year appear to have stopped, employers are now receiving penalty letters for the 2016 calendar year.

If your company receives a Letter 226-J, you should read the letter very carefully and ensure that you respond within the thirty (30) days allowed. It is important to remember that the Letter 226-J is not a final assessment. Employers are allowed to respond to the Letter 226-J and challenge the asserted penalty. In Moreton & Company's experience, many of the companies receiving an initial penalty notice in fact provided health coverage as required under the ACA. However, due to inadvertent errors in the employer's Form 1094-C or Forms 1095-C, the IRS asserts a penalty is due.

For example, the employer may have incorrectly indicated on its Form 1094-C that it did not offer minimum essential coverage to 95% of its full-time employees, when in fact such coverage was offered. Or the employer may have used incorrect codes on an employee's Form 1095-C. Where an employer has offered coverage as required, a timely response to the IRS, with documentation of offers made, generally results in withdrawal of the penalty or a significant reduction in the amount assessed.

If you receive a Letter 226-J from the IRS and have questions, please reach out to your Moreton & Company representative. We can help you understand why the penalty was assessed and what information should be provided to the IRS to challenge the assessment.

EEOC Removes Vacated Incentive Provisions From Final Wellness Regulations

Consistent with an earlier court order vacating the incentive provisions of the EEOC's final wellness regulations, the EEOC has issued final rules removing the vacated provisions, effective January 1, 2019. As background, in 2017 a federal trial court determined that the EEOC had failed to justify its conclusions that a 30% incentive was a reasonable interpretation of voluntariness under the Americans with Disabilities Act (ADA) and that allowing incentives for providing a spouse's medical history met the nondiscrimination requirements of the Genetic Information Nondiscrimination Act (GINA). The court initially sent the regulations back to the EEOC for reconsideration, asking the agency to timely issue new rules addressing the court's concerns. But the EEOC responded that any substantively amended rules would not be applicable until 2021, and the court then vacated the incentive provisions as of January 1, 2019. The EEOC has now removed the vacated provisions from the ADA and GINA wellness regulations. The preambles to the new rules explain that, as administrative actions implementing an existing court order, the rules are not subject to public comment or the usual 30-day delay.

Currently, the EEOC has no deadline for issuing new regulations on wellness program incentives. (The court initially set a deadline but later conceded that it had no authority to order the EEOC to issue new regulations on any particular schedule.) However, indications are that the EEOC intends to issue such regulations in June 2019. In the meantime, employers with wellness programs must decide what to do when the current incentive provisions go away on January 1: leave existing incentives in place, lower them, or eliminate them entirely pending new regulations. It is important to remember that the court order and the EEOC's actions only affect the rules regarding an employer's ability to provide incentives under the ADA and GINA. HIPAA's wellness program regulations remain in full effect. Stay tuned for updates.

Health Plan Fiduciaries Liable for Restitution and Penalties

Relating to Tobacco Surcharge

A federal court has entered a consent order requiring the fiduciaries of a group health plan to repay over $145,000 to participants who, as tobacco users, were required to pay health insurance premium surcharges as part of the plan's wellness program. The DOL brought the lawsuit following an investigation in which it determined that, over a five-year period, the wellness program required employees to pay tobacco-use surcharges without offering reasonable alternative standards or waivers as required by HIPAA and the Affordable Care Act. As background, under HIPAA and the ACA, wellness programs that offer a reward to employees meeting a standard related to a health factor–such as not using tobacco–must (among other things) provide a reasonable alternative standard that is not related to a health factor–such as smoking-cessation classes–that will allow employees to earn the full reward.

In addition, the plan sponsor agreed to pay penalties to the DOL of almost $15,000–an amount reflecting a DOL compromise and penalty reduction of 50%. The employer also revised its wellness program to comply with the HIPAA rules prohibiting group health plans from discriminating against individuals in eligibility for benefits or in individual premium rates based on a health-status related factor. A DOL news release about the settlement suggests that those with questions on medical and other employee benefits contact the DOL's Employee Benefits Security Administration (EBSA) for compliance assistance.

As noted in another article in this newsletter, although portions of the EEOC's wellness program regulations have been vacated as of January 1, 2019, the HIPAA rules prohibiting discrimination based on health factors and requiring reasonable alternative standards remain in full effect. This case is a timely reminder of the importance of complying with those rules and the costs a plan sponsor can face if it does not comply.

IRS Extends "Good Faith" Penalty Relief and Due Date for Furnishing 2018 Forms 1095-B and 1095-C to Individuals, but Not for Filing with the IRS

The IRS has issued Notice 2018-94 to announce limited relief for information reporting on Forms 1094 and 1095 for the 2018 tax year, mirroring guidance it has provided for previous years. Here are the highlights:

- **Extension for Furnishing Statements to Individuals.** The deadline for furnishing Forms 1095-B and 1095-C to individuals is extended from January 31 to March 4, 2019. (This is slightly longer than last year's 30-day extension because March 2, 2019 is a Saturday.) Due to this automatic extension, the discretionary 30-day extension is not available, and no further extensions may be obtained by application to the IRS. The IRS will not formally respond to any previously submitted deadline extension requests relating to 2018 statements.

- **No Extension for Filing Returns With the IRS**. The notice does not extend the due date for filing Forms 1094-B and 1094-C (and accompanying Form 1095s) with the IRS. Accordingly, the deadline remains February 28, 2019, for paper filings, and April 1, 2019, for electronic filings. (Electronic filing is mandatory for entities required to file 250 or more Form 1095s. The 250-return threshold is calculated separately for Forms 1095-B and 1095-C.) Filers may obtain an automatic 30-day extension by filing Form 8809 on or before the regular due date.

- **Good Faith Penalty Relief.** The IRS will again provide penalty relief for entities that can show they have made good faith efforts at compliance. No penalties will be imposed on entities that report incorrect or incomplete information—either on statements furnished to individuals or returns filed with the IRS—if they can show they made good faith efforts to comply with the reporting requirements. This relief specifically applies to missing and inaccurate taxpayer identification numbers and dates of birth, as well as other required information. Penalty relief is not available to entities that fail to furnish statements or file returns, miss an applicable deadline, or are otherwise not making good faith efforts to comply. Evidence of good faith efforts may include gathering necessary data and transmitting it to a third party to prepare the required reports, or testing the ability to transmit data to the IRS.

Those unable to meet the due dates are still encouraged to furnish and file as soon as possible, as the IRS says it will take such furnishing and filing into consideration when determining whether to abate penalties for reasonable cause. (Reasonable cause is distinct from good faith relief and requires, among other things, proof of significant mitigating factors or events beyond the reporting entity's control.)

This extension is essentially identical to that issued for the 2016 and 2017 forms, but the notice itself contains a few differences from prior guidance, reflecting intervening developments. For example, it indicates that the IRS is considering whether and how the Code § 6055 reporting requirements should change due to the reduction of the individual shared responsibility payment to zero for months beginning after December 31, 2018 . In any event, the extension of the "good faith" penalty relief is especially welcome, since inadvertent reporting errors may occur as those responsible for these forms continue to familiarize themselves with the process.

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