

## New Health Care Guidance on 'Full-Time' Employees and 90-Day Waiting Period Under the Affordable Care Act

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On August 31, 2012, the Internal Revenue Service issued guidance regarding the employer shared responsibility payment and the 90-day waiting period limitation provisions of the Patient Protection and Affordable Care Act (the “ACA”) in the form of IRS Notices 2012-58 and 2012-59.

### **Employer Shared Responsibility Payment – Determining Full-Time Employee Status.**

The ACA added Section 4980H to the Internal Revenue Code (“Code”). Generally, Code Section 4980H provides that an employer with at least 50 full-time employees may be subject to a “shared responsibility payment” if the employer does not provide full-time employees with minimum essential coverage, or if minimum essential coverage is provided to full-time employees, but the coverage does not satisfy certain minimum affordability requirements. Code Section 4980H(c)(4) defines a full-time employee as one who is employed, on average, for at least 30 hours of service per week; however, applying this standard is not always easy, especially for seasonal employees and employees who work a variable schedule.

To assist employers with this process, IRS Notice 2012-58 provides safe harbors. The safe harbors allow employers to use certain look-back “standard measurement periods” for purposes of determining whether newly hired variable or seasonal employees and also current employees qualify as full-time employees. Once an employer makes such a determination and after certain administrative periods, the employer is required to treat the employee as a full-time employee during a subsequent “stability period.” The Notice lists rules for determining the standard measurement periods, administrative periods, and stability periods that may be used under the safe harbors.

In addition to supplying the new safe harbors, IRS Notice 2012-58 provides that employers may continue to rely on certain prior ACA guidance until at least December 31, 2014. This includes IRS Notice 2011-73, which provides that an employer may calculate whether the coverage



offered to an employee is affordable based on that employee's W-2 wages instead of the employee's household income.

### **Maximum 90-Day Waiting Period.**

Also issued on August 31, 2012, was IRS Notice 2012-59, which offers guidance on the 90-day waiting period limitation. Pursuant to the Notice, a condition other than lapse of time may be used to determine eligibility as long as the condition is not designed to avoid compliance with the 90-day waiting period limitation. This guidance will also remain in effect through at least the end of 2014. The Department of Labor (in Technical Release 2012-02) and the Department of Health and Human Services joined in this guidance.

Companies should consider how to measure whether an employee is full-time for purposes of the ACA and should ensure that their group health plans comply with the 90-day waiting period requirement in order to minimize shared responsibility payments and other liabilities.

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