

**IN THE U.S. DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA  
WEST PALM BEACH DIVISION**

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KAWA ORTHODONTICS, LLP,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No.: 9:13-cv-80990
	)	
JACK LEW, in his official capacity as Secretary of the U.S. Department of the Treasury,	)	
	)	
and	)	
	)	
U.S. DEPARTMENT OF THE TREASURY,	)	
	)	
and	)	
	)	
DANIEL I. WERFEL, in his official capacity as the Acting Commissioner of the Internal Revenue Service,	)	
	)	
and	)	
	)	
INTERNAL REVENUE SERVICE,	)	
	)	
Defendants.	)	

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**COMPLAINT FOR DECLARATORY AND  
INJUNCTIVE RELIEF**

Plaintiff Kawa Orthodontics, LLP, brings this suit against Defendants Jack Lew, Secretary of the U.S. Department of the Treasury, the U.S. Department of the Treasury, Daniel I. Werfel, Acting Commissioner of the Internal Revenue Service, and the Internal Revenue Service, for declaratory and injunctive relief under the Administrative Procedure Act, 5 U.S.C. § 500, *et seq.*, (“APA”).

1. One of the pillars of the Patient Protection and Affordable Care Act (“ACA”) is the “employer mandate,” which subjects certain large employers to tax penalties if they do not offer “affordable,” “minimum essential” health insurance coverage to their employees and their employees’ dependents. Under the express terms of the ACA, large employers are obligated to offer such coverage in the “months beginning after December 31, 2013.” On or about July 2, 2013, Defendants purportedly postponed the effective date of the “employer mandate” until 2015. Plaintiff challenges this “agency action” for violating the APA.

### **JURISDICTION AND VENUE**

2. The Court has federal question jurisdiction under 28 U.S.C. § 1331 because this lawsuit arises under the APA, a federal law.

3. Venue is proper in this judicial district under 28 U.S.C. § 1391(e)(1)(C) because Defendants are officers and agencies of the United States, Plaintiff resides in this judicial district, and no real property is involved in the action.

### **PARTIES**

4. Plaintiff Kawa Orthodontics, LLP is a limited liability partnership organized under the laws of the State of Florida and having its principal place of business at 20423 State Road 7, Suite F18, Boca Raton, Florida 33498.

5. Defendant Jack Lew is the Secretary of the U.S. Department of the Treasury, which is headquartered at 1500 Pennsylvania Avenue, NW, Washington, DC 20220. He is being sued in his official capacity.

6. Defendant U.S. Department of the Treasury is an executive agency of the United States within the meaning of the APA.

7. Defendant Daniel I. Werfel is the Acting Commissioner of the Internal Revenue Service, which is headquartered at 1111 Constitution Avenue, NW, Washington, DC 20004. He is being sued in his official capacity.

8. Defendant Internal Revenue Service is a bureau within the U.S. Department of the Treasury and an executive agency of the United States within the meaning of the APA.

### **STATUTORY AND REGULATORY BACKGROUND**

9. Under the ACA, most “large” employers, defined as employers who have more than 50 “full time equivalent” employees, face tax penalties if they do not offer “affordable,” “minimum essential” health insurance coverage to their employees and their employees’ dependents. 26 U.S.C. § 4980H.

10. In addition, “large” employers also have certain annual reporting obligations under the ACA. 26 U.S.C. § 6056. These include having to certify whether they offer their full time employees and their employees’ dependents the opportunity to enroll in “affordable,” “minimum essential” health insurance coverage under an employer-sponsored plan, the length of any waiting period, the months during which coverage was available, monthly premiums for the lowest-cost option, the employer plan’s share of covered health care expenses, the number of full-time employees, and the name, address, and taxpayer identification number of each full-time employee. *Id.* Employers who “self-insure” have separate reporting obligations. 26 U.S.C. § 6055.

11. The obligations under Section 4980H of Title 26 “shall apply to the months beginning after December 31, 2013.” Pub. L. No. 111-148, § 1513(d), 124 Stat. 119, 256. The obligations under Section 6055 of Title 26 “shall apply to calendar years beginning after 2013.” Pub. L. No. 111-148, § 1502(e), 124 Stat. 119, 252. The obligations under Section 6056 of Title

26 “shall apply to the periods beginning after December 31, 2013.” Pub. L. No. 111-148, § 1514(d), 124 Stat. 119, 257.

### **FACTUAL BACKGROUND**

12. Plaintiff employs more than 50 full-time equivalent employees and therefore is a “large employer” for purposes of the obligations under Sections 4980H and 6056 of Title 26. Plaintiff currently offers health insurance coverage to its employees and pays a portion of the coverage’s cost.

13. Prior to July 2, 2013, Plaintiff expended substantial time and resources, including money spent on legal fees and other costs, in preparation for the “employer mandate” taking effect on January 1, 2014. Plaintiff did so in order to determine what options and obligations it has under the “employer mandate” and how the coverage Plaintiff currently offers to its employees will be affected by the mandate. Plaintiff would not have expended its time and resources and incurred these anticipatory costs in 2013 if the mandate had not been scheduled to take effect until 2015, but instead would have spent its time, resources, and money on other priorities.

14. On July 2, 2013, Defendants announced in a posting on Defendant U.S. Department of Treasury’s website that the reporting obligations and the obligation to offer “affordable,” “minimum essential” coverage were being delayed until 2015.

15. On July 9, 2013, Defendants formalized their July 2, 2012 announcement by issuing Notice 2013-45, entitled “Transition Relief for 2014 Under §§ 6055 (§ 6055 Information Reporting), 6056 (§ 6056 Information Reporting) and 4980H (Employer Shared Responsibility Provisions).”

16. Defendants' delay of the "employer mandate" injured Plaintiff by causing Plaintiff to lose some, if not all, of the value of the time and resources it expended in 2013 in anticipation of the mandate going into effect on January 1, 2014.

17. According to the White House's website, at least 200,000 employers in the United States employ more than 50 employees. *See* The White House, "The Affordable Care Act Increases Choice and Saving (sic) Money for Small Businesses," at 1, (available at [http://www.whitehouse.gov/files/documents/health\\_reform\\_for\\_small\\_businesses.pdf](http://www.whitehouse.gov/files/documents/health_reform_for_small_businesses.pdf)) (visited Sept. 15, 2013). Another, reputable source has put the number of employers in the United States having more than 50 employees much higher. *See* Agency for Healthcare Research and Quality, Medical Expenditure Panel Survey, "Table I.A.1 - Number of private-sector establishments by firm size and selected characteristics: United States, 2012," (available at [http://meps.ahrq.gov/mepsweb/data\\_stats/summ\\_tables/insr/national/series\\_1/2012/tia1.htm](http://meps.ahrq.gov/mepsweb/data_stats/summ_tables/insr/national/series_1/2012/tia1.htm)) (visited Sept. 15, 2013) (identifying 1,668,613 private sector U.S. employers with more than 50 employees). Regardless, Defendants' delay of the "employer mandate" will affect an enormous number of employers, including Plaintiff, as well as tens of millions of employees across the nation.

18. According to the Congressional Budget Office ("CBO"), Defendants' delay of the "employer mandate" will result in an estimated loss of \$10 billion in penalty payments by employers. *See* Letter from Douglas W. Elmendorf, Director, Congressional Budget Office, to the Hon. Paul Ryan, Chairman, Committee on the Budget, U.S. House of Representatives, Re: Analysis of the Administration's Announced Delay of Certain Requirements Under the Affordable Care Act, July 30, 2013, at 3. Also according to CBO, "roughly 1 million fewer people are expected to be enrolled in employment-based coverage in 2014 than the number

projected in CBO's May 2013 baseline, primarily because of the one-year delay in penalties on employers." *Id.* at 4.

**COUNT I**  
**(Administrative Procedure Act Violation)**

19. Plaintiff repeats and re-alleges each of the allegations set forth in paragraphs 1 through 18, above, as if fully set forth herein.

20. Defendants' delay of the "employer mandate" constitutes "agency action" for purposes of the APA.

21. The APA forbids agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). It also forbids agency action that is "contrary to constitutional right, power, privilege, or other immunity" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." *Id.* §§ 706(2)(B) and (C).

22. The ACA unambiguously states that the obligations of the "employer mandate" under Section 4980H of Title 26 "shall apply to the months beginning after December 31, 2013" and that the obligations under Section 6056 of Title 26 "shall apply to the periods beginning after December 31, 2013." Pub. L. No. 111-148, §§ 1513(d) and 1514(d), 124 Stats. 119, 256-57. The plain text of the ACA thus mandates that these obligations commence on January 1, 2014.

23. The delaying of the "employer mandate" until at least January 1, 2015, exceeded Defendants' statutory authority, is arbitrary, capricious, and contrary to law, and is otherwise unlawful. 5 U.S.C. §§ 706(2)(A), (B), and (C).

24. Plaintiff has no adequate or available administrative remedy; in the alternative, any effort to obtain an administrative remedy would be futile.

25. Plaintiff has no adequate remedy at law.

26. Defendants' unlawful delay of "employer mandate" until at least January 1, 2015 injured Plaintiff in a manner that warrants relief.

WHEREFORE, Plaintiff respectfully prays that this Court:

1. Enter a declaratory judgment declaring that Defendants' delay of the "employer mandate" violates the APA;
2. Enter a preliminary and permanent injunction prohibiting and setting aside Defendants' unlawful delay of the "employer mandate;" and
3. Award all other relief as the Court may deem just and proper, including any costs or fees to which Plaintiff may be entitled by law.

Dated: October 1, 2013

Respectfully submitted,

/s/ Christopher B. Lunny

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(Pro Hac Vice Application Pending)

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