Issues Concerning Expatriate Employees Under ACA

The Patient Protection and Affordable Care Act ("PPACA") enacted in the U.S. in March 2010 did not go so far as to create a new government-run national health system in the mold of Canada or the United Kingdom. The reform law did, however, impose obligations requiring most individuals to have health coverage, and requiring "large" employers (that is, ones with 50 or more full-time employees) to offer coverage. These requirements are known as the "individual mandate" and the "employer mandate," respectively, and each goes into effect in 2014. Individuals and employers that are covered by the mandates and that fail to comply are subject to penalties, in the form of excise taxes.

The agencies charged with developing regulations to implement the mandates have not yet begun the process of drafting those regulations. This means that presently, there are many unanswered questions about the details of how the mandates will work, since the law was drafted in broad terms. Many of the unanswered questions related to what will be required of expatriates in the U.S. and abroad, and the employers for whom they work; in fact, there are more "unknowns" concerning this issue, than "knowns" at the moment.

Following is a summary of what can, and cannot, be gleaned from the text of the health reform statute with respect to expatriates.

- **Does the employer mandate apply to U.S. citizens working full-time outside the U.S., such that U.S. companies would be penalized for not covering these workers?**

  Probably not. The employer mandate section does not explicitly address this issue, and it is one that should be clarified through rulemaking. We believe that employers should not be penalized under the mandate provisions for employees living abroad, though, both because the individual mandate exempts U.S. citizens living abroad (see PPACA § 1501 (adding Internal Revenue Code ("IRC") § 5000A(f)(4))) and because citizens living abroad will be ineligible to purchase coverage through any individual plan offered through new state-based health insurance marketplaces (known as "Exchanges") that will begin operating in 2014 with the aim of ensuring that all individuals have access to health coverage. (See PPACA § 1312(f)(1)(A)(ii)).

- **Does the individual mandate apply to U.S. citizens who are working outside the U.S.? Would such persons be eligible to purchase insurance through the new Exchanges?**

  The answer to both these questions is "no." As discussed above, the individual mandate provision exempts U.S. citizens living abroad. In addition, U.S. citizens living abroad will be ineligible to purchase coverage through any individual plan offered through an Exchange (see PPACA § 1312(f)(1)(A)(ii)).

- **Does the employer mandate apply to a non-U.S. citizen who is working in the United States?**

  Unclear. The employer mandate provisions of the statute do not explicitly address this issue. We note, however, that it is possible that regulators will interpret the statute to penalize large employers that do not offer coverage to their full-time employees located in the U.S. even though some of those employees are not U.S. citizens. Such an interpretation is a possibility because neither the text of the employer mandate provision nor that of the individual mandate provision exempts foreign employees who are working in the U.S., whether for U.S. or non-U.S. companies. It follows that, in the absence of regulatory guidance, large employers should not assume that there will be no consequences for failure to offer coverage to non-U.S. citizen employees working in the U.S.

- **Does the individual mandate apply to a non-U.S. citizen who is working in the United States?**

  Probably yes, if the person legally present in the United States. This is the case because the individual mandate states that it applies to U.S. citizens, nationals (e.g., a resident of one of the U.S. insular possessions or territories), and to "an alien lawfully present in the United States." See PPACA § 1501 (adding IRC § 5000A(d)). if the personThe requirement to purchase coverage affects U.S. citizens and U.S. visa holders only if they actually live in the U.S. This is because these individuals are most likely to receive treatment in the U.S. Therefore, actual citizenship does not matter in this mandate. Instead, it is their legal residency that will be considered.

- **If a person subject to the individual mandate has a health coverage from a non-U.S. issuer, will this coverage satisfy the individual mandate's requirements?**

  Unclear. The statute does not explicitly address this issue, and it will also depend on factual circumstances. For example, while PPACA states that "employer-sponsored coverage" and coverage purchased in the individual market will generally satisfy the individual mandate, there are some instances where the statute specifies that such coverage must meet certain minimum standards (those employers in the "small group" market (50 and fewer employees) that offer coverage to their employees must contribute at least 60% toward the cost of the coverage; and coverage offered by issuers to individuals must include a basic benefits package as specified by PPACA, are just two examples). See PPACA § 1201. Extra-territorial application of U.S. law is a complex matter, and it is difficult to predict how regulators will treat the application of the minimum standards to non-U.S. issuers, though there is a plausible argument that if a non-U.S. carrier is covering persons located in the U.S., the carrier should be subject to PPACA. The upshot is that persons in the U.S. should not assume that health coverage from a non-U.S. carrier will satisfy U.S. law. Those persons who are subject to the individual mandate and who have coverage issued by a non-U.S. carrier will need to explore this issue further as we approach the 2014 implementation of the mandates.

- **Do the market reforms, such as the restrictions on lifetime and annual benefits limits, and requirement to cover child dependents until age 26, apply to insurance plans that cover U.S. citizens working abroad?**

Unclear. The statute does not address this issue. The market reforms clearly apply to a U.S. insurance carrier or group health plan that is covering employees working in the United States, but what is not known is whether regulators would interpret the statute to require these plans to adhere to the market reforms for any employees they cover outside the U.S.

- **How will PPACA affect the tax liability for U.S citizens working abroad or non-U.S. citizens working in the U.S.?**

The three important points to be aware of concerning PPACA's impact on U.S. income tax liability are: 1) for those employees who are subject to U.S. tax law, employers will be required to report the value of health coverage on the employee's Form W-2 (no implementation date has been announced for this requirement as of yet) (see PPACA § 9002); 2) while the value of health coverage must be reported, PPACA does not change current U.S. law, which excludes the value of health coverage from income tax; and 3) although there were no increases in individual income taxes because of the health reform law, there is an increase in the Medicare tax (known as "FICA" on the employee's pay stub) to help pay for the new reforms. Specifically, individuals earning more than $200,000 (and couples earning more than $250,000) annually will pay 0.9% more in Medicare payroll taxes, and a new 3.8% Medicare tax will be applied to investment income that exceeds these thresholds, starting with the 2013 tax year.