hat collective sigh heard 'round the business world in early July? It was prompted by the Obama administration’s announcement that the employer mandate under the Affordable Care Act (ACA) would be delayed for one year.

The government cited its efforts to reduce regulatory red tape across government agencies and help businesses that needed more time to comply with health care reform requirements. Media outlets credited a coordinated campaign mounted by business groups and health care organizations to push back the rules. Politicians and analysts noted the convenient timing of postponing the employer mandate (and any backlash) past the 2014 midterm elections.

In any event, many in the benefits industry were surprised by the announcement on July 2—just six months before the employer mandate was set to go into effect—in separate blog posts by the White House and the Treasury Department.

According to senior advisor Valerie Jarrett, author of the White House blog post, “we believe we need to give employers more time to comply with the new rules . . . [to] make any necessary adaptations to their health benefits while staying the course toward making health cover-
Does a delay in the mandate for large employers to provide health coverage for employees or pay a penalty mean other delays in the Affordable Care Act may be forthcoming?

by Shannon Goff Kukulka
age more affordable and accessible for their workers.” The Treasury Department’s blog attributed the delay to the administration’s continuing dialogue with businesses about ACA requirements and acknowledged concerns “about the complexity of the requirements and the need for more time to implement them effectively.”

The delay of the employer mandate effectively means that employers with 50 or more full-time employees (or full-time equivalents) will not face a penalty for failing to provide health insurance to employees until 2015 (rather than 2014 as originally required under ACA). Ultimately, the delay of the employer mandate—a cornerstone in ACA’s stated purpose to improve access to and the delivery of health care services for all individuals—illustrates the political and logistical challenges of the Leviathan health care law. This latest development begs the question: Might other provisions of ACA be “negotiable”? If so, how can businesses and benefits professionals effectively allocate limited resources to stay prepared in this shifting regulatory landscape?

**Background: Shared Responsibility Rules**

Under the employer mandate provisions, which were added by ACA to the Internal Revenue Code as Section 4980H, an employer with 50 or more full-time employees (or full-time equivalents) generally must offer minimum essential health coverage to full-time employees that is affordable and provides minimum value, or it will be assessed a “shared responsibility” penalty when at least one full-time employee obtains coverage from a health insurance exchange and receives a subsidy or cost-sharing reduction. Sections 6055 and 6056 of the Code require employers to report information about the health coverage offered to their full-time employees. The Internal Revenue Service will then use that information to determine whether the employer will be assessed a penalty under the employer mandate.

Formal transitional relief from the employer mandate—termed pay or play—and the information reporting requirements under Sections 6055 and 6056 of the Code, were published in Notice 2013-45. It explicitly states: “This transition relief . . . has no effect on the effective date or application of other Affordable Care Act provisions, such as the premium tax credit . . . and the individual shared responsibility provisions. . . .”

Certain other health plan changes (such as elimination of all preexisting condition exclusions, limits on waiting periods and no discrimination against providers) also appear to remain in effect, without change, to date.

Notably, Notice 2013-45 encourages employers, in spite of the postponement of the shared responsibility penalty, to “voluntarily comply for 2014 with the information reporting provisions (once the information reporting rules have been issued) and to maintain or expand health coverage in 2014. Real-world testing of reporting systems and plan designs through voluntary compliance for 2014 will contribute to a smoother transition to full implementation for 2015.”

**Impacts of the Delay on Stakeholders**

Many stakeholders viewed the delay of the employer mandate in a positive light. As mentioned, industry experts saw the delay as good news for employers, which were by all accounts scrambling to understand and apply the complex provisions of the now tens of thousands of pages of the ACA law, regulations and related guidance.

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**takeaways >>**

- Changes such as elimination of all preexisting condition exclusions, limits on waiting periods and no discrimination against providers remain in effect.
- The government is encouraging employers to comply with the health care coverage requirement voluntarily for 2014 in hopes that testing of reporting systems and plan designs will contribute to a smoother transition to full implementation in 2015.
- Insurers and health care providers that counted on more patients with health insurance in 2014 may be disappointed by the delay of the employer mandate.
- The limit on out-of-pocket costs already had been postponed for some insurers until 2015.
- Employers should use the extra year to work through complexities of the law and ramp up for 2015.
Some pundits have gone so far as to claim that the delay—by enlarging the pool of Americans who turn to the health exchanges because they do not have the option of employer-provided health coverage—may actually improve the efficacy of ACA since, ultimately, its success likely depends on how many people buy health coverage through the exchanges.

What was good news for many employers is perhaps not so good for insurers and health care providers that have been counting on increased numbers of patients with health insurance since 2010. Other significant effects of the delay of the employer mandate may include:

- Mitigation of the anticipated backlash from businesses forced to comply with the employer mandate in a more compressed time frame
- Less pressure by business interests on states to expand Medicaid
- A delay in some employers’ strategies to reduce employees’ hours to below 30 per week (in order to classify them as part-time for penalty calculations)
- Meaningful shortfalls in funding projected from the employer mandate’s original effective date ($140 billion in revenues for 2014-2023, according to estimates published in May 2013 by the Congressional Budget Office).

Perhaps the most difficult challenge for the administration following its postponement of the employer mandate is that the delay appears to be a tacit admission of the monumental logistical challenges imposed by ACA, an admission that engenders uncertainty among the very stakeholders from whom the administration needs buy-in.

**Bellwether for Future Delays?**

Possibly the worst-case scenario for the Obama administration would be that delaying the employer mandate somehow causes a “domino effect,” weakening the individual mandate or other provisions of ACA. First, without the information reporting requirements in place, the administration’s ability to verify eligibility and coverage is made difficult, if not impossible. And if the individual mandate is in turn made less effective, uninsured people may have a new incentive to defy the ACA requirements based on a wager that they are less likely to get caught. Second, House Republicans have responded to the delay of the employer mandate with direct calls for a similar postponement of the law’s individual mandate.

Additionally, there have been concerns that the state and federal exchanges, or “marketplaces,” which were scheduled to be up and running by October 1, 2013, would be delayed owing to mounting security and privacy concerns and the negative momentum of the employer mandate delay. However, in the White House blog announcing the employer mandate delay on July 2, Jarrett stated unequivocally: “We are full-steam ahead for the Marketplaces opening on October 1,” and the administration has been consistent in its messaging since then. Speaking before the House Energy and Commerce Subcommittee on Oversight and Investigations following the announced employer mandate delay, J. Mark Iwry, the deputy assistant secretary for retirement and health policy of Treasury, said that “his department has no current plans to delay additional provisions” and “[w]e don’t have any specific provision that we’ve identified for which we would give some relief.”

Ironically, another significant provision of ACA had already been delayed at the time the employer mandate delay was announced. Lost among the tangle of ACA information posted on the Department of Labor’s website since February...
2013—amid the 137 “frequently asked questions about Affordable Care Act implementation”—and finally addressed by DOL in August 2013 in response to an inquiry from the New York Times was this nugget: The limit on out-of-pocket costs (including deductibles and copayments) of $6,350 per individual and $12,700 per family were postponed for some insurers until 2015. Effectively, this one-year grace period will allow some insurers to set higher limits (e.g., an additional $6,350 cap on pharmacy benefits) in 2014. This delay is owing in part to the common scenario of employers and insurers using separate companies to administer their medical coverage and prescription drug benefits, resulting in separate out-of-pocket limits.

Most media outlets reported on the delay of out-of-pocket limits as a setback for ACA and the administration. But Erin Shields Britt, spokeswoman for the Department of Health and Human Services, said ACA is still implementing historic consumer protections from “the worst insurance company abuses, by banning discrimination based on preexisting health conditions, ending lifetime and annual limits on what an insurance company will cover, and capping out-of-pocket spending to protect Americans and their families.”

Employer Mandate Delay: The Bottom Line

The delay of the employer mandate means that employers that fail to offer minimum essential coverage that provides minimum value and is affordable to their full-time employees are granted a one-year grace period and will not be subject to a penalty until 2015. Employers still must comply with the many other provisions of ACA in effect, including requirements regarding the type of coverage that must be provided (e.g., women’s preventive care and the elimination of preexisting condition exclusions), preparing and distributing to participants a summary of benefits and coverage, and the new Form W-2 reporting and distribution requirements. Ultimately, employers need to use this furlough to ramp up for 2015.

Employers that were actively preparing for pay or play by establishing “measurement periods,” “stability periods” and “administrative periods” and amending their plan documents accordingly now have added time to complete what can be a complex process. As we know from the myriad guidance issued since the enactment of health care reform in March 2010, we can expect additional guidance or final regulations that may inform strategic implementation of the pay-or-play rules. Additionally, those employers that have been investigating the potential for ratcheting employee hours downward to a number below 30 per week can use this time to carefully consider whether to proceed in 2013 or delay those actions to 2014.

Editor’s note: Benefits Magazine goes to press about four weeks before distribution. Please be aware that federal agencies are continually releasing regulatory guidance regarding ACA. The latest guidance and updates are available at www .ifebp.org/acacentral.