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US IMMIGRATION & NATIONALITY LAW

WHO IS 'LAWFULLY PRESENT' UNDER THE AFFORDABLE CARE ACT?

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Had I been present at the creation, I would have given some useful hints for the better ordering of the universe.

Alphonse X the Wise of Castile

Many non-citizens will be subject to additional payment to the Internal Revenue Service if they do not maintain "minimum essential healthcare coverage" under the Patient Protection and Affordable Care Act (Affordable Care Act – ACA). This is known as the "individual mandate" or the "individual shared responsibility provision." By the same token, eligible non-citizens can also access health plans on the health exchanges or Marketplace. The last day to enroll is February 15, 2015 for the current year. Our first blog discussed the impact of the ACA on lawful permanent residents or green card holders who reside outside the United States. This blog focuses on non-citizens who are lawfully present in the United States. Section 1411(a) (1) of the ACA renders non-citizens lawfully present in the United States subject to the individual mandate.

The ACA is linked to immigration issues, just as it is joined at the hip with tax law, and it behooves the careful practitioner to consider the commonality of all these issues and how each of them can inform our understanding of the others when advising non-citizen clients. While an immigration practitioner need not be an expert in other disciplines, he or she must be aware of the eligible statuses for coverage under the ACA, the deadlines for enrollment, and the potential for the client to being subject to an additional payment to the IRS for failing to obtain coverage, unless the client can qualify for an exemption.

The definition of "lawfully present" in 45 CFR 155.2 tracks the prior definition, as it applied to pre-existing condition insurance plans, under 45 CFR 152.2. A summary of the definitions of "lawfully present" is posted on healthcare.gov, which we reproduce below:

Immigrants with the following statuses qualify to use the Marketplace:

- Lawful Permanent Resident (LPR/Green Card holder)
- Asylee
- Refugee
- Cuban/Haitian Entrant
- Paroled into the U.S.
- Conditional Entrant Granted before 1980
- Battered Spouse, Child and Parent
- Victim of Trafficking and his/her Spouse, Child, Sibling or Parent
- Granted Withholding of Deportation or Withholding of Removal, under the immigration laws or under the Convention against Torture (CAT)
- Individual with Non-immigrant Status (includes worker visas, student visas, and citizens of Micronesia, the Marshall Islands, and Palau)
- Temporary Protected Status (TPS)
- Deferred Enforced Departure (DED)
- Deferred Action Status (Deferred Action for Childhood Arrivals (DACA) is not an eligible immigration status for applying for health insurance)
- Lawful Temporary Resident
- Administrative order staying removal issued by the Department of Homeland Security
- Member of a federally-recognized Indian tribe or American Indian Born in Canada
- Resident of American Samoa

Applicants for any of these statuses qualify to use the Marketplace:

- Temporary Protected Status with Employment Authorization
- Special Immigrant Juvenile Status
- Victim of Trafficking Visa
- Adjustment to LPR Status
- Asylum (see note below)
- Withholding of Deportation, or Withholding of Removal, under the immigration laws or under the Convention against Torture (CAT) (see note

below)

Applicants for asylum are eligible for Marketplace coverage only if they've been granted employment authorization or are under the age of 14 and have had an application pending for at least 180 days.

People with the following statuses and who have employment authorization qualify for the Marketplace:

- Registry Applicants
- Order of Supervision
- Applicant for Cancellation of Removal or Suspension of Deportation
- Applicant for Legalization under Immigration Reform and Control Act (IRCA)
- Legalization under the LIFE Act

Note that undocumented aliens are not included in the above definitions, including beneficiaries of the 2012 DACA program as well as future recipients of the November 20, 2014 Obama Executive Actions that expand DACA as well as the Deferred Action for Parents Accountability program (DAPA).

While the above list provides a comprehensive summary and quick reference, some analysis of the actual regulatory definitions is warranted under 45 CFR 152.2.

A nonimmigrant is only considered "lawfully present" if he or she "has not violated the terms of the status under which he or she was admitted or to which he or she has changed after admission." See 45 CFR 152.2(2). This is unclear as a nonimmigrant may have technically violated his or her status unwittingly in many ways, but may still have eventually cured it. For example, if a person on an H-1B visa was mistakenly admitted into the United States for a lesser period of time than the validity period in the H-1B approval notice, and does not realize this, he or she has potentially technically violated status. Still, this person can hope to correct it by filing a late extension of status in the US, or leaving the US and returning, or at times, asking the CBP to extend the date within the US. An individual who is presently in lawful status should be considered "lawfully present" in order to access a health plan on the exchange. The larger point is that maintenance of status may now have a wider significance beyond the more modest confines of the INA. In turn, this commends the value of an inter-disciplinary approach to the whole question of

ACA jurisprudence. Interestingly, while 45 C.F.R. 152.2 gives a precise definition of "lawfully present" it does not contemplate nor define "unlawful presence" thus reflecting a refreshing preference for inclusion as opposed to exclusion, something the INA would do well to emulate.

Under 45 CFR 152.2(4) (vii), only an applicant for adjustment of status whose visa petition has been approved is subject to the ACA. However, it is possible to file an adjustment of status application concurrently with an I-130 or I-140 immigrant visa petition, without the need for such a petition to be approved. Thus, one who has filed an adjustment of status application concurrently with an I-130 or I-140 petition cannot have access to a plan under the health exchange until the petition is approved. Still, once the person is issued employment authorization after filing an adjustment application pursuant to 8 CFR 274a.12(c) (9) he or she can access the ACA even if the I-130 or I-140 petition has not been approved. 45 CFR 152.2(4) (iii) renders one who has been granted employment authorization under 8 CFR 274a.12(c) (9), (10), (16), (18), (20), (22), or (24) as lawfully present. But 8 CFR 274a.12(b)(20) is conspicuous by its absence in the ACA rules determining lawful presence, which allows those in a nonimmigrant status to continue employment for 240 days during the pendency of a timely filed extension request. It is thus unclear whether someone in a period of stay authorized by the Attorney General (POSABAG) while a timely extension request is pending could take advantage of the ACA. Even if a noncitizen is lawfully present, he or she has to also be a tax resident. IRS regulations at 26 CFR 1.5000A-3(c) exempt noncitizens who are nonresident tax aliens from the individual mandate. So while a non-citizen may be lawfully present and can access the health exchange, he or she will not be subject to the individual mandate under the IRS rules. It is also worth noting that one who is lawfully present may not be eligible to access health insurance who is here in the United States briefly. 45 CFR 155.305, which establishes eligibility criteria for enrolling exchange, requires the applicant to be a "citizen or national of the United States, or is a non-citizen who is lawfully present in the United States, and is reasonably expected to be a citizen, national, or a non-citizen who is lawfully present for the entire period for which enrollment is sought." See 45 CFR 155.305(a) (1).This durational requirement reinforces our understanding that the ACA is not a new form of government welfare nor can we view such a durational requirement as denying or abridging a fundamental constitutional right. Compare this to the lesson taught by the Supreme Court in *Shapiro v.*

Thompson, 394 U.S. 618 (1969) that struck down waiting periods for public assistance.

Being a "resident" for immigration purposes is not the same as being a "resident" for tax purposes. Tax law uses many of the same terms as immigration but the identical words or concepts can have dramatically different meaning. It is a measure of the ever-growing extent to which immigration has become inextricably interconnected to so many other areas of American life that we are increasingly prone to use immigration terms such as "lawfully present" when discussing non-immigration topics, sometimes with significantly different meanings. Definition therefore is inherently contextual and the relationship of the ACA to our immigration law is a fluid and dynamic one. INA § 101(a)(33) states: "The term 'residence' means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent." Note that the concept of domicile, which considers the applicant's intent rather than the place where he or she actually lives, is absent from this definition. Remember, in the naturalization context, if your client did not stay away one year, he or she must be considered a resident of the same state where they lived before leaving. 8 C.F.R. 316.5 (b) (5). *See Accardi V. Shaughnessy*, 347 US 260 (1954); *Morton v. Ruiz*, 415 US 199, 235 (1974) ("Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures").

Nonimmigrants are considered to be resident aliens for tax purposes if they meet the "substantial presence" test. Non-citizens are considered residents through the substantial presence test if they are physically present in the US for 31 days during the current year; and a total of 183 days during a 3-year period by counting all the days of the current calendar year, 1/3 days of the previous calendar year, and 1/6 days of the second previous calendar year. See IRC §7701(b) (1) and (3).

Even those who become tax residents under the substantial presence test may continue to remain non-residents if they meet a closer connection to a foreign country test. However, not all may be able to meet this test. A frequent tourist to the US in B-2 status can potentially become a tax resident under the substantial presence test, and thus subject to the ACA. If this tourist is the subject of an immigrant visa petition, such as an I-130 petition filed by a sibling, whose date has not become current, he or she can no longer meet the closer connection test. At the time of filing the 1040 return, this individual will be

subject to the shared responsibility payment.

Most students lawfully present in the US in F, J, M or Q status, or their dependents, are exempt for 5 years from counting days of presence under the substantial presence test. Even after five years and having become subject to the substantial presence test, they can continue to be treated as nonresident aliens if they meet the closer connection to a foreign country test. Teachers or trainees present in the US in J or Q status (and their dependents) are exempt from counting days towards substantial presence only for the first two years in the United States. This includes all Js and Qs who are not students, such as research scholars, professors, short-term scholars, specialists, physicians, trainees, interns, au pairs, and camp counselors. Even if these students are not subject to the individual mandate, they can still qualify for coverage through the health exchanges in the event that the school does not provide equivalent coverage

It is hard today to harken back to a time when immigration was less central to the rhythm of American life than it is now. Yet, before the enactment of the Immigration Reform and Control Act of 1986 (IRCA), most employers did not need to worry about immigration nor was immigration policy a matter of white-hot national debate. The lasting importance of IRCA was to bring immigration and immigrants in from the shadows, a process that continues to the present day. The ACA continues this process of inclusion and the extent to which the marriage of immigration with health care can be a lasting and meaningful one will go far towards assuring the success of both.

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