

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

\_\_\_\_\_  
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.  
\_\_\_\_\_

**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  
CHRISTOPHER B. LUNNY (FL 008982)  
E-Mail: [chris@radeylaw.com](mailto:chris@radeylaw.com)  
Secondary E-Mail: [cdemeo@radeylaw.com](mailto:cdemeo@radeylaw.com)  
HARRY O. THOMAS (FL 195097)  
E-Mail: [hthomas@radeylaw.com](mailto:hthomas@radeylaw.com)  
Secondary E-Mail: [jday@radeylaw.com](mailto:jday@radeylaw.com)  
Radey, Thomas, Yon & Clark, P.A.  
Post Office Box 10967 (32302)  
301 South Bronough Street, Suite 200  
Tallahassee, Florida 32301  
(850) 425-6654 (phone)  
(850) 425-6694 (facsimile)

Paul J. Orfanedes  
District of Columbia Bar No. 429716  
Email: [porfanedes@judicialwatch.org](mailto:porfanedes@judicialwatch.org)  
JUDICIAL WATCH, INC.  
425 Third Street, SW, Ste. 800  
Washington, DC 20024  
Tel: (202) 646-5172  
Fax: (202) 646-5199  
(*Pro Hac Vice* Application Pending)

*Attorneys for Plaintiff*

JS 44 (Rev. 12/12)

**CIVIL COVER SHEET**

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.) NOTICE: Attorneys MUST Indicate All Re-filed Cases Below.

**I. (a) PLAINTIFFS**

KAWA ORTHODONTOCS, LLP

(b) County of Residence of First Listed Plaintiff **Palm Beach**  
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number) **Christopher B. Lunny and Harry O. Thomas, Radey Thomas Yon & Clark, P.A., 301 S. Bronough, St., Ste. 200, Tallahassee, FL 32301; Phone (850) 425-6654**

**DEFENDANTS** JACK LEW, Secretary of the U.S. Department of the Treasury, U.S. DEPARTMENT OF THE TREASURY, DANIEL I. WERFEL, Acting Commissioner of the Internal Revenue Service, and INTERNAL REVENUE SERVICE  
County of Residence of First Listed Defendant

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.  
Attorneys (If Known)

(d) Check County Where Action Arose:  MIAMI-DADE  MONROE  BROWARD  PALM BEACH  MARTIN  ST. LUCIE  INDIAN RIVER  OKEECHOBEE  HIGHLANDS

**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff  3 Federal Question (U.S. Government Not a Party)
- 2 U.S. Government Defendant  4 Diversity (Indicate Citizenship of Parties in Item III)

**III. CITIZENSHIP OF PRINCIPAL PARTIES** (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State  1 PTF  1 DEF  1 PTF  1 DEF  4  4
- Citizen of Another State  2  2 Incorporated and Principal Place of Business In Another State  5  5
- Citizen or Subject of a Foreign Country  3  3 Foreign Nation  6  6

**IV. NATURE OF SUIT** (Place an "X" in One Box Only)

CONTRACT	TORTS	TORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Med. Malpractice	<b>PERSONAL INJURY - Product Liability</b> <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <b>PERSONAL INJURY - Other</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input checked="" type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	<b>PRISONER PETITIONS</b> <b>Habeas Corpus:</b> <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <b>Other:</b> <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement	<b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	
			<b>IMMIGRATION</b> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	

**V. ORIGIN** (Place an "X" in One Box Only)  
 1 Original Proceeding  2 Removed from State Court  3 Re-filed (See VI below)  4 Reinstated or Reopened  5 Transferred from another district (specify)  6 Multidistrict Litigation  7 Appeal to District Judge from Magistrate Judgment  8 Remanded from Appellate Court

**VI. RELATED/ RE-FILED CASE(S)** (See instructions):  
 a) Re-filed Case  YES  NO b) Related Cases  YES  NO  
 JUDGE \_\_\_\_\_ DOCKET NUMBER \_\_\_\_\_

**VII. CAUSE OF ACTION** Cite the U.S. Civil Statute under which you are filing and Write a Brief Statement of Cause (Do not cite jurisdictional statutes unless diversity):  
 5 U.S.C. 702; Plaintiff maintains that the "employer mandate" may not be delayed  
 LENGTH OF TRIAL via 2 days estimated (for both sides to try entire case)

**VIII. REQUESTED IN COMPLAINT:**  CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND \$ \_\_\_\_\_ CHECK YES only if demanded in complaint: JURY DEMAND:  Yes  No

ABOVE INFORMATION IS TRUE & CORRECT TO THE BEST OF MY KNOWLEDGE  
 DATE: October 1, 2013 SIGNATURE OF ATTORNEY OF RECORD: \_\_\_\_\_

**FOR OFFICE USE ONLY**  
 RECEIPT # \_\_\_\_\_ AMOUNT \_\_\_\_\_ IFP \_\_\_\_\_ JUDGE \_\_\_\_\_ MAG JUDGE \_\_\_\_\_