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### **How To Tell Which Employees Must be Offered Coverage under Health Care Reform**

The Patient Protection and Affordable Care Act (the "Act") provides that employers who employ more than 50 full-time employees must offer full-time employees and their dependents coverage that is "affordable" and provides "minimum value" (as defined in the Act) or pay a penalty. The number of full-time employees determines the amount of the penalty an employer who does not offer such coverage must pay. If an employer fails to offer all of its full-time employees any coverage and one such employee receives a premium tax credit or cost-sharing reduction for health insurance purchased through a health insurance exchange, the employer is subject to a penalty of \$2,000 per year for each full-time employee in the employer's workforce over the first 30. If an employer offers coverage that is either "unaffordable" or fails to provide "minimum value" the employer is subject to a penalty of \$3,000 per year for each full-time employee who receives a premium tax credit or cost-sharing reduction from a health insurance exchange (or if less \$2,000 for each full-time employee in the employer's workforce over the first 30). This "play-or-pay" penalty goes into effect in 2014.

Identifying full-time employees will be critical as employers determine which employees must be offered coverage to avoid a penalty. Under the Act, an employee who works an average of at least 30 hours per week is full-time. Recently released IRS Notice 2012-58 provides guidance and voluntary safe harbors that employers can use to determine whether employees who work variable hours or seasonally are full-time for purposes of the "play-or-pay" penalty. Keep in mind that employees who are reasonably expected to work full-time must be treated as such, even if the employer follows the voluntary safe harbors.

Generally, Notice 2012-58 permits an employer to establish a look-back period for measuring average hours for variable hour and seasonal employees for whom the employer is unable to determine full-time status. If an employee averages at least 30 hours per week during the measurement period, the employee is treated as full-time for a specified period (called a "Stability Period") after the measurement period ends.

You may also recall that the Act also prohibits employer plans from imposing a waiting period of longer than 90 days. Employers are subject to a \$100 per-affected-employee per day penalty for violating the waiting period restriction. A waiting period for this purpose is a period of time that must pass before

coverage for an otherwise eligible employee can become effective. Employers may need time to determine if variable hour and seasonal employees are eligible for coverage, when eligibility is based on hours worked. The safe harbors in the Notice allow employers to avoid waiting period penalties in addition to “play-or-pay” penalties.

### **Safe Harbor for Ongoing Employees**

For ongoing employees, the Notice permits an employer to select a standard measurement period of at least three and not more than 12 consecutive calendar months. If an employee averages at least 30 hours per week during this period, the employee must be treated as a full-time employee during the following Stability Period. To allow for administrative issues and coordinate with the waiting period restriction, the Stability Period may begin up to 90 days after the standard measurement period ends. If the employee is determined to be full-time the Stability Period must be at least 6 months long and no shorter than the standard measurement period. If the employee is determined not to be full-time, the Stability Period must be no longer than the standard measurement period.

The Notice permits employers to establish measurement and stability periods that differ in length or provide different starting and ending dates for collectively bargained employees, hourly vs. salaried employees, employees of different entities and employees located in different states. Most employers who wish to take advantage of the safe harbor will likely find it administratively most convenient to establish a 12-month measurement period and a 12-month Stability Period for all employees. Note that employers who wish to have a 12-month Stability Period in effect beginning January 1, 2014—when the play-or-pay penalty becomes applicable—may establish a measurement period that begins as early as October 2012. Employers will want to be sure they have systems in place soon to measure hours for part-time and seasonal employees so that they can identify full-time employees beginning in 2014.

### **Safe Harbor for New Hires**

The Notice provides a slightly different voluntary safe harbor for newly hired employees if it cannot be determined on the employee’s start date whether the employee is reasonably expected to work on average at least 30 hours per week. The rules also apply to seasonal employees who may work more than 30 hours per week for a seasonal period and less thereafter. The safe harbor for new employees provides for an initial measurement period of between 3 and 12 months to determine if the employee averages 30 hours of work per week. The Stability Period may begin 90 days after the initial measurement period ends. But 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. For example, for an employee hired on March 2, 2013, the initial measurement period and any administrative period cannot extend beyond April 30, 2014. An employer who fails to comply with this rule could be assessed a penalty for the failure to comply with the waiting period rules. Additionally, if an employee is determined not to be full-time, the Stability Period cannot be more than one month longer than the initial measurement period and cannot exceed the remainder of the standard measurement period in which the initial measurement period ends.

### **What Should Employers Do?**

Employers with employees who work variable hours or seasonally should determine whether they want to take advantage of the voluntary safe harbors described in the Notice. If so, they should:

- Identify measurement periods and Stability Periods
- Ensure that they have systems in place to measure the hours their part-time and seasonal employees work on a weekly basis
- Amend the eligibility provisions of their plan documents to reflect the adoption of the measurement and Stability Periods.

Employers may rely on the safe harbors described in the Notice at least through 2014.

Thompson Coburn will continue to keep you advised of any developments. If you have questions regarding the Act, or other employee benefits issues, feel free to contact your Thompson Coburn attorney or any member of our Employee Benefits Group.

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