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The Impact Of Health Care Reform On Seasonal Employees

PPACA Will Impact 5.1 Million Seasonal Employees In A Variety Of Industries

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The Patient Protection and Affordable Care Act (PPACA) impacts employers with seasonal employees in 2 important ways:

- The number of seasonal employees is important for determining whether or not an employer meets the 50 employee threshold for the employer penalty;¹ and
- Large employers are required to automatically enroll all full-time employees, including seasonal workers, after any waiting period that cannot exceed more than 90 days.²

Seasonal employees are defined by the statute as workers who perform labor or services on a seasonal basis as defined by the Secretary of Labor, including workers covered by 29 CFR 500.20(s)(1) and retail workers employed exclusively during holiday seasons.³ The CFR citation defines seasonal work as labor “where, ordinarily, the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year.”⁴ Depending on how the Department of Labor defines seasonal employees through its rulemaking process it could apply to millions of employees.

This report provides data on the number of seasonal employees and the industries in which they work. It also identifies potential issues for employers with seasonal employees as well as the possible impact PPACA may have on those employees.

Retail, Service, Construction, and Arts and Entertainment Industries Employ Most Seasonal Workers

Bureau of Labor Statistics data show that on average private-sector employers hire over 5.1 million seasonal employees, including 1.8 million 16 to 24 year-olds during the summer.⁵ Retail trade (813,000), the accommodation and food service industry (774,000), construction (763,000), educational services (594,000), administrative support services (589,000, including temporary help services), and the arts and entertainment industry (516,000) hire the most employees on a seasonal basis (see Table 1).⁶ On the other hand, the information industry (38,000), mining (31,000), management of companies (28,000), waste management (16,000), and utilities (7,000) hire the fewest numbers of seasonal employees.⁷

In percentage terms, the arts and entertainment industry has the largest number of seasonal employees (27%), followed by education services (19.1%), and construction (11.1%).⁸ Moreover, it is important to note that these are just industry *averages*. Many individual employers in specific industries (e.g. ski resorts, fishing and tourism, recreation, and amusements) may have even higher percentages of seasonal employees.

Table 1: Seasonal Hiring by Industry

Industry	Average Seasonal Hiring	Percent of Average Annual Employment
Retail Trade	813,000	5.6%
Accommodation & Food Service	774,000	7.0%
Construction	763,000	11.1%
Educational Services	594,000	19.1%
Administrative Support	589,000	7.8%
Arts & Entertainment	516,000	27.0%
Manufacturing	185,000	1.6%
Professional & Technical	145,000	2.0%
Other Services	137,000	2.5%
Financial Activities	119,000	1.5%
Transportation & Warehousing	102,000	2.4%
Social Services	94,000	3.6%
Wholesale Trade	83,000	1.5%
Health Care	82,000	0.6%
Information	38,000	1.2%
Mining	31,000	4.7%
Management of Companies	28,000	1.5%
Waste Management	16,000	4.5%
Utilities	7,000	1.3%
Total	5,116,000	4.6%

Source: Applied Economic Strategies analysis of Bureau of Labor Statistics data

Issues for Employers with Seasonal Employees

Many employers offer limited “mini-med” medical plans to seasonal employees that generally provide limited benefits for medical expenses in order to provide affordable coverage options. PPACA prohibits coverage that places annual and lifetime limits on essential benefits. The statute also sets a limit on insurers’ medical loss ratio (MLR) of 80 to 85 percent of the proportion of health premiums that pays for medical services rather than administrative costs. Mini-med plans usually have an annual dollar cap on overall benefits and/or an annual dollar cap on specific services and these plans may not meet the MLR requirements in PPACA because the higher turnover rates of the employees they serve result in higher administrative costs as a percentage of the premiums collected. However, the Department of Health and Human Services (HHS) has established a waiver process for these types of plans.⁹ Only limited medical plans in place prior to September 23, 2010 are eligible for the waiver program and employers must reapply every year in order to extend a waiver.

Automatic Enrollment and Waiting Period Requirements

PPACA requires employers that have more than 200 full-time employees, and that offer employees enrollment in 1 or more health benefit plans, to automatically enroll new *full-time* employees, including full-time seasonal employees.¹⁰ The penalty for not automatically enrolling an employee could be up to \$10,000 and/or imprisonment for up to six months for willful violations.¹¹

Beginning in 2014, employers are also prohibited from having waiting periods longer than 90 days before auto enrollment.¹² In general, the maximum federal penalty for having a longer waiting period is \$100 for each day for each individual.¹³ Therefore, large employers will have to automatically enroll full-time seasonal employees after 90 days if they offer employees 1 or more health benefit plans or face significant penalties.

Moreover, if an employer automatically enrolls full-time seasonal employees in one of their health benefits plans, but an employee opts out of the plan because it is unaffordable, the employer would be subject to an annual penalty of \$3,000 (assessed on a monthly basis) for any seasonal employee who purchases insurance through an exchange and receives a subsidy.

Potential Impact on Employers and Employees

One recreational industry group in Colorado that hires thousands of full-time seasonal employees estimated the penalty for these workers could be between \$9 million to \$14 million per year if all the employers in the industry stopped offering coverage all together rather than deal with the issues related to seasonal employees.¹⁴ However, because there is no penalty under PPACA for not offering part-time employees health insurance coverage, PPACA creates a strong incentive for employers to hire seasonal employees on a part-time basis instead of as full-time workers once health insurance exchanges are setup and PPACA's penalty provision becomes effective in 2014.¹⁵

For those large employers that must hire full-time seasonal employees, PPACA creates an incentive for employers to let them go after 90 days in order to avoid the administrative costs of having these employees ping-pong in and out of their health care plan for just a few months of coverage. For those employers whose peak season lasts 4 or 5 months, it may be better to stagger their hiring so as to not have any full-time seasonal employee for more than 90 days. Other employers may choose to pay the penalty for a couple of months instead of offering seasonal workers health care benefits.

The interaction of automatic enrollment, the 90 day waiting period limitation, and dynamic nature of the U.S. labor market where millions of people change jobs every month will present a significant administrative challenge for large employers, Medicaid, and the exchanges. In 2010, large employers (250+) hired on average 2.0 million new employees every three months while 1.9 million employees left their jobs.¹⁶ Coordinating and tracking all of these changes on a monthly or quarterly basis will be time consuming and expensive. The 5.1 million seasonal employees that move in and out of the labor force strongly suggests that that millions of Americans may switch in and out of Medicaid, the exchanges, and employer coverage on a fairly regular basis.

¹ P.L. 111-148, Section 1513. Employers will not be considered to have employed more than 50 full-time employees if their workforce exceeds 50 full-time employees for 120 days or less during the calendar year *and* the employees in excess of 50 employed during the 120-day period were seasonal employees. The 50 full-time employee threshold is calculated on a full-time equivalent basis. Seasonal employees are also not used for determining whether or not an employer is eligible for the small business tax credit (P.L. 111-148, Section 1421).

² 29 U.S.C.A. 218a. Although the automatic enrollment provision took effect on the date of enactment (March 23, 2010), agencies have indicated that they will not enforce the provision until after releasing regulations.

³ P.L. 111-148, Section 1421 and Section 1513.

⁴ 29 C.F.R. 500.20(s)(1).

⁵ Bureau of Labor Statistics, Employment and Unemployment Among Youth - Summer 2010, August 27, 2010, available at: http://www.bls.gov/news.release/archives/youth_08272010.htm. The estimate of 5.1 million seasonal employees was developed by calculating the average peak to trough seasonal adjustment factors for detailed private-sector industries from 2001 to 2010 and then multiplying the average peak to trough seasonal adjustment factor for each industry to the 2010 annual average employment level.

⁶ See endnote 5.

⁷ *Id.*

⁸ *Id.*

⁹ See OCIO Sub-Regulatory Guidance (OCIO 2010 - 1): Process for Obtaining Waivers of the Annual Limits Requirements of PHS Act Section 2711, September 3, 2010, www.hhs.gov/ocio/regulations/patient/ocio_2010-1_20100903_508.pdf; and Health Insurance Issuers Implementing Medical Loss Ratio (MLR) Requirements under the Patient Protection and Affordable Care Act; Interim Final Rule, December 1, 2010, edocket.access.gpo.gov/2010/pdf/2010-29596.pdf.

¹⁰ P.L. 111-148, Section 1511.

¹¹ 29 U.S.C.A. 218a requires employers to provide “adequate notice and the opportunity to opt out of any coverage the individual or employee were automatically enrolled in” and 29 USC 211(c) requires employers to “make, keep, and preserve such records ... as the [Administrator] shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter....” 29 USC 215(a)(5) makes it a prohibited act to “violate any of the provisions of section 211(c)” and 29 USC 216(a) sets the penalty for any person who “willfully violations any of the provisions of section 215” at not more than \$10,000 and/or imprisonment for not more than six months.

¹² P.L. 111-148, Section 2708.

¹³ 42 U.S.C.A. 300gg-22. State penalties may be higher.

¹⁴ Mike Lawrence, Health Policy Raises Red Flags at Steamboat Ski Area, Steamboat Today, March 24, 2010, available at: www.steamboattoday.com/news/2010/mar/24/health-policy-raises-red-flags-steamboat-ski-area/.

¹⁵ Part-time seasonal employees are also not subject to the automatic enrollment requirement.

¹⁶ Bureau of Labor Statistics, Business Employment Dynamics – Second Quarter 2010, February 1, 2011, Tables 3 and 4, available at: <http://www.bls.gov/news.release/pdf/cewbd.pdf>.