Employment, Labor & Benefits Advisory

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FEBRUARY 14, 2012

HHS, DOL, and IRS Issue FAQs Addressing Automatic Enrollment, Employer Shared Responsibility, and Waiting Periods under the Affordable Care Act

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A handful of important Affordable Care Act[1] provisions affecting employers and employer-sponsored group health plans take effect in or after 2014. Some provisions, such as the employer shared responsibility rules under Internal Revenue Code § 4980H, and standards that apply to waiting periods under Public Health Service Act § 2708, do so by the Act's terms, while others, such as amendments to the Fair Labor Standards Act (that technically took effect on enactment), do so as a matter of regulatory grace. Either way, the Affordable Care Act will require major changes to the design, maintenance, and operation of employer-sponsored (and other) group health plans. A recently issued set of frequently asked questions (FAQs)[2] from the Departments of Health and Human Services, Labor, and Treasury/IRS (collectively, the "Departments") provide interim relief in certain instances, and signal the Departments' thinking as to others. This client advisory explains and summarizes the FAQs.

Automatic Enrollment

The Act adds new Fair Labor Standards Act (FLSA) § 18A requiring employers subject to the FLSA that have more than 200 full-time employees to automatically enroll new full-time employees in one of the employer's health benefits plans (subject to any waiting period authorized by law), and to continue the enrollment of current employees in a health benefits plan offered through the employer. Employers subject to the Act's automatic enrollment requirement must provide adequate notice and the opportunity for an employee to opt out of any coverage in which the employee was automatically enrolled. The Act specifies no special or deferred effective date for the automatic enrollment rules, which means that the rule is technically effective on enactment (i.e., March 23, 2010). But in a set of frequently asked questions issued December 22, 2010, the Labor Department deferred enforcement until the issuance of regulations.

According to the FAQs, "the Department of Labor has concluded that its automatic enrollment guidance will not be ready to take effect by 2014." Therefore, employers are not required to comply with FLSA section 18A until after 2014.[3]

Employer Shared Responsibility

Code § 4980H provides that an "applicable large employer" is liable for an assessable payment if any full-time employee is certified as eligible to receive an applicable premium tax credit or cost-sharing reduction and either:

- The employer fails to offer to its "full-time employees" (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan, or
- The employer offers its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan that, with respect to a full-time employee who qualifies for a premium tax credit or cost-sharing reduction, is unaffordable or fails to provide minimum value.

The term "full-time employee" is defined to mean an employee who is employed on average at least 30 hours per week. Liability under Code § 4980H is determined month by month.

In IRS Notice 2011-36,[4] the Service proposed a "look-back/stability period safe harbor" for determining whether current employees (i.e., those who are not newly hired or transferred) are full-time employees for purposes of the employer shared responsibility provisions. Under the look-back/stability period approach, an employer would be permitted to determine each employee's full-time status by looking back at a defined period of not less than three but not more than twelve consecutive calendar months (the "measurement period") to establish whether the employee averaged at least 30 hours of service per week (or at least 130 hours of service per calendar month) during the measurement period. If the employee is determined to be a full-time employee during the measurement period, then he or she would be treated as a full-time employee during a subsequent "stability period," regardless of the number of the employee's hours of service during the stability period, so long as he or she remained an employee. The stability period would be a period of at least six consecutive calendar months and no shorter in duration than the measurement period.

Current employees

The FAQs endorse and expand on the notice 2011-36 look-back/stability period safe harbor. For purposes of determining whether an employee (other than a newly hired employee) is a full-time employee, it is anticipated that the guidance will allow look-back and stability periods not exceeding 12 months.[5]

Newly hired employees

For purposes of determining whether a newly hired employee is a full-time employee, the FAQs propose the following: [6]

- If a newly hired employee is reasonably expected to work full-time on an annual basis and does work full-time during the first three months of employment, the employee must be offered coverage under the employer's group health plan as of the end of the initial three-month period.
- If, based on the facts and circumstances as of the time of hire, it cannot reasonably be determined that a newly-hired employee is expected to work full-time:
    - o If the employee works full-time during the first three months of employment, and the employee's hours during that period are reasonably viewed, as of the end of that period, as representative of the average hours the employee is expected to work on an annual basis, the employee will first be considered a full-time employee as of the end of the initial three-month period.
    - o If the employee works full-time during the first three months of employment, but the employee's hours during that period are reasonably viewed, as of the end of that period, as not representative of the average hours the employee is expected to work on an annual basis, the plan is permitted an additional three-month period to determine the employee's status, during which time no assessable payment would be required.

The FAQ notes that forthcoming guidance is expected to coordinate the rules for newly hired employees with those applicable to other employees (including employees who are transferred from

one employment classification or status to another).

90-Day Limitation on Waiting Periods

For plan years beginning on or after January 1, 2014, the Act bars a group health plan or group health insurance issuer from applying any waiting period that exceeds 90 days. A "waiting period" is defined as "the period that must pass with respect to the individual before the individual is eligible to be covered for benefits under the terms of the plan." In contrast to the employer responsibility rule under Code § 4980H, the rules governing waiting periods do not distinguish between full-time and part-time employees. The FAQs state flatly that the Departments do not intent to "require the employer to offer coverage to any particular employee or class of employees, including part-time employees," noting that the applicable rule merely "prohibits requiring an otherwise eligible employee to wait more than 90 days before coverage is effective." Moreover, according to the FAQs, the Act does not penalize small employers for choosing not to offer coverage to any employee, or large employers for choosing to limit their offer of coverage to full-time employees. The FAQs also clarify the Departments' intention that, at least for the first three months following an employee's date of hire, an employer that sponsors a group health plan will not, by reason of failing to offer coverage to the employee under its plan during that three-month period, be subject to the employer responsibility payment under Code § 4980H.[7]

Conclusion and Next Steps

The frank recognition by the Department of Labor that the automatic enrollment rules will not be ready by 2014 is welcome news to employers, if for no reason other than it means one less thing to worry about at a time when compliance with other of the Act's important and substantive requirements is mandated.

The FAQs' anticipation of a rule under which the 90-day waiting period commences with the date of first eligibly is similarly welcome, as is its explicit recognition that small employers need not offer coverage to any employee and that a large employer can limit coverage to full-time employees. While employers and their advisors generally anticipated each of these positions, the FAQs provide confirmation and furnish a measure of certainty.

In contrast to the FAQs' proposals on automatic enrollment and the 90-day waiting period, the discussion of what constitutes a "full-time" employee for purposes of Code § 4980H is both substantive and novel. For employers with large, stable workforces and few part-time, seasonal, or temporary workers, determining who is a full-time employee will present little challenge. Industries and sectors such as banking, finance, and technology, for example, are not likely to be very concerned with the manner in which the Departments choose to define "full-time." But industries with large cohorts of contingent workers — e.g., staffing, retail, construction, and hospitality (among others) — will be very interested in what the Departments decide.

Lastly, the FAQs fail to address at least one very import set of rules, relating to non-discrimination standards for fully-insured group health plans, that could have a major impact on plan design and coverage. It will do little good for an employer to successfully navigate the assessable penalty and waiting period rules only to find that it has failed the applicable non-discrimination standards.

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Endnotes

1 Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010), as amended by the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111-152 (2010)), the Medicare and Medicaid Extenders Act of 2010 (Pub. L. 111-309 (2011)), and the Department of Defense and Full-Year Continuing Appropriations Act of 2011 (Pub. L. 112-10 (2011)).

2 Substantially identical versions of the FAQs were issued by the Treasury Department and the IRS (Notice 2012-17); by the Labor Department (Technical Release No. 2012-01); and by the Department of Health and HumanServices.

3 Q&A 1.

4 2011-21 I.R.B. 792 (available at: www.irs.gov/pub/irs-drop/n-11-36.pdf).

5 Q&A 4.

6 Q&A 5.

7 Q&A 3.
