

## Health Care Reform Update: Large Employers Must Offer Health Coverage or Pay Assessment

By Mark C. Jones and Lori Patrick

*Beginning in 2014, large U.S. employers that do not offer a minimum level of affordable health coverage to their full-time employees may be required to pay an assessment of up to \$3,000 per employee. For plan years beginning in 2015, the Internal Revenue Service (“IRS”) is proposing to extend this assessment to employers that fail to offer adequate health coverage to the children (up to age 26) of their full-time employees. Proposed “pay or play” regulations released on December 28, 2012 also include rules for determining whether an entity is a “large employer” subject to the shared responsibility requirements, identifying which employees and dependents must be offered coverage, and calculating any payment that may be due.*

### What Are the Shared Responsibility Payments?

Beginning in 2014, an employer will owe a shared responsibility payment for any month in which it:

- Offers health coverage to less than 95% of its full-time employees (or their dependents after 2014), and at least one full-time employee receives a premium tax credit to help pay for coverage from a health care exchange; or
- Offers health coverage that is unaffordable or does not provide minimum value, and at least one full-time employee receives a premium tax credit to help pay for coverage from a health care exchange.

**Affordable Coverage.** Coverage is considered to be unaffordable for an employee if the employee’s share of the premium would cost more than 9.5% of his or her annual household income. Under the proposed regulations, employers that otherwise provide adequate health coverage to their full-time employees may assume that the health coverage they offer is affordable for purposes of the shared responsibility payment, if the cost of coverage to an employee would not exceed:

- 9.5% of the wages the employer pays the employee that year, as reported on Form W-2;

- 9.5% of the employee's wages (computed for salaried employees using their monthly salary and for hourly employees by multiplying their hourly rate of pay by 130 per month); or
- 9.5% of the Federal poverty line for a single individual living in the state in which the employee is employed.

*Minimum Value.* To satisfy the minimum value requirement, a plan's share of the total allowed cost of benefits must equal or exceed 60% of such costs. In regulations issued last year, the IRS and Department of Health and Human Services ("HHS") proposed a minimum value calculator to help sponsors determine whether a plan meets this requirement. As an alternative, a sponsor may compare the plan to a checklist of features to be published by the IRS and HHS. If a plan contains non-standard provisions that are not suitable for the use of the calculator and the plan does not fit the safe harbor checklists, the sponsor may retain an actuary to certify the plan's minimum value.

### Who Is Subject to the Shared Responsibility Rules?

The shared responsibility provisions apply only to "applicable large employers." An applicable large employer is one that employed an average of at least 50 full-time employees, including full-time equivalent employees, across its controlled group during the preceding calendar year (or, for 2014, during any selected 6-month period in 2013). If the combined total meets the 50-employee threshold, then the shared responsibility rules apply to each member of the controlled group.

*Full-Time Employee.* An employee is considered to be full time in any month if he or she is employed at least 30 hours per week, or 130 hours for the month.

*Full-Time Equivalent.* The number of full-time equivalent employees in any month is determined by calculating the total hours of service (not to exceed 120 for any employee) for all employees who were employed on average less than 30 hours of service per week for the month, and then dividing that total by 120. "Hours of service" includes paid time off for vacation, holidays, illness, disability, jury duty, military duty and leaves of absence, but excludes service relating to non-U.S. sourced income.

*Seasonal Workers.* An employer that would not be an applicable large employer in any year but for the employment of one or more seasonal workers over a period of up to 4 months or 120 days will not be subject to the shared responsibility provisions for the year.

### How Are the Shared Responsibility Payments Calculated?

If an applicable large employer does not offer coverage during the calendar year to at least 95% of its full-time employees, it will owe an amount equal to the number of full-time employees employed for the year (minus 30), multiplied by \$2,000, if at least one full-time employee receives the premium tax credit. If an employer offers coverage to at least 95% of its full-time employees, but has one or more full-time employees who receive a premium tax credit, it will owe an amount equal to the number of full-time employees who receive a premium tax credit, multiplied by \$3,000 (but no more than it would owe if it did not offer coverage at all). Although the 30-employee reduction applies on a controlled group basis, the shared responsibility payment applies solely to the employer of the employees who receive the tax credit. The payments are calculated on a monthly basis and indexed to increases in projected per capita national health expenditures.

*Full-Time Employee.* The shared responsibility payment is assessable only for full-time employees who are expected to work at least 30 hours per week. In order to allow employers to determine in advance which

employees would be full-time employees, the proposed regulations permit employers to determine an employee's status by looking back at a measurement period of 3 to 12 months. Employees who are determined to work at least 30 hours per week during the measurement period would generally be assumed to remain full-time employees for a subsequent stability period of 6 to 12 months. The proposed regulations include alternative look-back rules that may be used for employees who work variable hour schedules, teachers who have time off between school years and seasonal employees.

*Dependents.* An employer may also be subject to a shared responsibility payment if it fails to offer adequate coverage to an employee's dependents. A "dependent" for this purpose is an employee's child who is under 26 years of age, including natural children, step-children, adopted children and eligible foster children. The proposed regulations do not define "dependent" to include an employee's spouse. Therefore, no assessment would be due because an employer failed to offer spousal coverage.

*Transition Period.* In order to accommodate employers that would like to use 2013 data to determine their full-time employees for 2014, the IRS will permit a shorter measurement period for this year, provided it is at least 6 months long and begins no later than July 1, 2013.

### Other Transition Relief

The proposed regulations provide transition relief for employers that, as of December 27, 2012, maintain health plans that operate on a fiscal year. Relief is also available with respect to dependent coverage for any employer that takes steps toward offering such coverage during the plan year that begins in 2014.

In addition, employers that offer group health coverage through a cafeteria plan with a fiscal year beginning in 2013 may permit participants to make one mid-year election change to drop such coverage in order to purchase coverage on a health care exchange. In 2013, employees who had previously chosen not to enroll in group health coverage may also be permitted to enroll in that coverage mid-year in order to avoid penalties under the individual mandate. Employers implementing these rules must amend their cafeteria plans by December 31, 2014, retroactive to the first day of the 2013 plan year.

### Actions to be Taken

In anticipation of the implementation of the shared responsibility rules in 2014, employers are encouraged to take the following actions:

- Determine whether it is an "applicable large employer" subject to the rule;
- Elect a method to determine which employees are "full-time employees" that must be offered health insurance, and consider whether the plan should be amended to close any gaps in coverage;
- Calculate whether the employer's existing health plans are "affordable" and provide "minimum value," in coordination with insurers and third-party administrators, and consider whether benefits or costs should be adjusted for 2014;
- For an employer that has fiscal-year plans, amend its cafeteria plan to allow participants to make mid-year election changes.

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