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LEGAL ALERT

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New PPACA FAQs Propose Coordinated Rules for Identifying Full-Time Employees

The tri-agency task force[1] developing guidance under the Patient Protection and Affordable Care Act (PPACA) has released frequently asked questions (FAQs) on three important issues affecting employers' group health plans: the mandatory automatic enrollment requirement, the rules for determining who are full-time employees (FT employees) for purposes of the employer shared responsibility provisions and the 90-day time limit on waiting periods for plan participation. Simultaneously issued as DOL Technical Release 2012-01, IRS Notice 2012-17 and an HHS Bulletin, the FAQs summarize proposals the agencies intend to include in future guidance to coordinate the definition of FT employee for purposes of these three rules and request comments on these proposals.

Automatic Enrollment

The FAQs announce a delay of the mandatory automatic enrollment requirement for FT employees. The automatic enrollment provision of section 18A of the Fair Labor Standards Act (FLSA), which was added by PPACA, requires FLSA-covered employers with 200 or more FT employees to automatically enroll each new FT employee in one of the employer's health plans and to automatically re-enroll employees currently participating in one of the plans pursuant to regulations issued by the DOL. In December 2010, the agencies released FAQs indicating that guidance on these rules would be completed by 2014.

According to the latest FAQs, however, because the agencies plan to coordinate guidance on the definition of FT employee for purposes of the automatic enrollment rules, the shared responsibility rules and the 90-day limit on waiting periods, the DOL has concluded that the automatic enrollment guidance will not be released in time to become effective in 2014. The FAQs note that employers will not need to automatically enroll or re-enroll employees until final regulations are issued and applicable.

Shared Responsibility

The shared responsibility provision of section 4980H of the Internal Revenue Code (Code) requires an employer with 50 or more FT employees to make an "assessable payment" if any of its FT employees are certified to receive either a premium tax credit to purchase health coverage through an exchange under Code section 36B or a cost sharing reduction payment for that coverage under section 1402 of PPACA. An FT employee could qualify for the tax credit or cost sharing because the employer does not provide the employee with minimum essential coverage, the coverage offered by the employer is unaffordable based on the employee's household income or the employer's coverage does not provide minimum value (*i.e.,* does not cover at least 60% of the cost of benefits). An employer's failure to provide an FT employee with applicable coverage could trigger a payment under Code section 4980H of $95 to $695 per FT employee between 2014 and 2106. Thus, the definition of FT employee – in the Code, an FT

[1] The tri-agency task force consists of the Internal Revenue Service (IRS), the Department of the Treasury, the Employee Benefits Security Administration of the Department of Labor (DOL), and the Department of Health and Human Services (HHS), which are also referred to above as the agencies.

employee is defined simply as an employee who is working 30 or more hours per week – is key in determining whether and, if so, to what extent, an employer may incur section 4980H liability.

The Code further provides that coverage under an employer-sponsored health plan is affordable to an employee if the employee's required contribution does not exceed 9.5% of the employee's household income for the taxable year. In Notice 2011-73, the IRS said that employers would be able to use W-2 wages as a safe harbor to determine whether employer-provided coverage is affordable.

In IRS Notice 2011-36, the IRS requested comments on the application of Code section 4980H, including a proposed look-back/stability period safe harbor for determining whether current employees are FT employees for purposes of Code section 4980H. Under the safe harbor method, an employer would determine each employee's full-time status by looking back at a defined period of three to 12 consecutive months (the measurement period), to determine whether the employee averaged at least 30 hours of service per week or at least 130 hours of service per calendar month. If so, the employee would be treated as an FT employee during a subsequent "stability period" (regardless of his or her actual hours worked during that period) of up to 12 months, with the length of the stability period based on the length of the initial measurement period.

According to the latest FAQs, employers may continue to use W-2 wages as a safe harbor for determining affordability of employer-sponsored coverage for purposes of Code section 4980H, and proposed regulations or other guidance will be issued to that effect. In addition, the IRS plans to issue proposed regulations or other guidance that addresses the coordination of the definition of FT employee for the 90-day waiting period limitation and Code section 4980H. The FAQs indicate that an employer will not be subject to the shared responsibility payment under Code section 4980H for a new hire for at least the first three months following an employee's date of hire.

The FAQs say that the IRS plans to issue proposed regulations that allow employers to use a look-back/stability period safe harbor method based on the approach described above to determine whether an employee (other than a new hire) is an FT employee for purposes of Code Section 4980H. In addition, the FAQs describe the expected approach for determining whether a new hire is an FT employee:

- If a new hire is expected to work full-time on an annual basis and does work full-time during the first three months of employment, the employee will be an FT employee who must be offered health coverage at the end of that three-month period for the employer to avoid the shared responsibility payment with respect to that employee.
- If a new hire does not have an expected schedule as of his or her date of hire, so that it is unclear whether the employee is expected to work full-time on an annual basis, the employer must make a determination based on the employee's first three months of employment.
    - If the employee works full-time during the first three months of employment and his or her hours are a reasonable representation of the average hours he or she is expected to work annually, the employee will be considered an FT employee for purposes of Code section 4980H as of the end of the three-month period, and the shared responsibility payment will be due if the employee is not offered coverage.
    - If the employee works full-time during the first three months but his or her hours during that three-month period are <u>not</u> representative of his or her expected average hours on an annual basis, the employer may evaluate the employee's hours over a second three-month period without becoming liable for a shared responsibility payment for failing to offer health coverage to the employee during that time.
    - If the employee works part-time during the first three months, the employer will not owe a shared responsibility payment for the first or second three-month period. This rule continues to apply in three-month increments, *e.g.,* if the employee works part-time

during the second three-month period, no shared responsibility payment will be due for the next three-month period.

Examples further explain these rules. One example describes an employee who is hired to work full-time for a short period as a seasonal employee and who will work part-time during the remainder of the year. Specifically, the example assumes that the employee works 35 hours per week in December, January and February and 20 hours per week in March, April and May, which is expected to be his schedule for the year. In this case, the employer must evaluate the facts and circumstances at the end of February to determine if that period is representative of the hours the employee will work on an annual basis. If it is not, the shared responsibility payment will not apply for the first three-month period. The employer can then use the period of March through May as the look-back period for determining if the employee is an FT employee. Under these facts, the employer will not owe a shared responsibility payment for a failure to offer the employee coverage during the first or second three-month period or for any later month in the stability period.

When further guidance is issued, it will need to address how to treat an employee who is expected to work full-time but who actually works part-time over the first three-month period. In that case, it seems likely that the employer will need to make an assessment of whether the part-time schedule for the first three months is reasonably representative of the employee's schedule on an annual basis or whether a second three-month period is needed for that assessment. The FAQs indicate that future guidance will coordinate the rules for new hires with additional rules regarding the treatment of employees who change status or who are hired solely for seasonable work.

Waiting Periods

Section 2708 of the Public Health Service Act (PHSA) provides that a group health plan cannot impose a waiting period of more than 90 days in plan years beginning on or after January 1, 2014. The statute did not specify whether the rule applies once to all classes of employees or when the 90-day period begins (*e.g.*, on the date of employment or the date of eligibility for the plan). The IRS requested comments on the 90-day waiting period limit in IRS Notice 2011-36.

The latest FAQs state that the 90-day limit will not require an employer to offer group health plan coverage to part-time employees or any other category of employee when it becomes effective in 2014. The employer will have flexibility to identify the categories of employees to be covered. For example, coverage could be based on full-time status, a bona-fide job category or receipt of a license.

For purposes of counting the 90 days, the waiting period begins on the date that the employee is otherwise eligible for coverage under the plan, *i.e.*, when he or she is in the eligible category. However, any waiting period based solely on the lapse of time must not be longer than 90 days, and waiting periods must not be designed to avoid compliance with the 90-day limit. According to the FAQs, future guidance will address situations in which a plan provides that employees (or certain classes of employees) are eligible for coverage once they complete a specified cumulative number of hours of service within a specified period (such as 12 months). This type of condition will not be treated as an eligibility condition designed to avoid compliance with the waiting period limit if it complies with the rules in future guidance.

The agencies have requested comments on the various approaches described in the FAQs by April 9, 2012.

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