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M&As Are On The Upswing And So Are ACA Compliance Risks

Not being prepared could result in a potentially beautiful transaction turning sour

By Kyle J. Scott

Mergers and acquisitions, a proven strategy for corporate growth, took a definitive back seat last year as companies large and small focused their energy on surviving the pandemic. This year paints a rosier picture as fiscal advisors like PwC report that 53% of U.S. executives said their companies plan to increase M&A activity in the coming months.

While a merger or acquisition usually represents positive growth for the acquiring entity, it can also bring with it some serious challenges when it comes to complying with the Affordable Care Act's (ACA) employer shared responsibility regulations.

In many cases, ACA compliance is an afterthought when a new company is acquired — sometimes so much so that the HR/benefits department is not even made aware of the acquisition until the process is finished. Other times the acquired company may have been too small to merit ACA compliance.

Regardless of the situation, failure to comply with ACA employer responsibilities for employee populations brought onboard through an M&A can expose even the most diligent and proactive companies to newfound compliance issues and, potentially, extremely expensive fines levied by the IRS. Here's what HR professionals need to know and do to protect their organizations from compliance headaches stemming from an M&A:

First, its vital to understand that, from the date of acquisition, the acquiring entity is liable for ACA reporting responsibilities for any employees that come along as part of the deal. In these uncertain times, it's also critical to know how the acquired company is classifying the status of its nonworking employees and to determine if you are, in fact, acquiring those employees as part of the merger or acquisition.

That is, have the nonworking employees been placed on unpaid or paid leaves of absences or furloughs? Were they laid off? If they have been terminated, are you considering rehiring any of these employees within 13 weeks (26 weeks for educational organizations) of their termination?

To devise an ACA eligibility management and reporting strategy that can be implemented immediately upon acquisition closing, you'll need a clear vision into the acquired company's measurement periods, benefit offerings, and HR and benefit technology platforms.

Among the information you need to collect:

- The prior employer's statistics as an Applicable Large Employer (ALE)
- Details of the sales agreement as they pertain to ACA information filings, benefits and eligibility
- Whether the M&A was a stock or asset purchase
- ACA information reporting obligations that the acquired company agreed to
- Access to data including benefits, HR, payroll, COBRA, ACA, leaves of absence
- Prior period and current period measurement, administration and stability period data
- IRS filing information
- Collective bargaining or multi-employer union representative contact information and contracts

The acquiring organization also needs historical information to accurately and effectively measure employees to determine if they averaged 30+ hours per week or 130 hours per month during their measurement period to qualify as full-time employees under the ACA. In other words, you need to ensure that you're making the necessary offers of health coverage to avoid what's known as Penalty "A" – a fine of $2,700 (for 2021) per full-time employee (minus the first 30 individuals) for failing to offer minimum essential coverage to 95 percent of your full-time employees.

The best practice is to align the employees to their new, future measurement periods by using the acquired company's data and coordinating the measurement periods of both organizations, carefully following IRS guidance.

One approach to collecting the mass of data needed for ACA purposes is to use a comprehensive compliance management system that empowers the acquiring entity to manage all the information arriving from multiple source systems and locations. It should also be able to help you recreate historical information or provide you with a strategy when historical information isn't accessible for acquisition employee populations. If historical data isn't available, the acquiring company should at least get the ACA eligibility determinations and negotiate with the prior employer about which organization is going to continue the offer of coverage and for how long.

Acquiring corporations also must accurately calculate the applicable affordability safe harbor for each acquired employee population to avoid IRS Penalty "B," which is levied if an employer fails, for whatever reason, to offer affordable health coverage that meets minimum value requirements to eligible employees who receive a subsidy on the public healthcare exchange. Coverage is considered affordable if the employee's contribution for employee-only (or single) coverage is less than or equal to 9.83% of their income. Failure to meet this requirement results in a $4,060 penalty per full-time employee who receives a subsidy when purchasing insurance through a public exchange.

Affordability safe harbors include the federal poverty level (FPL), rate of pay or W2 calculations. These calculations can be used to determine whether the health coverage offer for each full-time employee is affordable. Employers may even choose different safe harbors for different employee populations, in accordance with ACA guidelines.

Another M&A risk lurks if the acquiring company obligates newly acquired employees to complete an additional waiting period or initial measurement period before offering health coverage (instead of treating them as ongoing employees with immediate offers of coverage). Doing so can put you at increased penalty risks if the affected employees were taken on as a whole population and not hired individually, especially if the acquisition was a stock purchase or if the employees were receiving service credit and are treated otherwise as ongoing employees.

In a stock purchase, the new employer acquires an interest in the acquired company, including the company's employees, and they are typically transferred to the new employer as part of the entity. Whereas with an asset purchase, the buyer is purchasing only the assets of the target company (which may include tangible and intangible assets), but not the employees.

M&As are important milestones for any organization. They require a tremendous amount of time, effort and resources to complete successfully. If your organization is joining the growing M&A trend in 2021, be sure that you're ready for the ACA implications you'll be facing. Not being prepared could result in a potentially beautiful transaction turning sour.

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