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IRS Issues Request for Comments on PPACA's Employer Shared Responsibility Provisions

The Internal Revenue Service issued Notice 2011-36, a request for comments on PPACA's shared employer responsibility provisions which will become effective in 2014. The Notice, while not guidance, details and requests comments on a number of "potential approaches" under consideration for purposes of determining which employers are subject to the employer responsibility provisions and how penalties should be calculated. Comments are due by June 17, 2011.

Background

The Patient Protection and Affordable Care Act, as modified by the Health Care and Education Reconciliation Act of 2010 (PPACA), contains provisions effective in 2014 that impose penalties on certain employers that do not provide coverage or that provide inadequate or unaffordable coverage.

PPACA Coverage Requirements

Employers That Do Not Provide Coverage. If an employer with 50 or more full-time employees (including full-time equivalent employees) does not offer health coverage to its full-time employees and their dependents, and at least one full-time employee obtains a premium tax credit or cost-sharing reduction, the employer will be assessed a penalty of $2,000 for each full-time employee (over a 30-employee threshold).

Employers That Provide Unaffordable Coverage or Coverage Below Minimum Value. Employers with 50 or more full-time employees (including full-time equivalent employees) that offer health coverage may also be subject to penalties if the coverage is deemed unaffordable (employee premium contributions are more than 9.5% of household adjusted gross income) or does not meet an actuarial value test (60% minimum actuarial value) and the employee obtains either of the subsidies described above. The penalty is $3,000 per full-time employee receiving the subsidy, but the maximum penalty is $2,000 times the number of full-time employees (over the 30-employee threshold).

PPACA provides that the $2,000 and $3,000 penalties are to be assessed on a monthly basis (1/12th per month).

PPACA Waiting Periods

Under PPACA, a group health plan may no longer require employees to wait more than 90 days before they are allowed to enroll in the plan.

Notice 2011-36

The Internal Revenue Service (IRS) issued a Request for Comments on PPACA's employer shared responsibility provisions. The request states that the IRS is working in concert with the Department of Labor (DOL) and the Department of Health and Human Services (HHS) to develop regulations and other administrative guidance. Notice 2011-36 is not guidance; rather, it details "potential approaches" being considered for determining which employers are subject to PPACA's employer responsibility provisions and the amount of the penalty.

> ***BUCK COMMENT.*** *IRS officials have stated that guidance on PPACA's employer responsibility provisions will be issued well before the provisions take effect in 2014.*

Defining Employer, Employee and Hours of Service

Generally, the IRS contemplates that the definitions of employer, employee, and hours of service will conform to existing definitions applicable to employer-provided health and pension plans.

Employee. Notice 2011-36 suggests that the common-law test will be applied, as it is throughout the Internal Revenue Code, to determine who is an employee. Leased employees will not be counted.

> ***BUCK COMMENT.*** *Notice 2011-36 does not suggest that the proposed regulations will address who will be responsible for the health coverage of leased employees, but it appears that the employer that furnishes the leased employee will be responsible.*

Employer. For purposes of determining whether an employer is an applicable large employer, consistent with PPACA, the Notice provides that the employer will be the common-law employer plus members of the common-law employer's controlled group and any affiliated service group.

> ***BUCK COMMENT.*** *Although both PPACA and the Notice apply the control group test in determining whether an employer is an applicable large employer, neither explain how penalties will apply if some employers in the controlled group offer coverage to their employees and others do not. In the absence of any permissible exceptions, employers could be subject to the full assessment on all employees for failure to provide coverage to a single employee.*

Hours of Service. The Notice also provides that as under existing DOL regulations for counting pension service, "hours of service" will encompass (1) each hour for which an employee is paid, or entitled to payment, for service to an employer; and (2) each hour for which an employee is paid, or entitled to payment during a period of time no service is performed because of vacation, holiday, illness, incapacity, layoff, jury duty, military duty, or leave of absence.

The IRS contemplates that 130 hours of service in a calendar month will be treated as the monthly equivalent of at least 30 hours of service per week. In addition, the Notice suggests methods for calculating the hours of service. For hourly employees, the employer will total the actual hours the employee worked or was entitled to be

paid. For non-hourly employees, an employer may use any of the following three methods for calculating hours of service:

- Actual Hours of Service. The employer counts the actual hours of service from records of hours the employee worked or was entitled to be paid;
- Days-Worked Equivalency. The employer credits the employee with eight hours of service for each day for which the employee would be required to be credited with at least one hour of service; or
- Weeks-Worked Equivalency. The employer credits the employee with 40 hours of service per week for each week for which the employee is required to be credited with at least one hour of service.

Notice 2011-36 suggests that an employer be able to apply different methods for different classifications of non-hourly employees as long as the classifications are reasonable and consistently applied.

BUCK COMMENT. *For example, an employer might want to select the actual hours of service method for salaried employees who work less than 30 hours per week.*

Determining Whether an Employer is an Applicable Large Employer

Generally, the employer coverage requirements apply only to employers with 50 or more employees (applicable large employer). Notice 2011-36 suggests methods for calculating the number of employees to determine if the employer coverage requirements apply.

Full-Time Employees. Generally, a full-time employee is one who averages at least 30 hours of service a week or 130 hours of service in a calendar month. Notice 2011-36 suggests using the following steps to calculate the number of full-time employees:

- Total the number of full-time employees (including seasonal workers) for each calendar month in the preceding calendar year;
- Total the number of full-time equivalents (as defined below) for each calendar month in the preceding calendar year;
- For each month, add the number of full-time employees and full-time equivalents; and
- Total the 12 monthly numbers and divide by 12.

If this number is 50 or more, the employer would then determine if the seasonal employee exception applies. Under PPACA, an employer is not an applicable large employer if (1) its workforce exceeds 50 full-time employees for 120 days or less during the calendar year and (2) the employees in excess of 50 during that period were seasonal workers.

Full-Time Equivalents. Notice 2011-36 provides that all employees who are not full-time employees for any month in the preceding calendar year are included in calculating the employer's full-time equivalents for that month. The Notice suggests the following steps for calculating the number of full-time equivalents:

- Total the aggregate number of hours of service (no more than 120 hours per employee) for all employees who are not full-time employees during the month; and
- Divide the total number of hours by 120.

BUCK COMMENT. *Full-time equivalents are used only for determining whether an employer is an applicable large employer and subject to the shared responsibility provisions. Employees who are not full-time do not have to be offered coverage to avoid the penalties.*

Determining Full-Time Employee Status for Purposes of Calculating the Penalty

Notice 2011-36 also outlines approaches to calculating the number of employees for purposes of determining the amount of a penalty on employers who either do not provide coverage or who provide inadequate or unaffordable coverage.

Month-to-Month Method. Under this method, each employee's full-time status will be determined on a monthly basis.

Look-Back/Stability Period Method. The IRS acknowledges that the month-to-month method might be administratively difficult for employers, employees, and the State Exchanges and suggest an alternative method. Under the look-back/stability period method, an employer would determine if an employee is full-time by looking at a period of 3 to 12 months (*the measurement period*) to determine whether the employee averaged at least 30 hours of work per week or at least 130 hours of service per calendar month.

If an employee is determined to be full-time during the measurement period, then the employee is treated as a full-time employee during a subsequent "*stability period*" as long as the employee remains employed, regardless of the number of hours worked during the stability period. If an employee is found to be a full-time employee during the measurement period, the stability period must last at least six consecutive calendar months after the measurement period and can be no shorter than the measurement period. If an employee is not a full-time employee during the measurement period, the employer does not have to treat the employee as a full-time employee during the during the stability period.

BUCK COMMENT*. The proposed approach provides a mechanism for employers to avoid an inadvertent failure to provide coverage that would otherwise result in the assessment of a penalty. This is particularly important if the penalty for not providing coverage to even one full-time employee results in a $2,000 assessment on all full-time employees, including those employees who are provided coverage.*

The IRS notes that the look-back/stability period method may not work well for new employees or for employees who move into full-time status mid-year. The agency requests comments on how to determine the full-time status for these employees. The IRS also requests comments on the (1) pros and cons of requiring employers to use the same measurement and stability periods for all employees; (2) when the measurement and stability periods should begin; and (3) how often employers may change their measurement and stability periods.

Other Methods. In Notice 2011-36, the IRS requests comments on other possible methods for determining full-time status for purposes of calculating the penalty.

> ***BUCK COMMENT.*** *In the Notice, the IRS states that there have been requests to clarify how the different penalties apply, especially for an employer who does not offer coverage to all of its full time employees. In response, the IRS notes that they contemplate that any regulations will make clear that employers that offer coverage to all or substantially all of their employees will not be subject to the $2,000 penalty. This clarification is encouraging, particularly for employers with significant numbers of seasonal or transient full-time employees who may not be eligible for coverage.*

Waiting Periods

The IRS requests comments on PPACA's 90-day limitation on waiting periods to enroll in group health plans. Specifically, the agency requests comments on:

- How should the waiting period limitation be applied in certain circumstances (e.g., probationary periods, or a requirement that employees are enrolled in a group health plan on the first day of the month after completion of the waiting period)?
- What service-based eligibility conditions do employers, plans or issuers currently impose that could result in violating the 90-day waiting period provision?
- May employers require continuous service to satisfy the waiting period, or must they aggregate separate periods of service to accumulate no more than 90 days?
- How should the employer coverage requirements be coordinated with the 90-day waiting period provision?

Conclusion

Notice 2011-36 describes possible rules for determining who is a full-time employee and what constitutes an applicable large employer for purposes of PPACA's employer shared responsibility provisions. In addition, the IRS also seeks comments on whether there should be exceptions to PPACA's employer shared responsibility provisions and how any exceptions would be consistent with PPACA's structure and purpose. The deadline for comments is June 17, 2011.

Buck's consultants are available to assist you in determining how PPACA's employer shared responsibility provisions and the suggestions made in Notice 2011-36 would affect your group health plans, and in preparing comments that you may wish to submit.