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For Your Information®

Volume 39 | Issue 26 | March 3, 2016

IRS Notice Provides Additional ACA Employer Shared Responsibility Guidance

The IRS recently issued Notice 2015-87, which among other things, provides important clarification of its position on a number of ACA-related issues, including the crediting of hours of service for periods when no duties are performed, the application of the "rehire" rules to individuals performing services for educational organizations through a third party, and the treatment of government entities and their reporting obligations under the shared responsibility rules.

Background

In Notice 2015-87, the IRS offers guidance in a question and answer format. Although most of the guidance relates the Affordable Care Act (ACA), the notice also addresses non-ACA issues, such as health flexible spending account carryovers and COBRA. (See our January 28, 2016 *For Your Information* for information about flexible spending account carryover guidance.) This *For Your Information* discusses ACA guidance on the determination of full-time employee status, the application of the "rehire" rules to individuals providing services to educational organizations and the reporting obligations of government entities. The notice also discusses the status of AmeriCorps participants and employer-provided TRICARE coverage under the ACA.

What's an IRS notice?

An IRS notice is a public pronouncement that may contain guidance involving substantive interpretations of the Internal Revenue Code. The IRS uses notices to provide clarification of its position on various issues and to indicate what regulations will say when they may not be published in the immediate future.

Additional ACA Guidance

The status of an individual as a full-time employee affects whether an employer is subject to, and the amount of, a shared responsibility assessable payment. Generally, a full-time employee is an employee who, for a given calendar month, either is credited with at least 30 hours of service per week or 130 hours of service during that month. (For an in-depth discussion of the ACA shared responsibility rules, see our April 17, 2014 *FYI In-Depth*.)

Crediting Hours of Service for Periods When Employee Not Working

The notice provides useful clarification on when an employee entitled to payments for periods during which he or she isn't working must be credited with hours of service:

Employer must be the source of the payment. An employer will be considered the source of a payment not only when it pays the employee directly but also when payment is made by a third party, such as an insurer or trust fund, to which the employer contributes or pays premiums. This is the case regardless of whether contributions are made for the benefit of specific employees or an aggregate group of employees.

Definition of "Hour of Service"

For determining status as a full-time employee, an "hour of service" includes each hour for which the employee is paid or entitled to payment for periods during which no duties are performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty, or leave of absence.

The guidance clarifies that employees receiving short- or long-term disability payments must be credited with hours of service as long as the employer contributed directly or indirectly towards the payment. However, hours of service do not have to be credited if the employee paid for the disability coverage with after-tax contributions; in that case, the employer would not be the source of the payment.

Certain payments do not require hours of service credit. Hours of service do not have to be credited with respect to payments mandated by applicable workers' compensation, unemployment or disability insurance laws. Similarly, an employee is not entitled to hours of service for payments that solely reimburse the employee for medical or medically related expenses.

Although similar, the ACA definition of hour of service differs from definition for retirement plan purposes. The shared responsibility regulations cite a separate DOL regulation that sets out the rules that retirement plans must follow in crediting hours of service for eligibility, vesting and benefit accrual purposes for periods when no services are performed. The notice states that certain provisions of the DOL regulation do not apply to determining hours of service for ACA purposes. For example, an hour of service for ACA purposes does not include any hours after the individual terminates employment with the employer. There is also generally no 501-hour limit on the hours of service required to be credited to an employee on account of any single continuous period during which the employee performs no duties (although the 501-hour limit on crediting hours does apply to employees of educational organizations during employment break periods during the calendar year).

Employees receiving short- or long-term disability payments must be credited with hours of service as long as the employer contributed directly or indirectly towards the payment. However, hours of service do not have to be credited if the employee paid for the disability coverage with after-tax contributions.

The notice states that Treasury and IRS intend to include these clarifications as proposed regulations effective as of December 16, 2015.

Comment. The effect of including these clarifications in proposed regulations is not clear. For example, some employers may have previously believed that they did not have to count hours for which an employee received short- or long-term disability payments as hours of service. They were mistaken. The new guidance doesn't change the general rule that these hours must be counted; all it does is to clarify when hours do not have to be counted — when the employee has paid for the coverage on an after-tax basis or when the recipient no longer maintains employee status.

Treatment of Individuals Not Employed by but Providing Services to an Educational Organization

The final shared responsibility regulations include a rehire rule that generally permits an employer to treat an employee who resumes providing services (or is credited with an hour of service) after going at least 13 consecutive weeks without being credited with an hour of service as a new employee. The regulations provide two special rules for employees of educational organizations. The first, which applies under both the monthly measurement method and the look-back measurement method, increases the period of time that an employee must go without being credited with an hour of service before the educational organization can treat the employee as a new hire from 13 to 26 consecutive weeks. The second rule, which applies only when the look-back measurement method is used, sets out how periods during which the employee may not be providing services, such as a summer break period, are accounted for under the look-back measurement method.

Concerned about potential abuse, Treasury and IRS announced in the notice that they intend to amend the shared responsibility regulations to require staffing agencies and other third parties to apply the special educational organization rules to those employees who provide services primarily to educational organizations — if those employees are not given a meaningful opportunity to provide services during the entire year either to the educational organization or to another service recipient. The notice specifically cites school bus drivers and cafeteria workers as the type of employees whose hours of service would have to be credited under the special rules if, for example, they are not provided meaningful employment opportunities during the educational organization's summer recess period.

Changes on the Way

Treasury and IRS intend to amend the shared responsibility regulations to require staffing agencies and other third parties to apply the special educational organization rules to those employees who provide services primarily to educational organizations if those employees are not given a meaningful opportunity to provide services throughout the entire year.

However, an employer would not be required to apply the special rule to employees who, although they primarily provide services to an educational organization, are offered a meaningful opportunity to provide services during all months of the year. The notice cites, for example, cafeteria workers who are placed at a hospital cafeteria during the summer recess period of the educational organization at which they generally work.

The notice states that the amendments will apply as of the applicability date to be specified in the regulations, which will be no earlier than the first plan year beginning after the date the proposed regulations are issued.

Application of Controlled Group/Aggregation Rules to Government Entities

Only "applicable large employers" (ALEs) are subject to the shared responsibility rules including the reporting requirement under Section 6056 of the Code. Generally, an ALE is an employer with at least 50 full-time (or full-time equivalent) employees in the prior calendar year. The number of employees is determined on a controlled group basis using the aggregation rules under Section 414 of the Code.

The notice reiterates statements in the preamble to the final shared responsibility regulations that a government entity may apply a reasonable, good faith interpretation of the employer aggregation rules in determining whether it is an ALE or a member of a group of ALEs.

Each Reporting Government Entity Employer Must Use Own EIN

Each separate government employer entity subject to a reporting requirement (either as an ALE, an ALE member, or because it provides self-insured coverage to its employees), must use its own employer identification number (EIN) in completing the reporting forms. For example, if a state treats the state executive and executive agencies, the state judiciary, and the state legislature as three separate employers that are ALE members, each of the three employers must have a separate EIN and must file the Forms 1094-C and 1095-C using its own EIN.

The notice states that this requirement still applies when a government entity has transferred the responsibility for reporting to a designated government entity (DGE). For example, if a state governmental entity agrees to be the DGE for multiple counties that are each an ALE, the state government entity would file a Form 1094-C on behalf of each county as well as a Form 1094-C on its own behalf as an employer. Each Form 1094-C would list the name and EIN of the state government entity as the DGE, and the name and EIN of the county as the employer. The Form 1094-C for each county would be accompanied by the Form 1095-C for each employee of that county and would identify the county as the employer.

> **Comment**. Although all of the examples involve Form 1094-C and Form 1095-C filings, the same rules would apply to an employer providing self-insured coverage that is filing Forms 1094-B and 1095-B.

Special ACA Situations

Employee status of AmeriCorps participants. The notice clarifies that AmeriCorps participants are not considered employees of either AmeriCorps or the grantee receiving assistance through the AmeriCorps program.

Offers of coverage under TRICARE. The notice states that an employee who becomes eligible for coverage under TRICARE for any month due to employment with an employer is treated as having received an offer of minimum essential coverage under an eligible employer-sponsored plan for that month for shared responsibility assessment and reporting requirements.

In Closing

Employers should review Notice 2015-87 to confirm that they are properly crediting hours of service for periods when no services are being performed. Governmental entities, particularly those that have delegated shared responsibility reporting to a DGE, need to ensure that their employees are reported under the correct EIN. Although the proposed changes to the rules affecting employees who primarily perform services for educational organizations may not become effective for some time, staffing agencies and other third parties that contract with educational organizations should review their staffing models to assess the impact of those changes.

Volume 39 | Issue 26 | March 3, 2016

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