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Employment, Labor & Benefits Alert

SEPTEMBER 4, 2012

# Agencies Issue Long Awaited Guidance under Affordable Care Act's Employer Shared Responsibility Rules and 90-Day Waiting Period Limit

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The Patient Protection and Affordable Care Act (the "Act") imposes new obligations—referred to as "employer shared responsibility" standards (a/k/a "pay-or-play" requirements) — on employers with 50 or more full-time equivalent employees. These rules, which are set out in newly added Internal Revenue Code § 4980H, will increase administrative burdens for all affected employers and increase costs for many or most. The Act also imposes comprehensive new requirements on health insurance issuers in the individual and group markets and group health plans maintained by all employers irrespective of size. These requirements include a limit of 90 days on the maximum length of waiting periods that plans may impose. The 90-day waiting period limitation appears in newly added Public Health Service Act § 2708. It is also incorporated by reference into both the Employee Retirement Income Security Act and the Internal Revenue Code. As a result, the limitation applies to health insurance issuers and to group health plans in the public and private sectors, including church-sponsored plans.

Two recent guidance items shed light on the application of the employer shared responsibility rules and the 90-day waiting period limitation.

- *IRS Notice 2012-58*. IRS Notice 2012-58 describes safe harbor methods that employers may use to determine which employees are treated as full-time employees for purposes of the employer shared responsibility rules. Building on prior guidance, Notice 2012-58 clarifies an existing safe harbor for ongoing employees and provides a separate safe harbor for new hires.
- *IRS Notice 2012-59*. IRS Notice 2012-59, Department of Labor Technical Release 2012-02, and an HHS Bulletin entitled "Guidance on 90-Day Waiting Period Limitation under Public Health Service Act § 2708" each provide temporary guidance regarding the 90-day waiting period limitation.

Together these notices offer rules that are for the most part favorable to employers, particularly those in industries with large cohorts of contingent workers, e.g., retail, franchise, construction, hospitality, and temporary staffing. But while regulators have furnished standards that are generally workable in light of the underlying statutory provisions, the resulting costs and administrative burdens are not insubstantial.

## Background

### Employer Shared Responsibility

The Act's employer shared responsibility requirements apply to "applicable large employers." An applicable large employer means "an employer that employed at least 50 full-time employees, including full-time equivalent employees, on business days during the preceding calendar year." Thus, whether an employer is an applicable large employer depends on the number of full-time equivalent employees (FTEs), which includes full-time and part-time employees. In contrast, "assessable payments" (discussed below) are determined on the basis of full-time employees only. The Act provides that a "full-time employee" with respect to any month is an employee who is employed on average at least 30 hours of service per week. In Notice 2011-36, the IRS said that it expects that 130 hours of service in a calendar month would be treated as the monthly equivalent of 30 hours of service per week.

Beginning in 2014, each applicable large employer is subject to an assessable payment if any full-time employee is certified as eligible to receive an applicable premium tax credit or cost-sharing reduction and either:

- *No-coverage prong*. The employer fails to offer to all its "full-time employees" (and their dependents) the opportunity to enroll in "minimum essential coverage" under an "eligible employer-sponsored plan." Under this prong, if an employer fails to make an offer of coverage to its full-time employees, an assessable payment is imposed monthly in an amount equal to $166.67 multiplied by the number of the employer's full-time employees, excluding the first 30.
- *Coverage prong*. The employer offers its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan that, with respect to a full-time employee who qualifies for a premium tax credit or cost-sharing reduction, either is (1) "unaffordable" or (2) does not provide "minimum value." If the employer makes the requisite offer of coverage, the assessable payment is equal to $250 per month multiplied by the number of full-time employees who qualify for and receive a premium tax credit or cost-sharing reduction from a health insurance exchange. The amount of the assessable payment under the coverage prong is capped at the amount that would be charged under the no-coverage prong. As a result, an employer that offers group health plan coverage can never be subject to a larger assessable payment than that imposed on a similarly situated employer that does not offer group health plan coverage.
    - "Minimum essential coverage" includes coverage under an "eligible employer-sponsored plan." An eligible employer-sponsored plan includes "group health plans offered in the small or large group market within a state" but does not include "excepted benefits" as defined and described under the Public Health Service Act, e.g., stand-alone vision or dental benefits, hospital indemnity plans, etc.
    - Employer-provided health insurance coverage is deemed "unaffordable" if the premium required to be paid by the employee exceeds 9.5% of the employee's household income. In Notice 2011-73, the IRS proposed a safe harbor under which an employer would be permitted to determine affordability on the basis of a employee's income as reported on his or her Form W-2 (in Box 1) instead of household income. Notice 2012-58 refers to this substitution of W-2 income for household income as the "affordability safe harbor."
    - Coverage is deemed to provide "minimum value" if it pays for at least 60% of all plan benefits, without regard to co-pays, deductibles, co-insurance, and employee premium contributions. The IRS prescribed rules governing the determination of minimum value in Notice 2012-31. That guidance establishes rules for determining minimum value based on guidance previously issued by the Department of Health and Human Services relating to actuarial value but modified to reflect differences in benefits offered and populations covered under large, fully-insured plans and self-funded plans.

### 90-Day Waiting Period Limitation

For plan years beginning on or after January 1, 2014, a group health plan or group health insurance issuer must not apply any waiting period that exceeds 90 days. Previously issued rules under the Health Insurance Portability and Accountability Act define a waiting period to mean "the period that must pass before coverage for an employee or dependent who is otherwise eligible to enroll under the terms of a group health plan can become effective." The IRS has proposed in previous guidance that assessable payments would not be imposed during a 90-day waiting period that complies with the requirements of the Act.

## Notice 2012-58

The Act's employer shared responsibility rules apply month-by-month. Recognizing that a month-by-month application would be administratively challenging, the IRS in Notice 2011-36 proposed to permit employers to use an optional "look-back/stability period safe harbor" to determine whether ongoing (but not newly hired) employees are full-time employees for purposes of Code § 4980H. Under the look-back/stability period safe harbor, an employer would determine each employee's full-time status by looking back at a period of not less than three but not more than 12 consecutive calendar months to determine whether the employee averaged at least 30 hours of service per week. Notice 2011-36 refers to the look-back period as the "measurement period." If an employee is determined to be a full-time employee during the measurement period, then he or she would be treated as a full-time employee during a subsequent "stability period," regardless of the employee's number of hours of service during the stability period (so long as he or she remained an employee).

For an employee determined to be a full-time employee during the measurement period, the stability period would be a period of at least six consecutive calendar months that follows the measurement period and no shorter than the measurement period. If the employee is determined not to be a full-time employee during the measurement period, the employer would be permitted to treat the employee as not a full-time employee during a stability period that followed the measurement period.

In Notice 2012-17, the IRS sought to expand the look-back/stability period safe harbor to include newly hired employees. While the look-back/stability period safe harbor as applied to ongoing employee was well received, the IRS's original efforts to expand the safe harbor to newly hired employees was not. Notice 2012-58 modifies the look-back/stability period safe harbor for new hires in an effort to provide rules that are both flexible and administrable.

## Look-Back/Stability Period Safe Harbor — Ongoing Employees

For ongoing employees, Notice 2012-58 generally adopts the look-back/stability period safe harbor originally proposed in Notice 2011-36, with a handful of definitional changes. The term "measurement period" is changed to "standard measurement period" to distinguish it from the "initial measurement period" proposed for newly hired employees (discussed below). An "ongoing employee" is an employee who has been employed by the employer for at least one complete standard measurement period. The standard measurement period is defined as a time period of not less than three but not more than 12 consecutive calendar months, as chosen by the employer, that is applied on a uniform and consistent basis for all employees in the "same category." Categories include:

- Collectively bargained employees and non-collectively bargained employees;
- Salaried employees and hourly employees;
- Employees of different entities; and
- Employees located in different States.

Under the safe harbor method for ongoing employees, an employer determines each ongoing employee's full-time status by looking back at the standard measurement period. If, for example, an employer selected a standard measurement period of 12 months, the employer could choose to make it the calendar year, a non-calendar plan year, or a different 12-month period, such as one that ends shortly before the start of the plan's annual open enrollment season. If the employer determines that an employee averaged at least 30 hours per week during the standard measurement period, then the employer must treat the employee as a full-time employee during the subsequent stability period. If the employee did not work full-time during the standard measurement period, the employer would be permitted to treat the employee as not a full-time employee during the stability period that follows, but is not longer than, the standard measurement period.

## Option to Use Administrative Period — Ongoing Employees

Recognizing that employers may need time between the standard measurement period and the associated stability period to determine which ongoing employees are eligible for coverage and to notify and enroll employees, Notice 2012-58 provides for an "administrative period" of up to 90 days that commences before the standard measurement period ends and before the associated stability period begins. An administrative period may neither reduce nor lengthen the measurement period or the stability period. Ongoing employees who are eligible for coverage because of their status as full-time employees based on a prior measurement period must continue to be offered coverage during the administrative period.

> Example 1: An employer chooses a 12-month stability period that begins January 1 and a 12-month standard measurement period that begins October 15. The period between the end of the standard measurement period (October 14) and the beginning of the stability period (January 1) is the administrative period. Previously-determined full-time employees already enrolled in coverage

must continue to be offered coverage during the administrative period.

## Newly Hired Variable Hour Employees and Seasonal Employees

Notice 2012-58 provides rules governing the treatment of "new variable hour employees or seasonal employees" as full-time employees for Code § 4980H purposes.

- A new employee is a "variable hour employee" if, based on the facts and circumstances at the start date, it cannot be determined that the employee is reasonably expected to work on average at least 30 hours per week. A new employee who is expected to work initially at least 30 hours per week may be a variable hour employee if, based on the facts and circumstances at the start date, the period of employment at more than 30 hours per week is reasonably expected to be of limited duration and it cannot be determined that the employee is reasonably expected to work on average at least 30 hours per week over the initial measurement period. Thus, for example, a variable hour employee would include a retail worker hired at more than 30 hours per week for the holiday season who is reasonably expected to continue working after the holiday season but is not reasonably expected to work at least 30 hours per week for the portion of the initial measurement period remaining after the holiday season
- While the Act defines the term "seasonal worker" (generally with reference to regulations issued by the Secretary of Labor), it does not address how the term "seasonal employee" might be defined for purposes of determining the amount of any assessable payment under Code § 4980H. Notice 2012-58 fills this gap, at least temporarily, by permitting employers to use "a reasonable, good faith interpretation of the term 'seasonal employee' for purposes of this notice."

## Look-Back/Stability Period Safe Harbor — Newly Hired Variable Hour Employees

It is with respect to newly-hired variable hour and seasonal employees that Notice 2012-58 diverges from prior guidance by introducing the concept of an initial measurement period. The "initial measurement period" must be between three and 12 months, as selected by the employer. The employer measures the hours of service completed by the new employee during the initial measurement period and determines whether the employee completed an average of 30 hours of service per week or more during this period. If a new variable hour or seasonal employee is determined *not* to be a full-time employee during the initial measurement period, the employer may treat the employee as not a full-time employee during the stability period that follows the initial measurement period. But the stability period must not:

- Be more than one month longer than the initial measurement period, nor
- Exceed the remainder of the standard measurement period, plus any associated administrative period for new hires (explained below), in which the initial measurement period ends.

> Example 2: For new variable hour employees, an employer uses a six-month initial measurement period that begins on the start date and applies an administrative period that runs from the end of the initial measurement period through the end of the first full calendar month beginning after the end of the initial measurement period. Employee Z is hired May 10, 2014. His initial measurement period runs from May 10, 2014, through November 9, 2014, during which he works an average of 30 hours per week. The employer offers coverage to Z for a stability period that runs from January 1, 2015 through June 30, 2015. Here, the employer uses (1) an initial measurement period that does not exceed 12 months; (2) an administrative period totaling not more than 90 days; and (3) a combined initial measurement period and administrative period that does not last longer than the final day of the first calendar month beginning on or after the one-year anniversary of Employee Z's start date. The employer is not subject to any payment under Code § 4980H.

## Transition from New Employee Rules to Ongoing Employee Rules

Once a newly-hired employee has been employed for an initial measurement period, he or she must then be tested for full-time status under the rules governing standard measurement periods at the same time and under the same conditions as other ongoing employees. For example, an employer with a calendar year standard measurement period that also uses a one-year initial measurement period beginning on the employee's start date would test a new variable hour employee whose start date is February 12 for full-time status first based on the initial measurement period (February 12 through February 11 of the following year) and again based on the calendar year standard measurement period (if the employee continues in employment for that entire standard measurement period) beginning on January 1 of the year after the start date.

Where an employee is a full-time employee during an initial measurement period but not during the standard measurement period that begins within the initial measurement period, the employer may treat the employee as not a full-time employee only *after* the end of the stability period associated with the initial measurement period. If the employee is determined not to be a full-time employee during the initial measurement period, but is determined to be a full-time employee during the overlapping or immediately following standard measurement period, the employee must be treated as a full-time employee for the entire corresponding stability period.

### Option to Use Administrative Period — Newly-Hired Employees

Notice 2012-58 provides for a separate administrative period for newly-hired employees, which cannot exceed 90 days and which includes all periods between the start date of a new variable hour or seasonal employee and the date the employee is first offered coverage under the employer's group health plan, other than the initial measurement period. The combined length of the initial measurement period and the administrative period cannot extend beyond the last day of the first calendar month beginning on or after the first anniversary of the employee's start date. The following examples help illustrate how administrative periods apply to new variable hour employees.

> Example 3: An employer adopts a 12-month initial measurement period that begins on the start date and applies an administrative period from the end of the initial measurement period through the end of the first calendar month beginning on or after the end of the initial measurement period. Employee Y is hired on May 10, 2014. Employee Y's initial measurement period runs from May 10, 2014, through May 9, 2015. Employee Y works an average of 30 hours per week during this initial measurement period. The employer offers coverage to Employee Y for a stability period that runs from July 1, 2015 through June 30, 2016. Because Employee Y works an average of 30 hours per week during his initial measurement period and the employer uses (1) an initial measurement period that does not exceed 12 months; (2) an administrative period totaling not more than 90 days; and (3) a combined initial measurement period and administrative period that does not last beyond the final day of the first calendar month beginning on or after the one-year anniversary of Employee Y's start date, the employer is not subject to any payment under Code § 4980H.

> Example 4: Same facts as Example 3 except that the employer selects an 11-month initial measurement period that begins on the start date and applies an administrative period from the end of the initial measurement period until the end of the second calendar month beginning after the end of the initial measurement period. Employee Y's initial measurement period runs from May 10, 2014, through April 9, 2015, and the employer offers coverage to Employee Y for a stability period that runs from July 1, 2015 through June 30, 2016. The result is the same: the employer is not liable for an assessable payment under Code § 4980H.

In the first example, the 12-month initial measurement period was followed by a 1-plus partial month administrative period; in the second example, an 11-month initial measurement period was followed by a 2-plus partial month period. In each case, the combined initial measurement period and administrative period does not last beyond the final day of the first calendar month beginning on or after the one-year anniversary of the employee's start date.

## Notice 2012-59

For plan years beginning on or after January 1, 2014, a group health plan or health insurance issuer offering group health insurance coverage is barred from applying any waiting period that exceeds 90 days. A waiting period is defined as "the period that must pass before coverage for an employee or dependent who is otherwise eligible to enroll under the terms of a group health plan can become effective."

Notice 2012-59 clarifies that, "being eligible for coverage means having met the plan's substantive eligibility conditions (such as being in an eligible job classification or achieving job-related licensure requirements specified in the plan's terms)." Nothing in the Act or elsewhere requires an employer to offer coverage to any particular employee or class of employees, including part-time employees. The 90-day waiting period limitation merely prevents an otherwise eligible employee (or dependent) from having to wait more than 90 days before coverage becomes effective. Thus, other coverage conditions are generally permitted, unless the condition is designed to avoid compliance with the 90-day waiting period limitation. Notice 2012-59 also clarifies that in instances where an employee may elect coverage that would begin on a date that does not exceed the 90-day waiting period limitation, the 90-day waiting period limitation is considered satisfied. There is, therefore, no violation merely because employees take additional time to elect coverage.

In the case of newly-hired employees, Notice 2012-59 coordinates with the approach taken under Notice 2012-58 such that a plan may take a reasonable period of time to determine whether the employee meets the plan's eligibility condition, including a measurement period. Generally, the time period for determining whether an employee meets the plan's eligibility condition will not be considered to be designed to avoid compliance with the 90-day waiting period limitation if coverage is made effective no later than 13 months from the employee's start date (or, if the employee's start date is not the first day of a calendar month, the time remaining until the first day of the next calendar month).

Unlike Code § 4980H, which applies only to applicable large employers, the 90-day limitation on waiting periods applies to all employers without regard to size. Notice 2012-59 permits plans to take a reasonable period of time to determine whether the employee meets the plan's eligibility condition, "which may include a measurement period that is consistent with the timeframe permitted for such determinations under Code section 4980H." Thus, an employer may use a measurement period that is consistent with Code § 4980H whether or not it is an applicable large employer.

## Reliance

Employers are generally permitted to rely on both Notices 2012-58 and 2012-59 through the end of 2014. In the case of Notice 2012-58, employers will not be required to comply with any subsequent more restrictive guidance until at least January 1, 2015. The Notice 2012-58 reliance period covers measurement periods beginning in 2013. This means that although Code § 4980H takes effect January 2014, the determination of full-time status under the safe harbors must commence before then.

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