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Federal Agencies Issue Guidance on 90-Day Waiting Period & Full-Time Determination

Recently released guidance provides employers with additional details regarding two issues relating to employer responsibilities under the healthcare reform law: the 90-day waiting period for group health plans and the determination of full-time employees (FTEs) for purposes of the shared responsibility rules. Even with the release of this new guidance, many issues relating to employer responsibilities under the healthcare reform law remain unanswered, particularly for employers with many part-time or seasonal employees, so employers should stay tuned for further guidance.

Background

Beginning in 2014, if an employer with 50 or more FTEs offers a health plan to FTEs but has at least one FTE enrolled in an Exchange plan and receiving the premium tax credit or cost-sharing reduction for Exchange coverage (generally individuals with household incomes between 100% and 400% of the federal poverty line), the employer must pay an assessment equal to the lesser of $3,000 per FTE on an Exchange plan or $2,000 per FTE minus the first 30 FTEs. If an employer with 50 or more FTEs does not offer health coverage and has at least one FTE enrolled in an Exchange plan and receiving the premium tax credit or cost-sharing reduction, the employer must pay up to $2,000 for each FTE minus the first 30 FTEs. The statute itself defines a FTE as one who, on average, works at least 30 hours per week, but employers have been awaiting further guidance on how that calculation is to be determined.

For plan years beginning on or after January 1, 2014, a group health plan is also not permitted to apply any waiting period that exceeds 90 days. An employer will not be subject to the shared responsibility payment for this 90-day period. Healthcare reform does not require an employer to offer coverage to any particular employee or class of employees, including part-time employees, but merely prevents an otherwise eligible employee (or dependent) from having to wait more than 90 days before coverage becomes effective. The agencies previously outlined various approaches under consideration with respect to both the 90-day waiting period limitation and the employer shared responsibility provisions.

Full-Time Employee Definition

A recently released IRS Notice describes safe harbor methods employers may use (but are not required to use) to determine which employees are treated as FTEs for purposes of the healthcare reform shared-employer responsibility provisions. The notice expands the safe harbor method described in previous guidance to provide employers the option to use a look-back measurement period to determine whether variable hour employees or seasonal employees are FTEs, without

being subject to a shared-responsibility payment for this period with respect to those employees. An employee is a variable-hour employee if, based on the facts and circumstances at the date the employee begins providing services to the employer (the start date), it cannot be determined that the employee is reasonably expected to work on average at least 30 hours per week. An employer can use a reasonable, good faith interpretation of "seasonal employee."

For ongoing employees (i.e., existing employees), an employer can determine FT status by looking back at a "standard measurement period" of 3 to 12 months (sometimes referred to as a "look-back period"). Once the employer determines the employee's part-time or FT status—based on averaging 30+ hours per week during the standard measurement period—the employer treats the employee as maintaining that status during the subsequent "stability period" regardless of the employee's hours of service during the stability period.

For variable hour and seasonal employees, an employer can determine FT status by looking back at an "initial measurement period" of 3 to 12 months. Once the employer determines the employee's part-time or FT status—based on averaging 30+ hours per week during the standard measurement period—the employer treats the employee as maintaining that status during the subsequent "stability period" regardless of the employee's hours of service during the stability period. The stability period for variable hour and seasonal employees must be the same length as the stability period for ongoing employees.

Employers are also permitted to use W-2 wages to determine if employee group health contributions are "affordable" under the shared-responsibility rules and can apply a three-month waiting period to new employees expected to work full time without incurring a shared-responsibility assessment.

90-Day Waiting Period

A DOL Technical Release, issued in substantially identical form by the IRS and HHS, provides temporary guidance for plans (whether or not grandfathered) regarding the healthcare reform 90-day waiting period limitation. The guidance defines the term "waiting period" and addresses implementation with respect to variable-hour employees where hours per service is a plan eligibility condition. The guidance also provides examples of implementation scenarios and requests comments on further examples or clarifications that may be needed.

The 90-day waiting period limitation applies to eligibility conditions based solely on the lapse of a time period. Other plan eligibility conditions (such as FT status, hours of service, job classification, or job-related licensure requirements) are generally permissible unless they are designed to avoid compliance with the 90-day waiting period limitation. For example, the agencies will consider an hours of service requirement exceeding 1,200 hours to be designed to avoid compliance.

If a plan conditions eligibility on working a specified number of hours per period or working FT, the plan can take a reasonable period of time to determine whether the employee meets that condition. This period can include a measurement period consistent with the timeframes for determining FT status (described above). However, coverage must be effective no later than 13 months from the employee's start date, plus any time remaining until the first day of the next calendar month (if the start date is not the first day of the calendar month). Otherwise, agencies may consider the plan to be designed to avoid compliance with the 90-day waiting period limitation.

Additional Guidance and Request for Comments

The definition of FTE is a key item in determining whether an employer will be subject to the

shared responsibility payment. The safe harbors are optional but likely will be useful for employers, particularly with respect to new, part-time, and seasonal employees. Employers can rely on this new guidance at least through the end of 2014.

The agencies intend to issue additional guidance and are specifically seeking comments on whether, and if so, what types of safe harbor methods should be available to employers in determining FT status of short-term assignment employees, temporary staffing employees, employees hired into high-turnover positions, and other categories of employees that may present special issues. They also seek comments on whether, and if so, what types of additional relevant factors and safe harbors 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, including whether the employee is a variable-hour employee. They are also considering rules to address coordination of differing measurement and stability periods following a merger or acquisition and how to define seasonal employees.

Should you have questions about this or any aspect of healthcare reform, contact your Conner Strong & Buckelew account representative toll free at 1-877-861-3220. For a complete list of Legislative Updates issued by Conner Strong & Buckelew, visit our online Resource Center.

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