

The 2010 health care law: Next steps for restaurateurs

Employers should not wait until 2014 to determine the impact on their business. Now is the time to understand the law's requirements and what it will take to comply.

The 2010 health care law begins kicking into gear for employers in 2013, with the biggest changes set for 2014.

There are some significant changes coming in 2013. For example, starting March 1, employers must notify employees about the existence of state health care “exchanges” that will become the marketplace for many individuals and small businesses to buy insurance. The same notice must tell employees they may qualify for tax credits or other government help if they can't afford an employer's plan. Next year also will be the first year employees' contributions to health savings accounts will be capped at \$2,500. And some new taxes take effect.

But 2014 is the big year: Starting then, employers with more than 50 full-time-equivalent employees will be required to offer all full-time employees an “affordable” health plan that meets a “minimum value” standard. Those who fail to do so could face penalties. *A full timetable of implementation dates is included on Page 4.*

Many details remain unknown

One of the biggest challenges with the health care law is that critical details are missing about how employers must comply with the law. Why is that the case? Well, Congress wrote the outline for the law, but the departments of Treasury, Health and Human Services, and Labor write the regulations or practical details about how the law must be implemented. And in many cases, the rules aren't in final form yet. In some cases, rules haven't even been proposed.

Final word from many states on how exchanges will operate in their states is also unknown. Exchanges are designed to be one-stop shops where some small businesses and people who don't get coverage through their employers can shop for insurance. States can operate their own exchanges, turn over the responsibility to the federal government, or

operate a joint exchange. The federal government is required to certify by Jan. 1, 2013, whether each state will have its own exchange up and running by Jan. 1, 2014.

The upshot: We do know a lot about how employers are affected by the law, even though there are many critical unknowns. That means restaurant operators should not wait to figure out how the law will impact their business.

The National Restaurant Association has been working for more than two years to highlight the restaurant industry's challenges in complying with the law. We've filed volumes of comments with regulatory agencies to get the answers restaurant operators need and to ensure that you have maximum flexibility as the rules are written. We will continue to do so as federal agencies release what's expected to be a barrage of proposed rules and regulations in the coming weeks and months.

In partnership with other business groups representing millions of U.S. employers, we also continue to work to make changes and urge Congress and the White House to address the provisions that have the greatest impact on employers' ability to create jobs — especially the law's employer mandate and related penalties.

We'll keep you informed

Detailed regulations are expected to be issued in late December on the most significant part of the law for employers: the employer mandate. That proposal is expected to spell out in detail exactly who is covered by the mandate, how penalties will be assessed against employers, which employees are considered full-time, and more.

We provide this Q&A as a general overview and will provide ongoing information at Restaurant.org/Healthcare as federal agencies, Congress and states take further steps on health care.

10 steps to take now to prepare for the health care law

1 Don't assume you're too small to be covered by the employer mandate. Most restaurant operators understand the law requires employers with 50 or more full-time-equivalent employees to offer “minimum essential coverage” to their full-time employees (and their dependents) or face potential penalties. However, many employers with more than one business entity don't realize that they might need to

consider their employees as one group. That could push you over the 50-FTE threshold. [See “Consult your tax adviser,” below.]

2 Consult your tax adviser. Make sure you contact your tax attorney or CPA about ownership considerations and how many employees each business entity has [guided by common control: IRC §414 (b), (c), (m), (o)].

Also, some new taxes associated with the health care law take effect in 2013.

3 Study your workforce numbers. For the purposes of this law, a full-time employee is defined as working an average of at least 30 hours a week in any given month, or the equivalent of 130 hours per calendar month. Study your workforce: Under this new definition, how many full-time employees do you have? What are the hours worked by part-time and seasonal employees? Although you are not required to offer benefits to part-time employees, their hours

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10 steps to take now *Continued from page 1*

(and those of seasonal employees) are included in the calculation for determining whether you meet the 50-FTE threshold for the employer mandate. The answers to these questions will help you better understand the potential impact of the law on your business.

- 4 Consult your insurance broker.** Consider whether you should make any changes to your current health plan(s) this year. Your broker will be able to help you determine more options as regulatory agencies release more rules.
- 5 Understand what your employees' responsibilities will be.** In 2014, the tax penalty for an individual who fails to obtain coverage will start at \$95, or 1 percent of a person's taxable income, whichever is greater. That amount increases to \$695 or 2.5 percent of income in later years. Employees with incomes between 100 percent and 400 percent of the federal poverty level (currently \$11,170 to \$44,680 for a single person, or \$23,050 to \$92,200 for a family of four) may qualify for premium tax credits or cost-sharing reductions to purchase coverage on the exchange in your state. Be aware of the cost of that coverage on your state's exchange: Employees will be comparing your plan's monthly premium contribution rate to those on the exchange.
- 6 Develop a strategy to talk about the health care law with employees.** Under the new law, most employers must act as sources of information for employees. Employers subject to the Fair Labor Standards Act must issue a written notice to employees that tells them about the exchange, how to access it and more. Employers must provide the written notification by March 1, 2013. Your employees might look to you for answers to their questions about the health care law. It is wise to think about how you will explain the impact of the law on your business.
- 7 Understand your state exchange.** Some states are setting up their own exchanges or insurance coverage marketplaces. Others have said they won't set up state exchanges, which means the federal government will operate a "federally facilitated exchange" in place of a state exchange. Several states may operate an exchange jointly with the federal government. Look for opportunities to

engage with state officials charged with establishing and operating the exchange. Ensure they hear from small restaurant operators who could purchase coverage for their employees on the exchanges. If employers could use the exchanges to buy coverage in the future, the business community needs to ensure the exchanges work for employers.

- 8 Evaluate your information technology capabilities.** Employers with 50 or more full-time equivalent employees will be required to comply with complex new reporting rules. Every Jan. 31, beginning in 2015, those employers must report information to the IRS about individual full-time employees and their dependents. That could include information from your payroll system, health benefit plans and other sources. Consider what information will need to come from which system or third-party vendor. How will you set up a process to aggregate this information to then report it to the IRS? Consider how much lead time you might need before reporting begins.
- 9 Tell your story: Let your elected officials know how the law is affecting you.** The restaurant industry is impacted by this law like almost no other industry because of the unique characteristics of our workforce. Explaining the business decisions that you are faced with now will help lawmakers understand how to mitigate the law's impact on employers' ability to create jobs. Consider attending the NRA's April 17-18 Public Affairs Conference in Washington, D.C., where restaurateurs from across the country will go to Capitol Hill to talk about the impact of the health care law. If you can't come to D.C., the NRA is collecting stories about how the law affects our members. Send your story to Ellen.Mize@restaurant.org.
- 10 Stay abreast of new developments at Restaurant.org/Healthcare.** The National Restaurant Association's Health Care Knowledge Center is your one-stop shop for information about the law and related regulations. Use the calculator to determine whether you are considered a large or small employer under the law. Learn about the employer requirements and recent regulatory developments. Access past webinars that walk NRA members through all the requirements of the law.

Q&A

EMPLOYER MANDATE — WHO IS COVERED?

1 Q: Am I covered by the employer mandate?

A: The health care law's employer mandate covers employers who employed an average of at least 50 full-time-equivalent employees on business days during the preceding year.

To calculate whether you are covered, you must look at each of the preceding 12 months to determine the average number of full-time equivalents you employed over those months. Under the law there is a new calculation you must use to determine full-time equivalents.

For each of the 12 months, an employer must look back and determine how many employees worked 130 hours or more in the calendar month. That will be the number of full-time employees the employer had during that month.

Next, the employer must add together the hours of all other employees, but not count more than 120 hours per person. The total hours worked by all others is then divided by 120. That determines a full-time-equivalent number for your non-full-time employees.

Next, the employer must add the number of full-time employees to the number of equivalents, to get the total number of full-time-equivalent employees.

Finally, the employer must:

- Repeat the process for each of the remaining 11 months.
- Add each of the 12 numbers together.
- Divide by 12 for the average annual full-time employee equivalent number. That is the number that employers must use to determine whether an employer is considered an applicable large employer.

If the total number of full-time-equivalent employees is 50 or higher, the employer is subject to the mandate. If the number is below 50, the employer is not considered a large employer subject to the mandate.

2 Q: When do I do the calculation to determine if I am an applicable large employer and subject to the mandate for 2014?

A: Businesses should look at the preceding calendar year to determine if they meet the threshold of 50 full-time-equivalent employees for the following year, says the

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Treasury Department. For 2014, that means employers should look at payroll from Jan. 1, 2013, to Dec. 31, 2013.

3 Q: I own 100 percent of three restaurants, but they are organized under different federal tax identification numbers. Am I considered one employer because I control all three restaurants? What does this mean for me?

A: Yes, more than likely you will be considered as one employer under the health care law. However, you should consult your tax adviser to determine how Internal Revenue Code §414(b), (c), (m), (o) affects you and your businesses. The application of these rules is case-specific and shouldn't be generalized. Assuming you are determined to be one employer, you must combine all the employees from all three restaurants to determine whether you are an applicable large employer.

SMALL EMPLOYERS

4 Q: What are the requirements for companies with fewer than 50 full-time equivalent employees?

A: Employers who employ fewer than 50 full-time-equivalent employees:

- Are not subject to the law's employer mandate. These businesses are not required to offer health benefits to their employees and will not owe federal penalties if they fail to offer health benefits.
- Must provide required notice to all employees about exchanges starting March 1, 2013.
- May be eligible to buy insurance through an "exchange."
- If you offer a health plan, certain insurance reforms apply. For example, you cannot impose annual/lifetime limits on coverage; you must cover people with preexisting conditions; you cannot rescind coverage; and you must allow children to remain on a parent's plan until age 26. You also are covered by other rules, including non-discrimination rules, the 90-day limit on maximum waiting periods, and restrictions on flexible savings accounts, health savings accounts and health reimbursement accounts. You must offer a "plain English" summary of your benefits and coverage to employees and must report the value of health care coverage on W-2 forms starting with W-2s issued for calendar year 2013.

Small employers also are likely to be affected by some new taxes under the law. For further details, see Restaurant.org/Healthcare.

LARGE EMPLOYERS

5 Q: What does the law require of large employers?

A: Starting in 2014, large applicable employers — those with 50 or more full-time-equivalent employees — must offer "minimum essential coverage" to all full-time employees and their dependents. Minimum essential coverage means that the coverage meets a minimum-value standard (at least 60 percent actuarial value) and is affordable to an employee (employee's premium contribution is no more than 9.5 percent of their household income).

Large employers also face new reporting requirements. For example, every Jan. 31, beginning in 2015, employers must report information to the IRS about individual full-time employees and their dependents. And like all employers covered by the Fair Labor Standards Act, large employers will be required to notify employees of the existence of state exchanges starting March 1.

6 Q: What are the penalties if a large business does not offer the required coverage?

A: Large employers covered by the law's employer mandate face two possible types of penalties:

- **If you do not offer any coverage, the "4980H(a)" penalty applies.** If you are covered by the employer mandate and don't offer health plan coverage and any full-time employee uses a tax credit to purchase insurance through an exchange, you are liable for a \$2,000 annual penalty for each full-time employee, minus your first 30 full-time employees. This is the 4980H(a) penalty, named for the section of tax code that contains it.

- **If you offer coverage but it's not affordable, the "4980H(b)" penalty applies.** If you offer a health plan but it's not affordable (see Q&A 8), you'll face a \$3,000 penalty for every employee certified by an exchange as eligible for a premium tax credit to help them purchase insurance through the exchange. Your liability in this scenario can never exceed the total penalty you'd pay for not offering coverage at all.

7 Q: Which employees are considered full time?

A: A full-time employee is defined as working an average of 30 hours a week on average in any given month, or the equivalent of 130 hours per calendar month. This is not a simple calculation, especially for employees whose hours vary significantly from month to month. In August 2012, the IRS offered businesses preliminary

guidance on how to use a "lookback" period to figure out whether existing and new employees with variable hours are considered full-time. The NRA expects the federal government to publish further regulations on this issue by late December. Visit Restaurant.org/Healthcare for the latest.

8 Q: What does it mean for insurance to be considered "affordable" for a full-time employee?

A: If a full-time employee who works for an applicable large employer is required to pay more than 9.5 percent of his or her household income for individual coverage under an employer's plan, the employer's health plan is considered unaffordable for that employee.

As noted above, failing the "affordability test" can be costly for an employer. If the employee goes to an exchange and the exchange certifies that an employer's plan is unaffordable for a particular employee and that the employee qualifies for a federal premium tax credit to help them buy insurance on an exchange, employers can be assessed \$3,000 a year for each full-time employee that does this.

So to avoid penalties, employers need to know whether premiums are affordable for each employee. The problem is, the health care law bases the calculation on an employee's household income — data employers don't have. Household income is typically available only by looking at a person's federal tax return to see "modified adjusted gross income" for individuals or "aggregate modified gross income" for couples and families.

At the urging of the NRA and other employers, Treasury/IRS agreed to give employers another way to calculate affordability. Under the "affordability safe harbor for employers," Treasury/IRS agreed to let an employer look at an employee's W-2 wages (Box #1) for the previous year, rather than household income.

Under this test, a health plan is considered affordable for an employee as long as the employee doesn't have to pay more than 9.5 percent of his or her W-2 wages in health care premiums for individual coverage. In cases where an employee has been on the job for less than a year and doesn't have a W-2 from his or her current employer for the prior calendar year, the NRA has asked Treasury to allow employers to estimate employee earnings based on current wages. We're waiting to hear Treasury's answer on this.

HEALTH CARE IMPLEMENTATION TIMETABLE

2013

- **Notification to employees.** As of March 1, 2013, employers must inform all current employees and any new hires after this date about the existence of the exchange in their state and how employees can access it. The Labor Department has indicated it will issue guidance and a template about how the information must be provided.
- **FICA tax increases.** Beginning in 2013, taxpayers with incomes over \$200,000 (single) or \$250,000 (married filing jointly) will pay increased taxes on the Medicare Contribution Tax (3.8% on unearned income) and the Medicare Hospitalization Insurance tax (.9% tax increase for employee). There are discussions about altering or delaying these taxes, but no changes have been made yet.
- **Flexible spending accounts limited.** Beginning in 2013, employees' contributions to flexible spending accounts can be no more than \$2,500.
- **Exchange open enrollment.** Beginning October 1, 2013, individuals will be able to enroll in coverage purchased on the exchanges for plans beginning January 1, 2014. Based on Massachusetts's experience with an exchange, many people are expected to look into coverage through an exchange.

2014

- **Employer mandate.** Employers with 50 or more full-time-equivalents must offer "minimum essential coverage" to all employees who average 30 or more hours a week in a given month, or potentially be liable for penalties. How calculations are made, how often, and how penalties will be assessed is the subject of current regulatory action by the Department of Treasury.
- **Automatic enrollment.** Employers with 200 or more full-time employees must automatically enroll their full-time employees into one of the plans the employer offers after the applicable waiting period. However, the Department of Labor has concluded that its automatic-enrollment guidance will not be ready to take effect by 2014. It remains the Department of Labor's view that, until final regulations under Fair Labor Standards Act Section 18A are issued and become applicable, employers are not required to comply with FLSA Section 18A.
- **90-day waiting period.** All group health plans are allowed up to a 90-day waiting period before offering coverage. The IRS in August 2012 offered preliminary guidance on implementation of the 90-day rule; see Restaurant.org/Healthcare for more information.
- **Individual mandate.** The law requires most individuals to obtain basic health insurance coverage, through their employers, state exchanges, Medicaid/Medicare, or elsewhere, or face an annual tax penalty. In 2014, the tax penalty will be \$95 for not obtaining minimum coverage.
- **State health insurance exchanges open.** Each state must establish an American Health Benefit Exchange by Jan. 1, 2014, to provide affordable health care options to individuals and small group employers. If they choose not to, the Department of Health and Human Services will set up and operate one in that state. The exchanges are envisioned as marketplaces that will offer individual and small group plans that are administered by private insurance companies. It is anticipated that all restaurateurs will have a great deal of interaction with the exchanges in their states, even if they do not purchase coverage through the exchange, because of the reporting requirements in the law. If employees go to the exchange for coverage they will be asked to provide:
 1. Employer contact information and identification number.
 2. Whether the applicant is employed on a full-time basis.
 3. Whether the employer offers minimum essential coverage (affordable and of minimum value).
 4. And if so, the required employee contribution to the employer's lowest-cost plan.
- **Exchange reinsurance fee.** From 2014 to 2016 health insurers and self-funded plans will contribute to a fund that will be used to make sure the exchanges function properly. This will be accessed on a per-capita basis of \$5.25 a month or \$63 in the first year. For smaller employers, this cost may be passed down to you.

2017

- **State exchanges grow.** From 2014 to 2016, only individuals and small group employers are eligible to participate in the state exchanges; beginning in 2017, states may elect to allow large group plans (100-plus) to be sold on the exchange as well. States may also form regional exchanges.

2018

- **"Cadillac" plans.** Beginning in 2018, the law imposes a new 40 percent excise tax on the value of coverage that exceeds certain dollar thresholds. For 2018, the dollar thresholds for the excise tax are \$10,200 for individual coverage and \$27,500 for family coverage.

Join Our Webinar

Health Care: Next Steps for Restaurateurs

Thursday, Jan. 17, 2013
2 p.m. to 3 p.m. ET

How will the health care law affect you? What steps should you be taking now to prepare? Whether or not you're covered by the law's employer mandate, your restaurant will be covered by some part of the 2010 health care law. Get the facts on the latest regulations for employers, plus compliance deadlines and more. The NRA's Michelle Neblett, director of labor and workforce policy, gives an overview of the law and next steps for employers.

Visit Restaurant.org/Webinars to sign up.