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Keeping You Informed
TO THE POINT
Spring 2014

Obamacare Compliance Delayed to 2016 for "Mid-Sized" Employers but Creates New Hazards

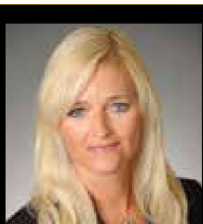
On February 10, 2014, the Obama Administration announced that "mid-sized" employers with 50 to 99 employees would have an extra year, until January 1, 2016, to comply with the Affordable Care Act's (i.e. "Obamacare" or "ACA") requirement that employers with 50 or more employees provide those employees with health insurance meeting the standard for "good coverage" defined by the ACA. Business groups such as the National Retail Federation widely applauded the delay. Employers initially had until January 1, 2014 to comply with the ACA but in July 2013, that requirement was delayed until January 1, 2015. Under the latest policy change, mid-sized employers who do not provide their employees with "good" health insurance coverage will not have to pay the ACA's tax penalties until the January 1, 2016 tax year. Although the announcement may seem like a reprieve for mid-sized employers, the delayed compliance date created several new issues for employers.

First, the change widened the gap in time between the commencement of the ACA's individual mandate and the employer mandate. Individuals must have health insurance in 2014 or they will be assessed tax penalties. Individuals whose employers do not have to provide coverage until 2016 will pressure employers to commence compliance now, but those employers likely will want to take advantage of the financial benefit that delayed compliance may provide. The conflict in the timing of the individual versus employer mandates has many calling for the delay of the individual mandate to coincide with the commencement of the employer mandate, but that delay is unlikely because of the need to operate the new health insurance exchanges.

Second, the delayed mandate for mid-sized employers created a new requirement that mid-sized employers certify to the I.R.S., under penalty of perjury, that the employers did not lay off employees to reduce their workforce to 99 or less so that the employer could delay compliance with the ACA. Although such a mandate is difficult to enforce, it is likely that in the event of an audit, the I.R.S. will look for emails, internal memoranda, or other communications regarding staff cuts which contain any language indicating that ACA compliance was a factor in determining the number or timing of staff cuts.

Third, mid-sized employers must also certify to the I.R.S. that they will not drop health insurance plans that they currently offer. That mandate may prove troublesome and expensive for mid-sized employers as they renew their health insurance plans for 2015. Insurers are likely to transition mid-sized employer plans in 2015 to include the specific coverage mandated by the ACA. The expanded coverage required by the ACA will increase renewal rates for plans offered in 2015, but mid-sized employers cannot drop those plans.

It is unlikely that we have seen the last of the "tweaks" to the ACA and employers must be mindful of the new hazards created by a seemingly "business friendly" change.



Kimberly L. Russell

Kimberly L. Russell is a principal in the Employment Law and Commercial Litigation groups. She devotes a significant part of her practice to defending employers in all types of employment litigation including sex, age, race and disability discrimination claims, wrongful discharge, Family and Medical Leave and wage claims, as well as counseling employers on issues related to the daily operations of a business. You can reach Ms. Russell at 610.941.2541 or by email to krussell@kaplaw.com.

KS News

Administration Continues to Target Carried Interest

President Obama's 2015 Budget Plan (again) takes aim at the income taxation of "carried interest". Most sponsors of private equity investments, such as real estate projects, are entitled to special distributions of cash from the project once the investors have received a return on, and a return of, their investment. These special distributions, often called the "promote" or "carried interest", rewards the promoter for its performance. Often, the "promote" is earned and paid at the time of a capital transaction, such as a sale of the project. These payments are treated by the promoter as a return on the equity investment made by the promoter and therefore are taxed as capital gain, which is subject to significantly lower income taxes than earned income. There has been a target on the tax treatment of carried interest for the past 10 years, and the current Administration has continued to take the position that these payments are in connection with services performed by the sponsor and should be taxed as regular earned income. So far, the Administration has not had success in changing the carried interest rules, but that has not stopped it from trying again.

We will continue to monitor the 2015 budget process and keep you informed if it appears that the President will be presented with a budget that includes a change in the tax treatment of the carried interest.

Follow us on:

The Kaplin Stewart Construction Law Group invites you to join us on social media to keep current on construction news, seminars and events, business issues, and other items of interest. Simply find us on Facebook under "Kaplin Stewart Construction Law" and click "like" or follow us on Twitter @KAPLAWBuilds

☛ We are pleased to announce that **Craig Robert Lewis** of the Land Use & Zoning Group has become a principal of the firm. Mr. Lewis' practice focuses in the areas of land use, land development and zoning of both commercial and residential real estate. His practice involves representation of a wide array of clients including developers, homebuilders, homeowners, landowners and educational institutions throughout various regions in the Commonwealth of Pennsylvania.

☛ **Mohammad A. Ghiasuddin,** principal of the Construction and Commercial Litigation groups, was re-appointed as Chair of the Diversity Committee of the Montgomery Bar Association for 2014. This will be Mr. Ghiasuddin's third year in that position. He has been an active member of the Diversity Committee of the Montgomery Bar since its inception in 2008. In his practice, Mr. Ghiasuddin concentrates in the areas of commercial litigation, construction and surety law.

☛ **Pamela M. Tobin,** a member of the Commercial Litigation group, was appointed to serve on the Executive Committee of the Montgomery Bar Association for 2014. Ms. Tobin has been an active member of the Montgomery Bar Association for a number of years serving on the Board of Directors, and as Vice Chairwoman of the Women in the Law Committee. Ms. Tobin will be partnering with Len Deutchman of LDiscovery to present a CLE at the Montgomery Bar association on cost effective ways for producing electronic discovery. In her practice, Ms. Tobin handles complex commercial litigation cases involving real estate disputes and claims against municipal authorities and agencies.

☛ **Joshua C. Quinter,** principal of the Construction and Commercial Litigation groups, was re-appointed Chair of the Montgomery Bar Association's Construction and Public Contract Law Committee for 2014. Mr. Quinter has extensive experience in representing owners, contractors, and subcontractors on both public and private projects, payment issues, defect and delay claims, and indemnification and insurance issues.

☛ **Neil A. Stein,** principal of the Land Use & Zoning group, was appointed to the Home Builders Association Board of Directors and re-appointed as Chair of the Political Action Committee of HBA. Mr. Stein occupies a leadership role in many builder and developer trade groups and bar association committees. In his practice he represents landowners, developers, institutions and non-profit groups in each and every phase of real estate transactions.

Meet Our Litigation Professionals

This month Kaplin Stewart shines the spotlight on Amy L. SantaMaria, a principal in the firm's Commercial Litigation Department in our Cherry Hill, New Jersey office.

Amy grew up in Brooklyn, New York. Amy decided she wanted to be a lawyer very young and developed great experience negotiating and arguing her position being one of five. She attended the State University of New York at Binghamton School of Management and completed a five year program in just three years graduating Magna Cum Laude. Amy went on to attend Temple University School of Law (now James E. Beasley School of Law) and graduated Cum Laude.

Amy L. SantaMaria

Amy began her career as a lawyer in November, 1996 at a firm in Center City Philadelphia where she was immediately thrown into civil litigation matters. Amy knew immediately that litigation was for her.

Amy's practice is unique and diverse. She represents large companies and individuals in various litigation matters involving contracts, leases, secured transactions, loan enforcement and enforcement of creditors' rights in both state and federal court in New Jersey and Pennsylvania. Amy also represents creditors in bankruptcy matters. Amy's practice has expanded to representation of clients in transactional matters including purchases, sales and leases of real property, creation of new business entities and development and documentation of financing relationships.

Amy's clients can always reach her and she is always focused on meeting their goals and objectives. She is both creative and practical. Amy believes the key to success is to always be prepared and remember the ultimate goal.

Amy married her college sweetheart Richard and they have two beautiful children – Kate (8) and Richard (4). When Amy is not hard at work she is managing all of the fun activities that her children participate in. She loves watching Kate dance and cheering at Richie's soccer games (even if he is dribbling toward the wrong goal!). Amy enjoys spending time with her family, reading and cooking. Someday she hopes to be a competitor on the TV show CHOPPED. Amy loves "Castle" marathons and watching the Yankees win (only win).

In the most recent game of LIFE she played with her children Amy again chose the career card of "Lawyer." Just further evidence that she shouldn't change a thing.

Do You Know…

The Construction Labor Force is Falling Short of Industry Demand

Since the height of the recession, the construction industry has been reduced by approximately 30% of its workforce. The Construction Labor Market Analyzers' 20/20 Foresight Report projects a shortage of nearly 2 million skilled craft workers by 2017 caused by an aging workforce, a plummeting pipeline of new workers, and an ever rising demand for workers.

Those recovering from the recession now confront fears that all hope in the strengthening market will be crushed by an inability to fill an increasing number of much needed work orders. Nearly 75% of construction firms nationwide report that craft workers such as carpenters and equipment operators and laborers are not available in numbers sufficient to meet even current demands. Additionally, approximately 50% of construction firms report difficulty in hiring for professional positions including project supervisors and engineers. With approximately 5 million non-residential workers in the construction industry nationwide and an expectation that the demand for non-residential workers is expected to grow to approximately 6.7 million in the next several years, the shortage is likely to persist.

Many construction related organizations and construction firms have undertaken a concerted and pro-active approach to developing the workforce by offering training programs, mentoring programs, career fairs, and lobbying to increase the availability of training programs in public schools and to lift the arbitrary caps placed on legal immigrant workers in the construction field during the recent immigration reform.

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Legal Perspectives

Negotiating Exclusive Listing Agreements

Scott C. Butler

Engaging a real estate broker is a vital step in adding value to commercial real estate through leasing or selling a property. Since the broker will be required to invest a significant amount of time and effort in marketing the property, most brokers require that the owner enter into an exclusive listing agreement. This type of agreement provides that the broker will have the exclusive right to list and market the subject property for a certain period of time, called the listing period. In the event a lease or agreement of sale is executed during the listing period, regardless of whether the broker was instrumental in the transaction, the broker will be entitled to a commission.

When negotiating an exclusive listing agreement, the parties should consider the following issues: (1) the length of the term of the agreement (which, according to the Pennsylvania Real Estate Licensing Act, shall not be longer than one year); (2) the timing of the payment of the commission; (3) whether the commission should be paid if a lease or agreement of sale is executed after the expiration of the listing period with a party that was found by the broker; (4) who is responsible for the payment of any co-brokerage fees; (5) whether a commission will be payable to the broker for any lease amendments or renewal terms under the applicable leases; (6) whether a commission will be payable in the event of either the sale or lease of the property, or the sale of interests in the owning entity; (7) who is responsible for the marketing costs in listing the property; and (8) whether a commission will be payable in the event of a lease or sale to any existing tenants or occupants of the property, or to an affiliate of an owner of the property.

In the event the owner previously engaged a different broker for the property, the owner should be careful to exclude from the listing agreement any transactions for which a commission is payable to the prior broker.

For more information, contact Scott C. Butler at 610.941.2560 or by email to sbutler@kaplaw.com.

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