



## Obamacare and the Agricultural Employer, Part 2.

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January 22, 2014

Published in Vegetable Growers and Fruit Growers News February 2014

Last month's column on the health care law was popular and I received several follow-up calls and e-mails. At NCAE's 50th Annual Meeting February 4-6, 2014 we will hear from two lawyers with even more potential updates so there may be a third article on this topic sometime in the near future and as we get closer to implementation, and possible enforcement actions in 2015 for those failing to comply with the individual mandate, I am sure we will discuss the Affordable Care Act (or Obamacare) again.

As in last month's article I again remind all readers that I am neither an attorney nor an insurance expert. My information is gleaned from recent writings, discussions, and presentations, from private and government sources and should be seen as information and not advice. Also remember that since the ACA is not yet fully in place and has not gone through the testing of a year of compliance, audit, and reporting much of the information we do have is still suppositional and may change with full implementation, interpretation by regulatory agencies, and even further legislative tweaking or rule-making changes.

In December we discussed the employer mandate for employers of 50 or more and its delay until January 1, 2015, the individual mandate that took effect January 1, 2014, "affordability", and the potential risks for those who attempt to break their businesses into separate segments for the purpose of avoiding employer mandates. We also discussed actions that employers and individuals should be taking now to prepare themselves for 2015.

Since last month the House majority leadership has announced that they will soon share the outline of plans for "replacement" legislation. Despite the coming November 2014 elections repeal/replace remains, at best, a long-

shot. To protect your business it is important to continue plans for full compliance with the Affordable Care Act as each part is phased in.

Since the last article we have also learned that the so-called "anti-discrimination requirement" has also been delayed. This portion of the ACA prohibits offering different coverage to management, or ownership, and/or highly compensated individuals only, or offering significantly better plans to upper level employees. One concern that caused the delay is that lower level employees could actually be hurt by this if the company offered a top-flight insurance plan to all employees but required even a relatively low, say 25%, employee cost-share. While such an offering may be extremely attractive to higher paid employees, the cost may deter lower paid employees from participating and cause them to opt-out, thus losing not only their employer offered plan but also the potential for receiving a subsidy in their state's exchange. The regulations on this are still being written and enforcement is delayed indefinitely. As with other clauses in the ACA/Obamacare law, what may seem relatively straight-forward for large fixed-base industrial employers will be extremely difficult to understand, much less implement for small businesses and industries like agriculture that do not fit traditional 9 to 5 office or factory models.

Now for some basics on H-2A guest-workers and the ACA. This information thanks to a recent paper written by attorney Sheldon J. Blumling, a partner in the law firm Fisher & Phillips, LLP.

Guest workers work hours, including H-2A and B do "count" for purposes of calculating your number of Full-time-equivalent headcounts to determine if you are an employer of 50 or more, or 200 or more under the ACA. They also "count" under the determination of employees. You must offer insurance under the ACA if they are expected to work 30 hours or more a week, and longer than the "seasonal" exemption (generally 120 days.)

Guest workers do not avoid the individual mandate. Under the ACA every adult legally present in the US is required to have health insurance either employer provided, individually purchased, or provided via Medicaid. Guest workers are not eligible for Medicaid and therefore are legally required to have qualifying employer coverage or individual coverage. Enforcement of the individual mandate will fall to the IRS. Remember that we are now required to provide W-2 forms to each H-2A employee instead of the 1099s previously used. IRS is already moving to attach wages of H-2A employees who have failed to file federal income taxes and pay any amounts due, some H-2A employees have also experienced visa difficulty for failure to file US tax

returns, expect more issues in 2015 as IRS begins enforcement of the ACA/Obamacare individual mandate.

Many of us were extremely surprised to learn that apparently legal guest workers WILL qualify for subsidies based on their income if they purchase health insurance through an exchange in their state. Remember that subsidies may apply for any individual, legally present; whose household income is not more than 400% of the applicable federal poverty level. While it is unclear how IRS will accurately determine "household income" it is probable that many agricultural workers will be at less than 400%, which is approximately \$23,550 for a family of 4, meaning that a family of 4 earning less than \$94,200 total household income would qualify for subsidy.

Generally, because guest workers are here legally they will be treated the same as domestic workers in calculating employer size, employee insurance options and obligations including the individual mandate, and for offerings and subsidies that may be available from state or federal run insurance exchanges.

We will expand upon and update information on ACA/Obamacare relative to agricultural employers as we learn more.

The author is Executive Vice President of the National Council of Agricultural Employers (NCAE.) NCAE is the national trade association representing Agricultural Employers in Washington, DC. NCAE advocates and addresses employer issues for all employers of both domestic and H-2 agriculture workers. NCAE is proud to count many individual growers and grower associations among our Membership. The invitation to become an individual Member of NCAE and receive our communication and information direct is extended to all agricultural employers. Visit NCAE's [website](#) at for more information and continuing updates.