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IRS Asks for Comments on Employer Mandate "Shared Responsibility" Provisions

Starting in 2014, employers with 50 or more full-time (FT) employees that do not offer affordable health coverage to their FT employees (FTEs) may be required to make a “shared responsibility” payment. The IRS has released a press release and Notice 2011-36 giving large employers an advance look at how it plans to formulate guidance on the shared responsibility provisions. Specifically, the notice outlines possible approaches employers could use to determine who is a FTE and issues related to the 90-day limit for waiting periods. The notice does not constitute guidance. Instead, it describes potential approaches, which could be incorporated in future proposed regulations, to certain discrete issues, particularly the issue of who is a FTE, and invites interested parties to provide comments on the proposed approach. The deadline for public comments is June 17, 2011.

Healthcare Reform Background. Beginning in 2014, healthcare reform requires that individuals maintain minimum essential health coverage, which includes individual coverage, coverage under an eligible employer plan or grandfathered plan, or coverage under a federal program such as Medicare and Medicaid. A tax penalty will be imposed on any applicable individual for any month after 2013 in which he or she fails to maintain minimum essential coverage.

By 2014, states will be provided funds to operate health benefit “exchanges” to make it easier for individuals to purchase coverage. The exchanges will offer insurance plans to individuals, families, and employers. Plans offered under the exchanges will have to provide “essential health benefits” and meet certain deductible and out-of-pocket limits. Individuals will be able to purchase different levels of coverage: bronze (60% coverage), silver (70% coverage), gold (80% coverage), or platinum (90% coverage).

A new refundable tax credit (the “premium credit”) will also be available for people with household incomes at or below 400% of the federal poverty level (FPL) who buy insurance exchange coverage. In addition, these individuals may also be eligible for cost-sharing (e.g., deductibles, co-payments) reductions to offset out-of-pocket expenses under certain exchange plans.

Employers are not required to provide health insurance, but beginning in 2014, certain “large” employers with 50 or more FTEs may be required to pay a penalty if they don't provide coverage or if they provide coverage that doesn’t meet the minimum value test or is unaffordable. (The Congressional Research Service (CRS) released a report dated June 2, 2010 that summarizes in

detail the potential employer penalties beginning in 2014.) Affordable employer health coverage caps the employee contribution at 9.5% of a FTE's household income. As to the minimum value test, an employer plan must pay at least 60% of total costs for allowed benefits (i.e., the copayment, deductible and other out-of-pocket expenses for allowed benefits can't exceed 40% of total benefit costs). Health insurance exchanges will inform an employer when one of its employees qualifies for premium tax credits because the employer's plan doesn't meet the minimum value test or is unaffordable. To help exchanges make that determination, employees will have to provide information about their employer-sponsored benefit plans and family income.

Only Large Employers are Potentially Subject to Penalty. A "large employer" is any public or private employer with more than 50 FT equivalent employees during the preceding calendar year. In order to determine whether an employer is a "large employer," both FT and part-time (PT) employees are included in the calculation. "Full-time employees" are those working 30 or more hours/week. The number of FTEs excludes those FT seasonal employees who work for less than 120 days during the year. The hours worked by PTEs (i.e., those working less than 30 hours/week) are included in the calculation of a large employer, on a monthly basis, by taking their total number of monthly hours worked divided by 120. For example, an employer has 35 FTEs (30+ hours) and 20 PTEs who all work 24 hours per week (96 hours/month). These PTE hours would be treated as equivalent to 16 FTEs, based on the following calculation: 20 employees x 96 hours/120 = 1920/120 = 16. Thus, in this example, the employer would be considered a "large employer," based on a total FT equivalent count of 51—that is, 35 FTEs plus 16 FT equivalents.

Penalties for Large Employers. Large employers will face shared-responsibility penalties ***only*** if at least one FTE enrolled in insurance exchange coverage has received federal financial assistance. One penalty structure will apply to employers that do not offer coverage to FTEs. Another penalty structure will apply to employers whose health coverage for FTEs fails the afford¬ability and minimum value tests.

- An applicable large employer *not offering coverage*, will face an annual penalty amount of up to $2,000 for every FTE, excluding the first 30 FTEs.
- An applicable large employer *offering coverage defined as "unaffordable"* (coverage fails the minimum value or affordability tests), will face an annual penalty of up to $3,000 for each FTE enrolled in insurance exchange coverage with federal financial assistance. The employer's total penalty liability is limited, however – the maximum amount is calculated by multiplying $2,000 by the employer's total number of FTEs – regardless of exchange coverage or eligibility for assistance – after subtracting 30 full-time employees.

For purposes of these penalty calculations, a FTE includes only those individuals working 30 hours/week or more. PTEs are not included in penalty calculations (even though they are included in the determination of a "large employer"). An employer will not pay a penalty for any PTE, even if that PTE receives a premium credit.

Comments Requested. Notice 2011-36 invites comments on a number of possible rules, definitions, and approaches for interpreting and applying the above penalty rules:

- Section III of the notice addresses potential definitions of employer, employee, and hours of service.
    - Employer and employee would be determined under the common-law test. Existing Department of Labor (DOL) rules would be used to identify seasonal employees,

such as retail workers employed exclusively during holiday seasons. And 130 hours of service in a calendar month would be treated as the monthly equivalent of at least 30 hours of service/week.
    - Hours of service for hourly employees would be actual hours of service from records of hours worked and hours for which payment is made or due (payment is made or due for vacation, holiday, illness, incapacity, etc.).
    - For non-hourly employees, employers could calculate the number of hours of service under any of the following methods: (1) actual hours of service from records of hours worked and hours for which payment is made or due for vacation, holiday, illness, incapacity, etc.; (2) using a days-worked equivalency method where the employee is credited with eight hours of service for each day for which the employee would be required to be credited with at least one hour of service; or (3) using a weeks-worked equivalency of 40 hours of service/week for each week for which the employee would be required to be credited with at least one hour of service. An employer wouldn't have to use the same method for all non-hourly employees, but could apply different methods for different classifications of non-hourly employees, if the classifications are reasonable and consistently applied. In addition, an employer could change the method of calculating non-hourly employees' hours of service for each calendar year.
- Section IV describes a possible method for determining whether an employer is an applicable large employer for a calendar year.
    - The number of FTEs for each calendar month in the preceding calendar year would be determined by: (1) calculating the aggregate number of hours of service (but not more than 120 hours of service for any employee) for all employees who were not FTEs for that month; and (2) dividing the total hours of service in step (1) by 120. The result is the number of FTEs for the calendar month. In determining the number of FTEs for each calendar month, fractions would be taken into account. Special rules would apply to seasonal employees and a complex, six-step process would be used to determine the number of FTEs in the preceding calendar year.
- Section V outlines possible rules that could be used to determine an employee's FT status for purposes of calculating an employer's assessable payment.
    - The IRS is considering proposing possible alternatives to a month-by-month determination of FTE status for purposes of calculating an applicable large employer's potential assessable payment. One possible alternative would permit applicable large employers, at their option, to use a look-back/stability period safe harbor.
- Section VI contains a more general request for comments, including comments on the 90-day waiting period limitation and the interaction of the rules.
    - Starting in 2014, group health plans can't have waiting periods exceeding 90 days. The Departments are seeking comments on which employees are now subject to waiting periods, when waiting periods apply after an employee's date of hire, and how the 90-day limitation should be calculated (for example, should the 90-day waiting period provisions be interpreted to require aggregating discrete periods of service or should plans be permitted to require continuous service to satisfy the waiting period).
    - Comments can be submitted through June 17, 2011 using any of the methods described at the end of the notice. The next step, after considering the comments, would be publication of proposed regulations.

Although the notice does not offer official guidance, it does offer specific examples and details and outlines possible approaches employers could use to determine who is a FTE. Employers may want to review the notice as it describes potential approaches which could be incorporated in future proposed regulation.

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

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