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Guidance Issued on Employer Shared Responsibility Provisions

Just before the new year, the IRS released proposed regulations and a new questions and answers document that address the employer shared responsibility (pay or play) penalties under the healthcare reform law. Starting in 2014, employers employing at least a certain number of employees (generally 50 full-time employees and full-time equivalents) will be subject to the employer shared responsibility provisions. If these employers do not offer affordable health coverage that provides a minimum level of coverage to their full-time employees (FTEs), they may be subject to one of two shared responsibility penalties if at least one of their FTEs receives a premium tax credit for purchasing individual coverage in one of the new affordable insurance exchanges. Employers may now rely on these proposed regulations and if the final regulations are more restrictive than the guidance in the proposed regulations, the final regulations will be applied prospectively, and employers will be given sufficient time to come into compliance with the final regulations.

The new proposed regulations condense previous guidance on the shared responsibility penalty and incorporate and modify the safe harbor guidance concerning the FTE calculations. The following outlines some highlights from the new guidance.

Effective date. The employer shared responsibility penalty provisions generally go into effect on January 1, 2014. Employers will use information about the employees they employ during 2013 to determine whether they employ enough employees to be subject to these new provisions in 2014.

Non-calendar year plans. An employer with a non-calendar year plan in existence on December 27, 2012 that offers employees affordable coverage that satisfies the minimum value requirement by the first day of the plan year starting in 2014, will not be assessed a shared responsibility penalty for any period in 2014 prior to the beginning of the 2014-2015 plan year. In addition, during the 2013-2014 plan year, an employer may permit participants who pay for health coverage through a cafeteria plan to make one mid-year election change to drop the coverage to enroll in exchange coverage. Employers may also permit employees who previously declined employer coverage to enroll in that coverage through the cafeteria plan, even if they had experienced no change in status event. An amendment to the cafeteria plan must be made by December 31, 2014, and be effective retroactively to the date of the first day of the 2013 plan year of the cafeteria plan.

Offer coverage to "substantially all" FTEs and their dependent children up to age 26. If an employer offers health coverage to all but 5% of its FTEs (or, if greater, 5 employees), it will be treated as offering coverage to its FTEs. Coverage generally will be considered offered to an employee only if it is also offered to the employee's dependents. However, the proposed regulations include a transition rule for employers that do not currently offer dependent coverage. Employers that take steps during the 2014-2015 plan year to offer dependent coverage will not be subject to the play or pay penalty solely for failing to satisfy this requirement. There is no requirement that an employer offer coverage to employees' spouses.

Employees who do not clock time. The Treasury Department and the IRS are continuing to consider, and invite further comment on, how best to determine the FT status of employees whose compensation is not based primarily on hours and employees whose active work hours may be subject to safety-related limits (for example, salespeople compensated on a commission basis, adjunct faculty, transportation employees). Until further guidance is issued, employers of employees in positions that raise issues with respect to the crediting of hours of service must use a reasonable method for crediting hours of service. A method of crediting hours would not be reasonable if it took into account only some of an employee's hours of service with the effect of recharacterizing, as non-FT, an employee in a position that traditionally involves more than 30 hours of service per week. For example, it would not be a reasonable method of crediting hours to fail to take into account travel time for a travelling salesperson compensated on a commission basis, or in the case of an instructor, such as an adjunct faculty member, to take into account only classroom or other instruction time and not other hours that are necessary to perform the employee's duties, such as class preparation time.

Two or more related companies. Companies that have a common owner or are otherwise related are generally combined together for purposes of determining whether or not they are a large employer (at least 50 FTEs). But if the combined total meets the threshold, then each separate company will determine whether they owe a penalty payment. For example, if an applicable large employer is comprised of a parent corporation and 10 wholly owned subsidiary corporations, each of the 11 corporations, regardless of the number of employees, is an applicable large employer member.

Affordable coverage. If an employee's share of the premium for employer-provided coverage would cost the employee more than 9.5% of that employee's annual household income, the coverage is not considered affordable for that employee. If an employer offers multiple healthcare coverage options, the affordability test applies to the lowest-cost option available to the employee that also meets the minimum value requirement. Because employers generally will not know their employees' household incomes, the IRS previously set out a safe harbor under which employers can avoid a payment if the required employee contribution for self-only coverage would not exceed 9.5% of the employee's Form W-2 wages (as reported in Box 1 of the employee's Form W-2, which excludes 401(k) elective deferrals and section 125 cafeteria plan salary reduction contributions). Two additional safe harbor options are also now available– one for the rate of pay and one for the federal poverty level (FPL). The rate of pay safe harbor bases affordability on a salaried employee's monthly salary; for an hourly employee, the hourly rate of pay times 130 hours per month would be the monthly wage. If the employee's required monthly contribution for self-only coverage does not exceed 9.5% of the monthly wages, the employer coverage would be affordable. The FPL safe harbor bases affordability on the FPL for a single individual. If the employee contribution for self-only coverage does not exceed 9.5% of the FPL, the employer coverage would be deemed affordable for all employees.

Minimum value. A minimum value calculator will be made available by the IRS and the Department of Health and Human Services (HHS). The minimum value calculator will work in a similar fashion to the actuarial value calculator (and methodology) that HHS made available. Employers can input certain information about the plan, such as deductibles and co-pays, into the calculator and get a determination as to whether the plan provides minimum value by covering at least 60% of the total allowed cost of benefits that are expected to be incurred under the plan.

Payment calculation if no coverage offered. In 2014, if an employer employs enough employees to be subject to the employer shared responsibility provisions and does not offer coverage during the calendar year to at least 95% of its FTEs, it owes a penalty payment equal to the number of FTEs the employer employed for the year (minus 30) multiplied by $2,000, as long as at least one FTE receives the premium tax credit. For an employer that offers coverage for some months but not others during the calendar year, the payment is computed separately for each month for which coverage was not offered. The amount of the payment for the month equals the number of FTEs the employer employed for the month (minus up to 30) multiplied by 1/12 of $2,000. If the employer is related to other employers, then the 30-employee exclusion is allocated among all the related employers. The payment for the calendar year is the sum of the monthly payments computed for each month for which coverage was not offered. After 2014, these rules apply to employers that do not offer coverage or that offer coverage to less than 95% of their FTEs and the dependents of those employees.

Payment calculation if sub-standard coverage offered. For an employer that offers sub-standard coverage to at least 95% of its FTEs in 2014, and has one or more FTEs who receive a premium tax credit, the payment is computed separately for each month. The amount of the payment for the month equals the number of FTEs who receive a premium tax credit for that month multiplied by 1/12 of $3,000. The amount of the payment for any calendar month is capped at the number of the employer’s FTEs for the month (minus up to 30) multiplied by 1/12 of $2,000. (The cap ensures that the payment for an employer that offers coverage can never exceed the payment that employer would owe if it did not offer coverage). After 2014, these rules apply to employers that offer coverage to at least 95% of FTEs and the dependents of those employees.

Making a shared responsibility payment. The IRS will contact employers to inform them of their potential liability and provide them an opportunity to respond before any liability is assessed or notice and demand for payment is made. The contact for a given calendar year will not occur until after employees’ individual tax returns are due for that year claiming premium tax credits and after the due date for employers that meet the 50 FTEs (plus FT equivalents) threshold to file the information returns identifying their FTEs and describing the coverage that was offered (if any). If it is determined that an employer is liable for a payment after the employer has responded to the initial IRS contact, the IRS will send a notice and demand for payment. That notice will instruct the employer on how to make the payment. Employers will not be required to include the payment on any tax return that they file.

The Obama administration continues to issue regulations implementing healthcare reform according to the original timetable set out under the 2010 law. Accordingly, employers are advised to continue to monitor healthcare reform developments. Should you have questions about this or any aspect of federal health insurance reform, contact your Conner Strong & Buckelew account representative toll free at 1-877-861-3220. For a complete list of Legislative Updates issued by

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