



For your information

Volume 35 | Issue 14 | March 1, 2012

Agencies Issue FAQs Regarding PPACA Automatic Enrollment, Employer Shared Responsibility, Waiting Periods, and Essential Health Benefits

The Departments of Labor, the Treasury, and Health and Human Services (the Agencies) issued additional FAQs on February 9, 2012 that address provisions of health care reform that are to be effective beginning in 2014: automatic enrollment, employer shared responsibility and waiting periods. In addition, on February 17, 2012, the Centers for Medicare & Medicaid Services (CMS) issued FAQs relating to essential health benefits. Group health plans are prohibited from imposing lifetime dollar limits on essential health benefits and may only impose annual dollar limits on such benefits that exceed certain thresholds. Beginning in 2014, annual dollar limits on essential health benefits will also be prohibited.

Background

The Patient Protection and Affordable Care Act (PPACA) amended the Fair Labor Standards Act (FLSA) by adding Section 18A, which requires employers who are subject to the FLSA, have more than 200 full-time employees, and provide health care coverage to their employees to enroll new full-time employees in the employer's health benefit plan automatically. In FAQs issued in December 2010, the Department of Labor (DOL) noted that the statute provided that the automatic enrollment provisions were to be implemented in accordance with regulations issued by the Secretary of Labor. At that time the DOL indicated that compliance was not required until such regulations were issued and that it intended to issue them by 2014.

In addition, PPACA contains "employer shared responsibility" provisions, effective in 2014, that impose penalties on certain employers that do not provide health coverage or that provide inadequate or unaffordable health coverage to their full-time employees (defined as employees working 30 or more hours a week). Employers with 50 or more full-time employees (including full-time-equivalent employees) who do not offer health coverage to their full-time employees and their dependents or who offer health coverage that is deemed unaffordable or does not meet an actuarial value test will be assessed a penalty if at least one full-time employee obtains a premium tax credit or cost-sharing reduction. Finally, PPACA provides that a plan cannot require eligible employees to wait longer than 90 days to be enrolled.

In [Notice 2011-36](#), issued on May 23, 2011, the Internal Revenue Service (IRS) requested comments on PPACA's employer shared responsibility provisions (see our June 2, 2011 [For Your Information](#)). In the [FAQs](#) issued on February 9, 2012, the Departments indicated that guidance is forthcoming, provided some insight as to how the final regulations may appear, and requested additional comments.

On December 16, 2011, the Department of Health and Human Services (HHS) released a bulletin in which it described its proposed approach to defining essential health benefits (EHBs). (See our December 22, 2011 [For Your Information](#).) The bulletin only addressed how EHBs would be defined for individual plans and employer plans in the small group market; it did not address how EHBs would be defined for self-insured employer plans. In the [new FAQs](#), CMS discusses how EHBs will be determined for purposes of complying with the rules regarding lifetime and annual dollar limits.

Frequently Asked Questions from Employers Regarding Automatic Enrollment, Employer Shared Responsibility, and Waiting Periods

Automatic Enrollment. To develop the required regulations, the DOL has been collecting information from employers and others, in particular regarding their concerns about the need for sufficient time to comply. Citing the need to coordinate the effort to develop guidance on automatic enrollment with the development of other guidance related to PPACA, the DOL concluded that it will not issue regulations on this subject before 2014. Employers do not have to comply with Section 18A of the FLSA until these regulations are in effect.

COMPLIANCE ALERT: At this time, there is no need for employers to develop plans to enroll employees in their health plans automatically.

Look-Back or Stability Period for Current Employees. Notice 2011-36 outlined approaches for determining whether an individual is a full-time employee for purposes of the shared responsibility penalty. One approach involved the use of "look-back" (measurement) and "stability" periods. Under this approach, employers would be permitted to determine whether an employee is full-time by looking at a period of three to 12 months (*the measurement period*) to confirm that the employee averaged at least 30 hours of work per week or at least 130 hours of service per calendar month during that period. An employee who had the requisite hours of service during the "look-back" period would then be considered a full-time employee during the "stability" 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.

The FAQs indicate that the forthcoming regulations will retain the concept of a “look-back/stability” period for purposes of determining whether an employee (other than a newly hired employee) is a full-time employee and will provide that such periods cannot exceed 12 months.

90-Day Waiting Period and Shared Responsibility. The FAQs are not guidance. They simply indicate that formal guidance is forthcoming and provide insight as to what the regulations might look like. They note that the rules regarding the waiting period and those governing shared responsibility must be coordinated, i.e., in what circumstances could failure to provide coverage during a waiting period subject an employer to a penalty? They contain positive statements that the DOL and IRS recognize employers’ requests for simplicity and safe harbors and intend to accommodate those requests to the extent feasible. In addition, they make it clear that expected regulations will confirm that the 90-day waiting period requirement only applies to employees who are otherwise eligible for coverage under the employer’s plan design.

First 90 Days of Employment. According to the FAQs, the expected guidance will provide that a simple 90-day waiting period (i.e., that the employer does not offer coverage during the initial 90 days of employment) will not subject the employer to the shared responsibility penalty. There is still no relief for plans that do not provide coverage until the first day of the month following 90 days of employment.

Newly Hired Employees – Will a Penalty Apply? The FAQs indicate that future guidance will address how the shared responsibility penalty will be applied with respect to newly hired employees. Under the intended rules:

- If a new employee is expected to work full-time on an annual basis from date of hire and, in fact, works full-time during the first three months of employment, the employer will not be assessed the shared responsibility penalty as long as the employee is offered coverage no later than the end of three months of employment. No penalty will apply with respect to the first three months of employment.
- If it cannot “reasonably” be determined on the date of hire whether the employee will work full-time, then the following rules apply in determining whether the employee is full-time for purposes of the shared responsibility penalty:
 - If the employee works full-time during the first three months and it is reasonably expected that he or she will work full-time on an annual basis, the employee will be considered full-time and must be offered coverage at the end of the three-month period. No penalty will apply with respect to the first three months of employment.
 - If an employee works full-time during the first three months of employment but the hours worked are reasonably viewed as not representative of expected future hours (e.g., an employee is hired to work full-time during the holiday season but only part-time the rest of the year), the employer may use a second three-month look-back period (following the first three months of employment) to determine whether the employee is a full-time employee. If it is determined that the employee is full-time, no penalty will apply for the full six months.

Coverage of Classes of Employees. PPACA does not require an employer to offer health coverage to any class of employees, or to any employees at all (although penalties may apply for failure to offer). However, once an employer decides to offer coverage to a class of employees, it must satisfy PPACA's 90-day waiting period requirement with respect to those employees, regardless of their status as full-time or part-time. The FAQs indicate that the forthcoming regulations will confirm that the 90-day waiting period begins when the employee is "otherwise eligible for coverage under the terms of the group health plan."

Eligibility rules that are deemed not designed to avoid compliance with this requirement are expected to be acceptable. Thus, basing eligibility on full-time status, a job classification, or completion of a number of hours within a 12-month period should be permissible. The FAQs state that upcoming guidance is expected to address situations in which employees become eligible for coverage only after completing a specified number of hours of service within a specified period (such as 12 months), and they provide that this eligibility condition will not be treated as designed to avoid compliance as long as the cumulative hours required do not exceed a specified threshold.

Comments Requested. Comments on all of the proposed regulations are requested by April 9, 2012.

INSIGHT

It is important to distinguish between the rules for determining whether the shared responsibility penalties will apply and those governing the application of waiting periods.

Frequently Asked Questions on Essential Health Benefits Bulletin

Question 10 of the FAQs (the only question applicable to group health plans) states that for purposes of complying with the rules regarding the imposition of lifetime and annual dollar limits, a self-insured group health plan, a large group market health plan, or a grandfathered group health plan may use a definition of EHB authorized by the Secretary of HHS. This includes any of the benchmark options described in the EHB Bulletin. The FAQ also states that the Departments intend to use their enforcement discretion and work with those plans that make a good faith effort to apply an authorized definition of EHB.

INSIGHT

This "guidance" is not particularly helpful because it does not provide plans with any type of list of benefits that would be EHBs. Thus, there is still uncertainty about which benefits may be subject to dollar limits. The fact that the Departments may apply a "good faith" compliance standard for enforcement

purposes is good news, but does not represent a change from the current approach,

Conclusion

The FAQs issued on February 9 provide welcome relief in the delay of the automatic enrollment requirements and in confirming that no “pay or play” penalties will apply in the first three months of employment and that the 90-day period will not begin until an employee is otherwise eligible for benefits. However, although the IRS noted in Notice 2011-36 that it contemplates 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, it is not yet clear whether an employer may exclude a specific class, such as call center employees or computer programmers, and avoid the “pay or play” penalty. The FAQs issued on February 17 do not provide much useful information; additional guidance would be welcome.

Buck Can Help

- Review all of your programs to identify those with eligibility criteria that may be inconsistent with the proposed requirements
- Assist in making a good faith determination whether certain benefits provided by your plans could be considered essential health benefits for purposes of the rules relating to dollar limits
- Prepare comments regarding the proposed solutions
- Keep you informed of further developments in the guidance

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.
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