

Affordable Care Act Considerations in Mergers and Acquisitions

Article By:

Health Care Practice Group

With the passage of the Patient Protection and Affordable Care Act (ACA) in 2010 and the potential imposition of significant penalties, companies that are involved in or are considering a merger or acquisition should be focusing their attention on group health plan issues. This article describes the ACA issues that should be considered. In this article, we use the term “acquisition” to mean a stock purchase or an asset purchase where the target company’s group health plan is to be assumed. Also, we use the term “target” to refer to the company that is to be merged into or acquired by the acquiring company, and we refer to the acquiring company as the “acquirer.”

Identifying Potential ACA Compliance Issues

Failure to comply with the ACA can result in significant penalties. Starting in 2015 (2016 for employers who qualify for transition relief), an applicable large employer (ALE) (*i.e.*, one that employed an average of at least 50 full-time employees during the preceding calendar year) is subject to two potential penalties. If the ALE fails to offer minimum essential coverage to substantially all full-time employees, then it will be subject to a penalty of \$2,000 per year for each full-time employee less 30 (80 for certain employers in 2015). In addition, if the ALE provides coverage that is unaffordable or does not provide minimum value, then it will be subject to a penalty of \$3,000 per year for each full-time employee receiving a premium tax credit. An employer’s failure to comply with the ACA could also result in an excise tax of \$100 a day for each affected employee. In addition to these monetary penalties, the Department of Labor could bring a civil action under the Employee Retirement Income Security Act (ERISA) to enforce the ACA.

In light of these penalties, acquirers need to undertake a thorough evaluation of the target’s group health plans. As part of this due diligence, all relevant health plan materials should be reviewed, including the plan document, summary plan description, benefit booklets, insurance certificates, employee communications, enrollment booklets and the target’s internal policies and procedures. In addition, the acquirer should gather employee data to determine whether the target’s health plan is compliant in operation with the ACA, including reports that show hours of service, compensation, date of hire, and benefit coverage details.

Consideration of Controlled Group Rules

For purposes of determining whether an employer is an ALE subject to the employer mandate under the ACA, all entities that are part of a controlled group or under common control are treated as a single employer. For example, if the target becomes a wholly owned subsidiary of the acquirer as a result of the acquisition, both the target and the acquirer will be considered part of the same controlled group. This change in employer status could have an impact not only on the group of employees who need to be offered ACA-compliant coverage but also the employer's ability to obtain a group health plan on a public exchange. (Note that even though ALE status is determined on a controlled group basis, each member of the controlled group is responsible for its own penalties for failing to comply with the employer mandate).

Representations and Warranties

To the extent any compliance failures are discovered during the course of due diligence, the acquirer should insulate itself from liability (e.g., through specific indemnification in the purchase or merger agreement). Health plan compliance concerns can also be covered by a general representation and warranty (e.g., a representation by the target that its health plan is in compliance with ERISA, the Internal Revenue Code and all applicable laws, including the ACA). Also, the representation should require the target to identify and disclose any compliance issues that fall outside the representation. Should any compliance issues be discovered during this process, the acquirer can then consider whether to proceed with the transaction and if so, how best to insulate itself from potential liability.

Post-Transaction Considerations

The acquirer will need to consider potential operational issues following the transaction, especially those that relate to the determination of full-time employee status for purposes of the ACA employer mandate rules. For example, if the acquirer and the target each use different measurement methods for determining full-time employee status, difficulties may arise in applying those methods following the closing of the transaction.

Recognizing these difficulties, the IRS in [Notice 2014-49](#) offers guidance on application of the look-back measurement method in situations where the measurement period applicable to an employee changes. Under the Notice, if the acquirer and the target use different measurement methods, they may rely on the approaches described in the Notice in determining an employee's status as a full-time employee. The IRS expects to issue further guidance after considering comments on the proposed approaches set forth in the Notice. However, the Notice may be relied upon until that guidance is issued and in any case, through the end of calendar year 2016.

© 2025 Faegre Drinker Biddle & Reath LLP. All Rights Reserved.

National Law Review, Volume IV, Number 353

Source URL: <https://natlawreview.com/article/affordable-care-act-considerations-mergers-and-acquisitions>