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ACA and US Territorial Employees

Employers with employees in US territories need to be aware of the special status of these employees for purposes of the ACA's employer shared responsibility requirements. Generally, territorial workers will not be full-time employees and will not affect an employer's potential liability for an assessment if not offered affordable, minimum value health coverage. Employers may want to take this into account in developing a benefits strategy for 2015. Employers should also be aware that their plans covering employees in US territories must comply with most ACA market reforms.

Background

Many employers have been modifying plan eligibility rules or contribution strategies to avoid or minimize potential shared responsibility assessments in 2015. (See our April 17, 2014 *For Your Information* for a comprehensive discussion of the employer shared responsibility requirements.) Employers have also been contemplating how to satisfy IRS rules that will require them to identify and report their full-time employees on a monthly basis. (See our August 29, 2014 *For Your Information*.) They may not be aware that their employees working in US territories may be treated differently for shared responsibility purposes than those who are US-based.

Shared responsibility and US territorial employees

Beginning in 2015, US employers who had on average at least 100 full-time employees during business days in 2014 may be subject to a nondeductible "shared responsibility" assessment if they either fail to offer minimum essential coverage to at least 70% of their full-time employees or offer coverage that is unaffordable or does not provide minimum value. The assessment is triggered only when a full-time employee purchases individual coverage through a public marketplace and qualifies for a low-income premium subsidy.

US Territories:

- Puerto Rico
- US Virgin Islands
- Guam
- American Samoa
- Northern Mariana Islands

Volume 37 | Issue 126 | September 17, 2014

Determining full-time employee status

As discussed above, the number of full-time employees in an employer's workforce is used to determine whether it may be subject to a shared responsibility assessable payment. The status of an individual as a full-time employee may also affect whether an employer is subject to, and the amount of, an assessment.

Generally, a full-time employee is an employee who, for a given calendar month, either averages at least 30 hours of service per week or has worked at least 130 hours of service during that month. An hour of service means each hour for which an employee is paid or is entitled to payment. This includes periods during which no services are performed, such as vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty, or a leave of absence. However, hours of service worked outside of the 50 US states and the District of Columbia (i.e., where compensation for services constitutes income from sources outside of the US) are not counted, regardless of the residency or citizenship of the individual.

Did you know?

Residents of US territories are not subject to the individual mandate and thus won't pay a penalty if they don't have medical coverage.

Did you know?

None of the US territories have public marketplaces.

Because compensation received for services performed in US territories is considered income from sources outside of the US, even those employees who work on average more than 30 hours a week in a US territory will not be considered full-time employees for purposes of the shared responsibility requirements because their hours will not be treated as "hours of service." This means that these employees do not have to be taken into account in determining whether an employer employed the requisite number of employees to be become subject to the shared responsibility rules. They also don't have to be taken into account in determining whether an employer has offered coverage to at least 70% of its full-time employees or counted in determining the amount of any assessment.

The final shared responsibility regulations contain a rule to address situations in which an employee's work location changes during the year. It provides that if a US-based employee transfers to a position outside of the US that is anticipated to continue for at least 12 months, and if substantially all of the employee's compensation constitutes income from sources outside of the US, the employer may treat the employee as having terminated employment for purposes of determining full-time employee status. This rule would apply to employees transferred to a US territory because positions in the US territories are treated as being outside of the US. The regulations also provide that an employer may treat a non-US-based employee who transfers to the US during the year as a new hire for purposes of the shared responsibility requirements.

Application of market reforms to health issuers in US territories

The Affordable Care Act (ACA) also imposed a number of requirements on health coverage. Some of these "market reforms," such as those extending coverage for children up to age 26, prohibiting waiting periods of more than 90 days, requiring non-grandfathered plans to cover certain preventive care benefits and to have limits on out-of-pocket maximums, apply to both group health plans and health insurance issuers. Other market reforms, such as those limiting medical loss ratios, only apply to health insurance issuers.

With the exception of insured expatriate plans, group health plans maintained by US employers that cover active employees must comply with those ACA's market reform provisions that apply to group health plans. This includes plans that cover employees who reside and work in US territories. (For more information about expatriate plans, see our March 11, 2014 *For Your Information*.) In a letter to territorial governors dated December 10, 2012, then Secretary of Health & Human Services Kathleen Sebelius stated that the market reforms applicable to health insurance issuers applied to issuers sitused in the territories.

The Centers for Medicare & Medicaid Services (CMS) recently sent a letter to officials in each of the territories advising them that certain ACA market reform provisions would no longer apply to individual or group health insurance issuers in the US territories. The reforms that will not apply are:

- Guaranteed availability
- Community rating
- Single risk pool
- Medical loss ratio
- Essential health benefits

Medical Loss Ratio Rebates

CMS's change in position means that plans will not receive medical loss ratio rebates on policies issued in the US territories for 2014 and subsequent years.

The letter explained that these provisions only apply to insurance issued in "states" as defined in the Public Health Service Act, and that the definition for that purpose did not include "territories."

> **Comment.** CMS notes in a footnote that those market reforms that apply to group health plans continue to apply in the territories and therefore issuers selling their policies to employers in the territories will have to make certain that their products comply with those ACA requirements.

In Closing

Employers should be pleased by the greater flexibility they have in designing benefit programs for their territorial employees. Although their plans may have to meet ACA benefit mandates, employers generally will not be adversely impacted if they fail to offer affordable, minimum value health coverage to these employees. In addition, because it is unlikely that a territorial employee would ever be considered full-time for purposes of the shared responsibility provisions, the tracking and reporting obligations of these employees should be minimal.

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