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For your information

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Agencies Issue Guidance Addressing Full-Time Employees and Waiting Periods

The government simultaneously issued two notices addressing employer responsibilities under the Patient Protection and Affordable Care Act (ACA). Notice 2012-58, issued by the Internal Revenue Service (IRS), describes safe harbor methods that an employer can use to determine which employees are treated as full-time for purposes of the shared employer responsibility provisions (also known as the "play or pay" provisions). While the safe harbor guidance is helpful to employers for identifying full-time employees under the shared responsibility penalty, its application to a part-time workforce can be onerous and complex. Notice 2012-59, issued by the Departments of Labor, Treasury, and Health and Human Services (the Departments), provides temporary guidance addressing the 90-day waiting period limitation. Employers will need to review plan provisions to assess compliance with the limitation, especially where coverage eligibility might change after a safe harbor approach is applied to an employee population. The guidance provided in the notices is effective at least through 2014 and will impact both insured and self-insured employer plans.

Background

The ACA includes "shared employer responsibility" provisions that are effective in 2014 and impose penalties on certain employers that do not provide adequate and affordable health coverage to employees. Generally, employers with 50 or more full-time employees (defined as employees working 30 or more hours a week) that 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 a 60% actuarial value threshold will be assessed a penalty if at least one full-time employee obtains a premium tax credit or cost-sharing reduction when purchasing coverage in a public health insurance Exchange.

Effective for plan years beginning on or after January 1, 2014, group health plans and insurers are prohibited from requiring eligible employees to wait longer than 90 days before their coverage becomes effective. Thus, any waiting period of more than 90 days will be considered excessive. This provision applies to all eligible employees, whether or not full-time.

In 2011, the IRS requested comments on the ACA's shared responsibility provisions, including the affordability requirement. (See Notice 2011-36, Notice 2011-73, as well as our June 2, 2011 and September 20, 2011 *For Your Information* publications.) In Notice 2012-17, issued in February 2012,

the Departments provided some insight into approaches under consideration regarding full-time employee determinations and waiting periods (among other things) and requested additional comments. (See our March 1, 2012 *For Your Information*.)

These most recent notices modify, confirm and expand on previous guidance, providing more definitive instructions for determining whether, and for how long, an existing or newly hired employee is considered a full-time employee. The notices also provide examples of acceptable approaches to determining full-time employment status and waiting periods.

Full-Time Employee Determination Safe Harbors

Notice 2012-58 sets out voluntary safe harbor methods for determining whether ongoing employees and new variable hour or seasonal employees should be treated as full-time employees for purposes of the shared-employer-responsibility provisions. The notice expands on previous guidance, permitting the use of an administrative period to notify and plan for coverage adjustments for newly eligible (or ineligible) employees.

Each safe harbor applies the same general concepts, which include:

- **A measurement period.** This is a defined period of not less than three, but not more than 12, consecutive calendar months during which the average number of hours worked by an employee per week is measured. The notice uses the term “standard measurement period” to describe the measurement period used for “ongoing employees” and the term “initial measurement period” to describe the measurement period used for “new employees.”
- **A stability period.** This is a defined period of time following the standard or initial measurement period during which an employee who worked at least 30 hours per week during such measurement period must be treated as a full-time employee for purposes of the shared responsibility provisions. The stability period, which must begin after the end of the applicable measurement period (and any applicable administrative period (see below)), must be at least six consecutive calendar months and can be no shorter than the applicable measurement period.
- **An administrative period.** This is a defined period of time that generally runs between the end of the standard or initial measurement period and the beginning of the associated stability period. The plan may use this period to identify employees who worked at least 30 hours per week during the measurement period and to notify these employees of coverage eligibility status and enroll employees. The administrative period cannot exceed 90 days and cannot reduce or lengthen either the measurement period or the stability period. Special rules apply to the administrative period used for newly hired employees.

Subject to the time limits of the general concepts described above, an employer may use measurement or stability periods that differ either in length, or start and end dates (and may vary the length of the administrative periods) for the following categories of employees: (1) collectively bargained and non-collectively bargained employees, (2) salaried and hourly employees, (3) employees of different entities, and (4) employees located in different states.

Safe harbor for ongoing employees – The notice defines "ongoing employee" as a current employee who has been employed for at least one complete standard measurement period. A standard measurement period is always associated with a corresponding stability period. Employers generally can determine whether an ongoing employee is full-time by confirming that the employee averaged at least 30 hours per week during the specified standard measurement period. For purposes of the shared employer responsibility penalty calculation, an employee who has the requisite number of hours of service would be considered a full-time employee during the stability period that is associated with a standard measurement period. This is the case even if the employee fails to work the requisite number of hours during the next standard measurement period.

Example: Only full-time employees (i.e., those working at least 30 hours per week) are eligible for health coverage under Employer W's group health plan. In determining full-time-employee status, Employer W uses a 12-month stability period that runs from January 1 through December 31, a 12-month standard measurement period that runs from October 15 through October 14, and an administrative period that runs from the end of the standard measurement period (October 14) to the beginning of the applicable stability period (January 1). Employee A is an ongoing employee who worked at least 30 hours per week during the standard measurement period beginning October 15, 2012 and ending October 14, 2013. Therefore, he must be treated as a full-time employee during the stability period beginning January 1, 2014 and ending December 31, 2014.

If Employee A does not work at least 30 hours per week during the standard measurement period beginning October 15, 2013 and ending October 14, 2014, he must continue to be treated as a full-time employee through the end of 2014 but will not be a full-time employee for the stability period beginning January 1, 2015 and ending December 31, 2015.

Safe harbor for new variable hour and seasonal employees – Although the notice does not specifically define a "new employee," for purposes of the guidance it appears to be an individual who has not yet been employed for a period equal to or greater than the standard measurement period used by the employer. A new employee is a variable hour employee if, based on the facts and circumstances at the employee's start date, it is unclear whether the employee is reasonably expected to work an average of at least 30 hours per week. Workers who initially and for a limited time work more than 30 hours per week can still be considered variable hour employees. For example, a variable hour employee who is hired at a holiday season might initially work more than a 30-hour week, but then after the busy period work less. The notice suggests that the IRS might use the definition of "seasonal worker" set out in the statutory definition of an "applicable large employer," but for now (through at least 2014) it allows employers to use a reasonable good faith interpretation of the term "seasonal employee."

The safe harbor for new variable hour and seasonal employees is similar to that used for ongoing employees except that the beginning of the "initial measurement period" generally will depend on the employee's hire date, and the employer can use part of the administrative period to delay the beginning of the initial measurement period to the first day of the calendar month after hire. An employee who has the requisite number of hours of service during the initial measurement period would be considered a full-time employee during the corresponding stability period. For new employees, the initial

measurement period and administrative period combined cannot extend beyond the last day of the first calendar month beginning on or after the one-year anniversary of the employee's start date.

Example: For new variable hour employees, Employer X uses a 12-month initial measurement period that begins on the employee's date of hire. Employee B is hired on May 10, 2014 and works at least 30 hours per week during the initial measurement period ending May 9, 2015. Under the safe harbor rule, any administrative period must end on or before June 30, 2015 and Employee B must be treated as a full-time employee for the stability period beginning July 1, 2015 and ending June 30, 2016.

Transition from new employee rules to ongoing employee rules – The notice provides that once a new employee becomes an ongoing employee (i.e., has been employed for an entire standard measurement period), the employee's status as a full-time employee must be tested at the same time and under the same conditions as that of other ongoing employees. Thus, in the example above, if Employer X uses a 12-month standard measurement period beginning October 15, Employee B's status as a full-time employee must also be tested for the standard measurement period beginning October 15, 2014 and ending October 14, 2015. If Employee B does not work at least 30 hours per week during the standard measurement period, he would no longer be considered a full-time employee on July 1, 2016, the end of the stability period that applied to his initial measurement period.

INSIGHT

Employers, particularly those that limit health plan eligibility to full-time employees and have a significant number of part-time employees, will have to implement additional administrative processes for tracking actual hours worked and for enrolling eligible employees or disenrolling ineligible employees. Employers should consider whether, under the terms of their plan, determining a worker's full-time-employee status would create an enrollment opportunity, and they should be aware of waiting period limitations, in addition to the application of other laws such as ERISA.

Safe harbor reliance – Generally, employers can rely on the ongoing employee and new variable safe harbors provided in this guidance at least through the end of 2014. The guidance provides that reliance extends to measurement periods beginning in 2013 and 2014 and their associated stability periods that may run into 2016 (e.g., where the measurement period began in late 2014). Employers will not have to comply with any subsequent, more restrictive guidance until at least January 1, 2015.

Additional rules expected – The notice requests comments on the following issues:

- What safe harbor methods should be applied to short-term-assignment employees, temporary staffing employees, employees hired into high-turnover positions, and other categories of employees that could present special issues

- Whether additional guidance should be developed to assist employers and employees in determining, as of an employee's start date, whether the employee is reasonably expected to work an average of at least 30 hours per week
- What rules should be formulated to address the coordination of differing measurement and stability periods in a merger or acquisition situation
- How the term "seasonal worker" should be defined.

These issues, as well as those addressed in the notice, will be covered in regulations that the IRS intends to issue on the shared employer responsibility provisions. In addition, the IRS says that it will include rules on the treatment of employees who experience a change in employment status during a measurement period.

Waiting Periods

The ACA 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 coverage to full-time employees). However, once an employer decides to offer coverage to a class of employees, it may not impose a waiting period of more than 90 days with respect to those employees or their dependents. The guidance in Notice 2012-59 confirms that the 90-day waiting period begins when the employee or dependent is "otherwise eligible for coverage under the terms of the group health plan." It also provides that as long as an employee is permitted to elect coverage that begins on or before the 90th day of employment, the fact the employee takes additional time to elect coverage does not affect the plan sponsor's compliance with the requirement.

INSIGHT

Plans that currently delay enrollment of otherwise eligible employees beyond 90 days of employment will have to be amended to comply with the waiting period requirement effective for plan years beginning on and after January 1, 2014.

Although eligibility conditions based solely on the elapse of time cannot exceed 90 days, other eligibility rules generally are permissible as long as they are not designed to avoid compliance with this requirement. The guidance notes, for example, that conditioning eligibility on full-time status, a job classification, or completion of licensure requirements is generally permissible. Note that the 90-day maximum administrative period provided in the safe harbor for determining full-time status coordinates with this requirement. Where eligibility is based on completion of a specified number of hours of service, the Departments will deem a requirement of more than 1,200 hours worked to be designed to avoid compliance with the requirements.

When it cannot be determined at the date of hire whether a newly hired employee will work the requisite number of hours to be eligible for coverage, the employer may use a "reasonable" period of time to make the determination – a "measurement period," which may be up to 12 months. In no event can coverage be delayed past the 91st day following satisfaction of the eligibility requirement.

Beginning in 2014, an employee may be eligible to receive a premium tax credit or premium sharing reduction during the waiting or measurement periods when the employee is not eligible for coverage. However, the employer will not be subject to a shared responsibility penalty with respect to that employee during these periods.

Comments Requested

Comments on both notices are requested by September 30, 2012.

Next Steps

This new guidance provides employers with reliable instructions for determining full-time employee status for purposes of the shared responsibility penalties and for maintaining waiting periods for coverage that comply with ACA requirements. It is important to note that an employer cannot be certain it will satisfy the safe harbors or comply with the waiting period requirements unless workers are correctly classified as employees or independent contractors--failure to offer coverage to a full-time employee incorrectly classified as an independent contractor could result in penalties. Thus an employer that contracts with independent contractors should review their status to confirm that they are not employees for purposes of these provisions.

In addition, in light of this newly issued guidance, employers should also consider:

- Whether to utilize the safe harbor guidance
- How they will track the actual hours worked by employees
- What are the optimal length for the safe harbor measurement and stability periods and their start and end dates. (Employers may want a standard measurement period that ends before the plan's open enrollment period and a stability period that runs concurrently with the plan year)
- Whether their current waiting periods, if any, for both new or newly eligible employees comply with the guidance in the notice.

The rules provided in these notices are complex. Compliance with the safe harbor and waiting period provisions, especially those provisions related to variable hour and seasonal employees, could be challenging. These notices require careful consideration, and employers should confer with trusted advisors and counsel before making definitive determinations.