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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

What To Know About ACA Collective Bargaining

Law360, New York (April 30, 2013, 11:59 AM ET) -- For the unionized employer, the advent of the Affordable Care Act requires careful strategic thought about its impact on upcoming collective bargaining negotiations. Indeed, for companies with a unionized workforce, the ACA poses additional challenges and strategic considerations above and beyond those confronting nonunionized workforces.

For example, like other employers, unionized companies must decide whether to offer affordable health insurance to their employees or pay a penalty. But they cannot make this decision without input from the union because doing so may constitute an unfair labor practice under the National Labor Relations Act.

Consequently, a strong understanding of the ACA and its strategic implications is essential for all employers entering collective bargaining negotiations over the next few years.

As a general matter, the ACA requires an “applicable large employer” to offer health insurance to its “full-time” employees (those working on average 30 or more hours per week). If health insurance is not offered, or if it is offered but is not “affordable” or of a “minimum value” (as defined in the regulations), the employer must pay a tax penalty.

In addition to the “pay or play” provisions, the ACA requires a host of other changes to health insurance, such as insuring dependents up to the age of 26, eliminating annual and lifetime caps and limiting eligibility periods to 90 days. An employer seeking to comply with the ACA must balance its unilateral efforts to contain cost increases with its obligation under the NLRA to bargain with the union representing its employees.

Section 8(a)(5) of the NLRA prohibits employers from making unilateral changes to mandatory subjects of bargaining, which generally includes health insurance. Even when a management rights provision or a past practice gives an employer the right to alter parts of its health plan, the employer must still offer the union the opportunity to negotiate over the effects of the decision.

Consequently, the existence of a union may significantly restrict an employer’s ability unilaterally to make decisions regarding the ACA.

Chief among the decisions that an employer needs to make is whether or not to offer health insurance to its employees. Under the ACA, large employers are given a choice: They must either offer affordable minimum essential coverage to their full-time employees, or they can choose to pay the required tax penalty.

But in a unionized work environment, employers may not unilaterally decide to discontinue health insurance. In fact, doing so would constitute an unfair labor practice. The typical union will not be too excited about the idea of an employer dropping health insurance for its employees. Accordingly, employers seeking to eliminate the health insurance coverage of its employees can expect a high level of pushback.

Even those employers who intend to keep their coverage in place will likely face challenges as the influx of many previously uninsured persons into the health care system is predicted to substantially increase the costs of insurance.

This fact may place unionized employers at a particular disadvantage as the union may be bargaining from a position of strength — unless the union agrees otherwise, the employer's out-of-pocket costs for health care are likely to see significant increases.

Decisions over hours and working conditions may also factor into compliance with the ACA and will no doubt impact the bargaining unit. For example, as only "large employers" are required to offer health insurance or pay a penalty, employers may choose to layoff some employees to get below the 50 full-time employee threshold.

In addition, employers may choose to subcontract out certain types of work to avoid hiring more employees or reduce employee hours to decrease or limit the number of full-time employees for whom coverage is mandated.

An employer's ability to take these actions will depend, in part, on its collective bargaining agreement. For example, does the agreement limit an employer's right to subcontract out bargaining unit work? What are the requirements for layoffs — must they be by seniority, or does the employer have discretion to select those whom it lays off?

Likewise, may an employer unilaterally reduce the hours of bargaining unit employees, or does the collective bargaining agreement contain set work hours that the employer may be required to maintain? Employers contemplating any of the foregoing actions should evaluate their options under their collective bargaining agreement and, if necessary, address problematic restrictions in negotiations.

Eligibility periods must also be reviewed. Many collective bargaining agreements include a probationary period, during which new employees do not receive benefits such as health insurance. Many agreements provide probation periods of 90 days or more, and some agreements allow the probationary period to be extended under certain circumstances.

But under the ACA, all full-time employees must receive health insurance within 90 days of their employment (note, however, that this may be extended for certain types of training programs). Under agreements with a probationary period longer than 90 days, or where health insurance does not kick in until the first of the month following a 90-day probationary period, the employee may not start receiving health insurance until well after the 90th day of employment. This could violate the ACA.

Employers who provide health insurance to their employees may have to pay penalties if the insurance they provide is not affordable or if the plan does not "minimum value." Under the regulations, this means that the plan cannot cost the employee more than 9.5 percent of his or her household income, and the employer must provide for 60 percent of the actuarial value of the benefits (note that the regulations provide several means for employers to make these determinations).

As a result, an employer needs to review not only the costs of its health insurance plan but also the wage rates of its employees. Indeed, in some circumstances, it may be necessary for employers to either increase wages or change the structure of its coverage to avoid these penalties.

Employers should expect that unions understand this reality and will factor these issues into their wage proposals. Employers should plan in advance if they hope to shift these costs through other economic proposals.

Many unionized employers participate in multiemployer plans, which may pose a special challenge because employers generally have less control over them than their own company-sponsored plans. In anticipation of bargaining, employers may want to send the union information requests to ensure that the plan is compliant with the ACA.

The ACA may actually give employers a means to exit these plans. If employees are ultimately able to get comparable benefits on a state exchange at a lower cost (with tax credits provided by the government), then the employer can propose to withdraw from the plan and potentially allocate a portion of the savings to its employees' wages. This may be attractive to employees since they could receive similar benefits, with an increase to their salary.

If employers are able to retain a portion of the savings, it could result in a more favorable economic agreement. Of course, employers should keep in mind that there are income and payroll tax implications to increasing wages in lieu of health coverage and potential recruiting and morale issues. In addition, some unions may be opposed on the basis that they do not want a mass exodus of employers from their benefits plans.

The uncertainty of how the state exchanges are going to work is another topic employers should be thinking about. For example, it is unclear how well the exchanges will work and how much the cost of insurance will increase. It is also important to note that new regulations are being released on a regular basis.

In light of all these uncertainties, employers may want to consider a short-duration contract of only one or two years. Alternatively, employers can agree to a longer contract, perhaps with the inclusion of a "reopener" provision specifically applicable to health insurance. A contract of short duration will allow the parties to revisit health insurance once they have an opportunity to evaluate the impact of the state exchanges and the other parts of the ACA.

Importantly, employers should also evaluate whether their health insurance plan is "grandfathered" and not subject to some requirements of the ACA. Among other things, grandfathered plans are exempt from certain discrimination provisions; limits on out-of-pocket expenses, deductibles and co-insurance for preventative care services; the prohibition on pediatricians serving as primary care physicians; requirements that plans cover clinical trials and costs; and some expanded appeal procedures.

Health insurance plans may lose their grandfathered status if benefits are eliminated, the co-insurance, deductibles or out-of-pocket expenses are increased by certain percentage ratios or if an employer's contribution decreases by more than 5 percentage points.

With an awareness of the ramifications of the ACA and an eye toward the bottom line, employers can successfully navigate their collective bargaining negotiations and avoid any adverse consequences of failing to consider the ACA. Simply put, an employer cannot afford to ignore the Affordable Care Act in its dealings with a union.

--By Evan M. Rosen and Mark M. Trapp, Epstein Becker & Green PC

Evan Rosen is a partner in Epstein Becker & Green's Atlanta office. Mark Trapp is a partner in Epstein Becker & Green's Chicago office.