Labor & Employment Law

Affordable Care Act Compliance: Say "Hello" to Collective Bargaining Obligations

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Related Links:

- •UC Berkely Labor Center, The Affordable Care Act: A Guide for Union Negotiators (Aug. 2012): http://laborcenter.berkeley.edu/healthpolicy/acaguide12.pdf
- •Evan Rosen & Mark Trapp, What to Know About ACA Collective Bargaining, Law360.com (LexisNexis) (April 30, 2013): http://www.law360.com/articles/435817/what-to-know-about-aca-collective-bargaining
- •Bargaining for Health Care, AFL-CIO: http://www.aflcio.org/Issues/Health-Care/Bargaining-for-Health-Care

Beginning January 1, 2014, every employer of fifty or more full time employees (130 hours/month or more, including full-time equivalents, controlled group employees and joint employees, less seasonal workers) must offer "minimum essential coverage" to all full-time employees or pay a non-deductible penalty of $167.77 monthly for each full time employee (less 30) if at least one of the uninsured obtains coverage through a health insurance exchange. But wait, there's more. Even if the employer offers minimum essential coverage that provides "minimum value," the employer must pay a $250.00 monthly penalty for each full-time employee who instead obtains premium assistance through an exchange if the individual coverage offered that employee was "unaffordable"—*i.e.*, priced in excess of 9.5% of his W-2 wages, under the current "safe harbor" test. Employers of 200 or more also must implement automatic enrollment. As the IRS and Department of Labor have found in two years of trying to draft and publish enforcement regulations, it's tough to explain how this will work, exactly, assuming that it can work, more or less.[1] While these notices don't explain how the penalties can be administered as written, they provide reliable guidance on how to avoid penalties by adopting an alternative safe harbor scheme for categorizing variable hour employees and new hires as full-time (to be offered coverage) or part-time (not) employees. Myriad questions not addressed include how to count (or not) time that a variable hour employee spends on FMLA or military leave, but what's said is helpful.

Dizzy yet? Shake it off. Here's where the fun starts. Imagine that, during the 59 weeks between the November 2012 election and the enforcement deadline, you are asked to work with the CFO and HR V.P. to map your compliance process. If you have union-represented employees, you'll need at least two—one map for all of your non-union employees and a longer, more complex map for each separately-represented employee group. You also may need to tell your boss that the best opportunity to negotiate —that's right, negotiate—your compliance plan has passed.

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I. NLRB Enforcement of An Employer's Duty to Bargain

The National Labor Relations Act, 29 U.S.C. § 151 et seq., a federal law from the 1930's, prohibits employers of union-represented employees to change their wages, hours or working conditions without first giving their union fair notice and an opportunity to bargain about the proposed changes and about their effects on the represented employees. To do so would be an unfair labor practice remediable under 29 U.S.C. § 158(a) (administrative charges, hearings and appeals) and § 160(j) (authorizing preliminary injunction proceedings in district courts). The Act is enforced primarily by the National Labor Relations Board, a commission of five[2] Presidential appointees. Though legal damages are not available in NLRB adjudications, remedies typically require restoration of the status quo ante and a period of demonstrated, good-faith bargaining before lawful changes may be made. Such orders sometimes enable unions to make what may seem to be extortionate demands.[3]

The employer's dilemma is particularly acute if changes need to be made during the term of a collective bargaining agreement. Since bargaining is a substantial transaction cost, one of the deals typically struck is that neither the employer nor the union may require the other to bargain further during the contract term. As long as the union's waiver of bargaining rights is "clear and unequivocal," it's enforceable. But pity the employer that fails to anticipate and negotiate the consequences of a new legal mandate that will take effect during the contract term. In that situation, the union may be privileged both to refuse to bargain and to complain of any discretionary aspect of the employer's compliance.

For example, an employer dutifully may raise its minimum wage during a contract term without incurring NLRB wrath because Congress left nothing to its discretion. But choosing from among lawful compensation and benefits options is a mandatory subject of bargaining.[4] The Board probably will apply this line of precedent to decisions such as setting safe harbor "measurement" and "stability" periods for variable hour employees under IRS Notices 2012-58 and 2012-59. The Board should not order you to rescind mandated ACA compliance measures, but you might need to purchase the union's waiver of the zipper clause – perhaps by granting something that you de-

clined in the last negotiation – in order to negotiate a mid-term change in your health insurance program that is not specifically compelled by law. Otherwise, the NLRB might order you to restore your prior offerings, to the extent consistent with law, make employees whole for the difference between what they received and what they would have received, and then bargain for the union's agreement to any changes.[5] It would be no defense that the new law made your prior insurance program intolerably expensive.[6]

Once you get to the table, unless you've been there before, you may be surprised by the NLRB's definition of "bargaining." If you're bargaining with a customer or supplier, a phone call or e-mail, or two or three, might give you the feeling that your time is better spent in other pursuits. Your counterpart would have no legal cause to complain. But the NLRB, historically, and especially lately, has characterized similar employer conduct as an unlawful refusal to bargain. The Board requires an accused employer to prove that it exhausted all reasonable possibilities for agreement before declaring a deadlock and implementing its final offer. This normally requires many meetings over the course of months.[7] Sensing your hurry, the union may inundate you with information requests, each of which must be answered, and may postpone meetings until it has digested your responses. There is no shot clock in this game.

If you time this right and raise the subject during bargaining for a new contract, so as to avoid mid-term modification prohibitions, and even if you do what seems to you to be your full bargaining duty, the union will retain material leverage if it can persuade the local NLRB office to deem its strike to have been a response to your refusal to bargain fully and fairly. That's because so-called "unfair labor practice strikers" are entitled to be reinstated promptly after making an unconditional offer to return to work, even if you must fire their replacements to make room for them. Since employees who strike to force contract concessions are subject to permanent replacement, unions normally file NLRB charges and characterize their walk-outs as protests of unfair employer bargaining tactics. It's relatively easy to persuade employees to strike if they can be told that the NLRB's Regional Director has outlawed their replacement. So, if you propose insurance changes that workers strongly oppose, you'll need to be extra careful to assure that even the NLRB Regional Director, as solicitous as he or she may be of union approval, will conclude that you bargained early, often and in complete good faith. That will take time.[8]

II. Seek Union Cooperation, Soon

So now, back to your assignment, counsel. While seeking to encourage reasonable union cooperation, you should plan for tactical union delay and obstruction of your ACA compliance. If you have a late 2013 policy renewal or self-insured plan funding decision, expect ACA-related cost increases for the plan year that includes part of 2014. As a result, plan, if you can, to negotiate your compliance strategy between now and your 2013 renewal, and the sooner, the better. *Even if negotiations commence promptly after you decide what to propose* —either because the union agrees to re-open the agreement or there is no existing agreement—*the obligation to give a union fair advance notice and then to bargain, over both changes and their effects, until reaching an agreement or a lawful deadlock, may take months*. Faster resolution may require you to offer costly inducements. The union may file unfair labor practice charges, grievances, strike and take other actions to maximize both the delay and its consequent leverage.

Normally, time favors the employer in labor negotiations. But unionized employers who delay their ACA compliance planning and related union negotiations may find that the script has flipped, and expensively so.

Endnotes

1 *See* IRS Notices 2012-58, 59, DOL Technical Release 2012-02 and the HHS Bulletin titled "Guidance on 90-Day Waiting Period Limitation under Public Health Service Act § 2708," (August 31, 2012).

2 Confirmation battles in recent years often have reduced the Board to less than the three members required to issue binding opinions. *See* New Process Steel, L.P. v. NLRB, __ U.S. __, 130 S.Ct. 2635, 177 L.Ed.2d 162 (2010). Presently, the Board's four members may issue opinions only because the President recess-appointed three members during a period when the Senate was not, according to its rules, in recess. The legal standing of those recess appointees is being litigated, s*ee, e.g.*, Richards et al. v. NLRB, 7th Cir. Dkt. No. 12-1973 (filed April 23, 2012). With only one member holding an uncontested appointment, a final decision adverse to the President could invalidate all decisions made since early January 2012. As of this writing, more than 150 such opinions have been officially published.

3 The Board has ordered employers to re-establish closed facilities and to re-hire their terminated employees, will full back pay, including compensation for lost employment benefits. The more common *Transmarine* remedy requires the employer to make employees whole for their losses and put them back on the payroll, despite closure of their facility, until the employer has bargained to the point of agreement or genuine impasse. *See* Transmarine Navigation Corp., 170 NLRB 389 (1968). An employer in either situation might well have preferred an award of fixed legal damages.

4 *See* Quality Health Services of P.R., Inc., 358 NLRB No. 70 (June 25, 2012) (compelled minimum wage raise lawful, but related, discretionary changes to incentive pay unlawful); Industria Lechera De Puerto Rico, Inc., 344 NLRB 1075 (2005) (employer duty to accommodate an employee under Americans with Disabilities Act did not excuse its failure to bargain over the particular accommodation); Keystone Steel & Wire Div. of Keystone Consolidated Industries, Inc., 309 NLRB 294 (1992), *reversed on other grounds*, 41 F.3d 746 (D.C. Cir. 1994) (even if ERISA compelled plan changes, it did not compel the specific changes made without bargaining).

5 *See* FirstEnergy Generation Corp., 358 NLRB No. 96 (August 6, 2012) (ordering rescission of retiree health benefit changes, restoration of losses and bargaining).

6 Paul Newman fans may recall the line from the film, "Absence of Malice," in which a news story is described as "accurate, but not true." That may be the best way to understand the promise, embodied in ACA § 1251, that "if you like your insurance, you can keep it." Opponents argued that the Affordable Care Act would compel employers to drop or alter insurance offered to employees, thereby depriving the employees of the opportunity to keep the coverage that they liked. In a white paper published in early 2012, Truven Health Analytics forecast that over 70% of employers could be subject to the 40%, nondeductible, "Cadillac" plan excise tax in 2018 if they do not act to reduce plan payouts. *See* R. Fabius, L. MacCracken and J. Pritts, "Vocabulary of Healthcare Reform," at 13, Fig. 13 (January 2012), *available at* www.truvenhealth.com.

7 Unions are so accustomed to having their way in this process that they sometimes overplay their hands, as did Teamsters Local 104 in *Redburn Tire Company*, 358 NLRB No. 109 (August 31, 2012). When health insurance negotiations broke down, the employer declared an impasse, implemented its final offer and replaced union strikers. Evaluating bad faith bargaining charges, the NLRB found those actions lawful, since the Teamsters had refused to make a counter-offer and had instead demanded that the employer bid against itself until the Teamsters heard something that they liked.

8 There is a bit of good news here. The ACA gives a few breaks to plans that cover union-represented employees. For example, if your employees have health coverage under a collective bargaining agreement that was negotiated and ratified before March 23, 2010, then you may have an extended period to make the decision to remain "grandfathered," in order to avoid some new ACA coverage requirements – e.g., guaranteed renewal under Public Health Service Act § 2703 - or to make cost-shifting, coverage-reduction or other changes that will reduce payouts but forfeit your grandfathered status. *See* 42 U.S.C. § 18011(d); 45 C.F.R. § 147.140 (f).