THE BENEFITS GAME

Playbook for Compliance with the Health Care Reform's Pay or Play Rules for Employers Late in the Game

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The Affordable Care Act's (ACA's) employer shared responsibility provisions (commonly called "pay or play") impact "large" employers and go into effect in 2014. Although effective in 2014, employers must plan NOW. Advance preparation is even more important for employers with "variable hour" employees.

The pay or play rules are complex and technical *Internal Revenue Code* rules that require large employers to either offer health coverage to full-time employees or pay tax penalties – the law calls "assessable payments."

For many large employers, determining whether to "pay or play" will not be an easy process. Employers need sufficient education on how this law operates, what impact the law has on its business and bottom line, and how to successfully navigate it in the best interests of the business and its employees. This law has been in constant flux. There has been a steady stream of sub-regulatory guidance issued by the government. Proposed regulations were issued January 2013, and further proposed regulations affecting this topic were issued on May 3, 2013. While things could change in final regulations, employers can rely on the proposed regulations until issuance of final regulations or

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other guidance. Since you are only required to either potentially pay (a penalty for) or play (offer coverage to) those individuals who are considered your full-time employees (and their dependents), your ability to substantiate whether an employee is or is not "full-time" will be critical to successfully navigating the "pay or play" provisions of the ACA.

While you may have your own rules for determining whether an employee is classified as "full-time," it is the ACA definition of "full-time employee" that controls the "pay or play " requirements. For this limited purpose, a full-time employee is any employee who is reasonably expected to work an average of at least 30 hours a week. The January proposed regulations include important rules for determining what hours (including certain periods of absence) that must be counted as hours of service for both non-hourly and hourly employees, and include a presumption that 130 hours of service in a calendar month is treated as the monthly equivalent of at least 30 hours of service per week.

What are the Pay or Play Rules?

The pay or play rules are a complex web of laws, regulations and government sub-regulatory guidance. Here's a simplified version of how they work.

Only those employers with 50 or more "full-time" and "full-time equivalent" employees (called "applicable large employers" or "large employers") will be subject to *non-deductible tax penalties* (called "assessable payments") if either (1) or (2) apply.

(1)The large employer doesn't offer substantially all (at least 95% or, if greater 5) of its full-time employees (and their ***dependents*)** the opportunity to enroll in ***minimum essential health coverage,*** and at least one full-time employee enrolls in government subsidized coverage] through a ***health insurance exchange*** *("*No Offer Penalty*").*

OR

(2) the large employer offers minimum essential health coverage to its full-time employees (and their dependents) but the coverage is either: (1) ***unaffordable*** or doesn't provide ***minimum value***, and (2) at least one full-time employee enrolls in government subsidized coverage through a health insurance exchange ("Non-Compliant Coverage Penalty") .

While it is necessary to determine how many full-time equivalent employees you have to determine whether you are an “applicable large employer” subject to the pay or play rules, *the penalties can only be triggered if at least one of your full-time employees gets government subsidized coverage from a health insurance exchange*.[1]

In a surprising twist, the January proposed regulations clarified that you must also offer coverage to all dependents of your full-time employees (although the term “dependent” does not include a spouse). Dependent means an employee’s child who is under age 26 where child means a son or daughter of the employee including adopted children and those placed for adoption, stepson, or stepdaughter or eligible foster child of the employee. If you have not previously offered dependent coverage, you will not be penalized for not offering dependent coverage in 2014 provided that you take steps during 2014 to offer dependent coverage.

The “minimal essential coverage” that must be offered in order to avoid the penalty, at least at the present time, is fairly bare bones. It includes employer provided health coverage other than coverage for certain “excepted benefits” (including, but not limited to, certain stand alone dental and vision programs). The IRS expects to issue more guidance in the future on what constitutes “minimal essential coverage.” The term “minimum essential coverage” is also relevant to the other “pay or play” rule effective 2014: the individual mandate. Unless they fall within very limited exemptions, your employees (and their dependents) will be required to maintain some form of minimum essential coverage or pay

[1] In general, an employee may be eligible for a subsidy if all the following apply --(1) The employee has household income no more than 4 times the federal poverty level for the year (in 2013 approximately $46K for a single person or approximately $94, 400 for a family of four); (2) is not offered employer minimal essential coverage that is both affordable (based on *household income*) and meets minimum value standards (however, employees who actually enroll in employer minimal essential coverage are not eligible even if the coverage is not affordable or does not meet the minimum value standards); (3) Is a citizen or legal resident; and (4) Is not eligible for certain other coverages such as Medicaid, CHIP, Medicare Part A, and Tricare.

a penalty tax. Employer provided minimal essential coverage will satisfy this *individual mandate* to either carry coverage or pay a penalty tax for the year.

In order to constitute a valid "offer" of coverage, each full-time employee must be provided with an opportunity to accept or decline the coverage at least once during the plan year. This means that you cannot defeat potential eligibility for subsidized exchange coverage (and avoid penalties to the employer) by forcing your employees to take unaffordable coverage or coverage that does not satisfy minimum value standards.

Coverage is unaffordable if the "cost" is more than 9.5% (adjusted for years after 2014) of the employee's household income. "Cost" for this purpose means how much the employee must pay *for employee-only coverage under the lowest cost minimum value plan offered to the employee*. Coverage is considered to provide minimum value only if the plan's share of the total allowed costs of benefits under the plan is at least 60 percent. Methodologies proposed by the IRS for determining minimum value include minimum value calculators (which have been made available), certain safe harbors and actuarial certifications of plans.

Since you will not know your employees' household income, you may rely on one of 3 "safe harbor" methods for determining whether coverage is affordable to the employee ("affordability safe harbors"). The affordable safe harbor are: (1) the W-2 safe harbor, (2) the rate of pay safe harbor; and (3) the Federal poverty line safe harbor. In order to use any of the affordability safe harbors, the coverage you offer must provide minimum value with respect to the employee-only level of coverage under the lowest cost minimum value plan.

Under the W-2 safe harbor, regardless of what level of coverage the employee actually selected, you determine whether the cost of employee-only coverage under the lowest cost plan the employee could select was more than 9.5% of that employee's Box 1, W-2 wages for the year. The employee's required contribution must remain a consistent amount or percentage of all Form W-2 wages during the calendar year (or for plans with fiscal year plan years, during the part of the fiscal year falling in the calendar year). You may not make discretionary adjustments to the required employee contribution for a pay period.

Under the rate of pay safe harbor, coverage is deemed affordable for a month if the cost of employee-only coverage under the lowest cost minimum value plan is no greater than 9.5%

of (130 hours times the hourly rate of pay on the first day of the plan coverage period). For salaried employees the cost for a month can't exceed 9.5 % of monthly salary. This safe harbor is only available only if the employee's rate of pay or monthly salary is not decreased during the year.

Finally, under the federal poverty line safe harbor, coverage will be deemed affordable if the amount the employee pays per month for self-only coverage under the lowest cost minimum value plan you offer is not more than 9.5% of the annual federal poverty line for a single individual (in the State where the employee is employed) divided by 12.

Effect of Wellness Rewards on Affordability

Proposed regulations issued this month say wellness rewards do not reduce the cost of coverage for affordability purposes except in the case of a non-discriminatory wellness program designed to prevent or reduce tobacco use. Where a plan charges a higher premium for smokers, affordability will be determined based on the premium that will be charged to non-tobacco users.

When is an Employer an "Applicable Large Employer" or "Large Employer?"

In general, you will be a large employer if you employed an average of at least 50 "**full-time**" and "**full time equivalent**" employees on business days during the *preceding calendar year*. "Full-time" means employed, on average, at least 30 hours of service per week. For purposes of determining whether an employee is a large employer, in addition to counting all full-time employees, the employer must also take into consideration all *full time equivalents* based on hours worked by employees not satisfying the definition of full-time. Full-time equivalents are considered only for purposes of determining "large employer" status and not for purposes of calculating the amount of any penalty due.

To make the determination of full-time equivalents for a month, the employer divides the sum of all the hours of service in a month for employees who are not full-time by 120. Fractions are taken into account. To arrive at how many total employees the employer has for purposes of the large employer threshold, the employer adds the number of full-time employees for a month to the number of full time equivalents for the month. If the average

for the year is 50 or greater, the employer is treated as a large employer. Fractions are disregarded in arriving at the average. For example, an average of 49.9 is rounded down to 49 and, in that case, the employer would not be a large employer subject to the pay or play rules.

If the average is 50 or more, the employer then determines whether the seasonal employee exception applies. The proposed regulations include a transition rule permitting employers to use any six consecutive month period in 2013 (rather than the entire 2013 calendar year) to make a determination of large employer status for 2014.

What is the Exclusion for Seasonal Employees?

An employer will not be treated as having 50 full-time employees if: (1) the employer's workforce exceeds 50 full-time employees for 120 days or less during the calendar year, and (2) the employees in excess of 50 employed during that period were seasonal workers. Seasonal workers means a worker who performs labor or services on a seasonal basis as defined by the Department of Labor including certain agricultural workers and retail workers employed exclusively during the holidays.

Be Careful Before You Conclude You are NOT a Large Employer

Controlled Group Rules Apply -- Special rules apply requiring employees of employers that are part of a "controlled group" or "affiliated service group" to be aggregated for purposes of determining whether each of the individual controlled group members is a large employer. Complex IRS rules, that are not intuitive, apply in making these determinations. Each member of a controlled group is referred to in the regulations as an "applicable large employer member." Each member of a controlled group having 50 or more employees in the aggregate is treated as a large employer.

So a member of a larger controlled group with only 20 full-time employees is still considered a large employer if the total full-time employees and full-time equivalent employees in the controlled group is 50 or more. However, the potential penalty is determined on a member-by-member basis. This means that one member is not responsible for pay or play penalties incurred by other members of the group.

Predecessor Rules Apply. Employees of a predecessor employer are counted in determining whether an employer is a large employer.

And, Special Rules Apply to New Employers. For employers not in existence the preceding year, the determination of whether the employer is a large employer is based on the average number of employees the employer reasonably expects to employ on business days in the current year.

What are the Penalties under the pay or play Rules?

Remember, nothing in the ACA requires any employer, including any large employer, to provide health care coverage to its employees (full-time or otherwise). However, a large employer may be subject to the following non-deductible assessable payments (penalties), if it doesn't "Play."

The "No Coverage" Penalty

Under the law, if a large employer fails to offer full-time employees (and their dependents) the right to enroll in minimum essential coverage for any month and at least one full-time employee has been certified to the employer as having enrolled for the month in government subsidized coverage through a health insurance exchange, then the employer will be assessed and must pay the following penalty (subject to annual inflationary increases): A monthly amount equal to 1/12th of $2,000 ($166.67) multiplied by the number of full-time employees minus 30 (a "toss out"). For controlled group members, the 30 employee reduction is pro-rated across the members of the controlled group based on the number of full-time employees employed by each applicable large employer member during the calendar year. If a member's total allocation is a fractional number less than one, it will be rounded up to one.

A large employer will not be treated as failing to offer coverage if coverage is terminated solely because the employee failed to make timely payment of the employee portion of the premium. This treatment continues only through the end of the coverage period (usually the plan year). For this purpose, the same rules to determine when a COBRA payment is late or deficient will apply.

The Penalty for Providing Coverage that Either Fails the Minimum Value Requirement or is Unaffordable ("Non-Compliant Coverage Penalty")

In order to avoid any penalties, the employer must offer its full-time employees the right to enroll in minimal essential coverage that is both affordable and provides minimum value.

If the employer offers minimum essential coverage but the coverage is either unaffordable or doesn't provide minimum value and one or more full time employees enrolls in government subsidized coverage through a health insurance exchange, there is a different monthly penalty. The penalty in this case, subject to annual inflationary increases, is the lesser of: 1/12th of $3,000 (or $250 per month), times the number of full-time employees enrolled for government subsidized health insurance coverage for the month; or the penalty that would apply if no coverage was offered at all.

Accordingly, the Non-Compliant Coverage Penalty can be triggered if minimal essential coverage is offered to a large employer's full-time employees but either: (a) the coverage does not provide "minimum value," and one or more full-time employees enrolls in government subsidized coverage through a health insurance exchange, or (b) the coverage is unaffordable for an employee and the employee obtains government subsidized coverage through a health insurance exchange. No penalty will apply if the employer followed one of the Affordability Safe Harbors, even if the employee receives subsidized exchange coverage based on "household income."

Although there must be an offer of minimal essential coverage to the dependents, the January proposed regulations clarify that the affordability and minimum value conditions apply to the employee-only coverage and not to the cost of coverage offered to the dependents.

To Pay, Play or Both

If you want to avoid any employer pay or play penalty, you must offer minimal essential coverage to all full time employees that is both affordable and provides minimal value.

However, bear in mind that the employee only has to carry "minimal essential coverage" in order to avoid the penalty tax on individuals (the "individual mandate") that also takes effect in 2014. This means the bare bones coverage, which, unless future guidance provides otherwise, would not have to satisfy minimum value requirements. So you might consider offering your employees both a low cost, bare bones employer plan that will allow the employee to avoid penalty taxes under the individual mandate, and a richer coverage option that provides minimum value and is affordable. The richer plan allows the employer to avoid the "Non-Compliant Coverage" penalty and gives the employee the option of access to richer benefits.

Some employers may decide to simply pay the "No Offer" penalty if not offering coverage if that option does not present employee relations or recruitment issues. But, before you conclude that is the cheapest route, remember that the pay or penalty *is* ***non-deductible.*** Some employers may decide to both pay and play by offering minimal essential coverage that provides minimum value (60% plan) but not worry about affordability. This may expose the employer to the person-by-person "Non-Compliant Coverage" penalty but avoids the "No Offer" penalty.

So What Will it Mean to "Play" in order to Totally Avoid both the "No Coverage Penalty" and the "Non-Compliant Coverage Penalty?"

In order to avoid both the "No Coverage Penalty" or the "Non-Compliant Coverage Penalty," it will be important for large employers to both : (1) maintain records sufficient to substantiate those employees who are full-time under the ACA; and (2) offer all full-time employees minimal essential coverage that both provides minimum value and is also affordable. One way to ensure that coverage is affordable is to use the "Affordability Safe Harbors" discussed above.

Employer Participation in Multiemployer Plans

For 2014, you will not be subject to pay or play penalties with respect to a full-time employee if you are required to make contributions for the employee under a multiemployer plan and the coverage is affordable and provides minimum value. For purposes of determining affordability, the employer can use any of the three Affordability

Safe Harbor, or wages reported to the multiemployer plan (either actual wages or an hourly wage rate under the collective bargaining agreement). Under these circumstances, even if the employee is not actually offered coverage by the multiemployer plan because he or she does not satisfy the multiemployer plan's eligibility criteria, you will not be penalized and will not be penalized if that employee in turn receives government subsidized coverage from an exchange.

Safe Harbor Alternatives to Month-By-Month Determinations of Full-Time Status

The law requires an employee's status as full-time to be determined month-by-month. However, month-by-month determinations could result in some employees changing from full to part time on a month to month basis, and additional administrative burdens, especially when an employee's hours vary each month or when an employee is employed for a limited period of time. In recognition that monthly determinations are not practical, the IRS allows employers to use "safe harbors."

Safe Harbor for New Employees Reasonably Expected to Work Full-Time

If an employee is reasonably expected on the employment start date to work at least 30 hours of service per week, you will not be subject to any pay or play penalty by reason of failing to offer coverage for up to the first three calendar months of employment, if the employee is offered coverage at or before the conclusion of the 3 months. Be careful, though – three months is not 90 days. In 2014, waiting periods must be limited to 90 days, with coverage to be offered by day 91 after the employee satisfies the eligibility criteria. If you wait three months, you might violate the 90-day limit on waiting periods; if you impose other eligibility rules on full-time employees that exceeds three (3) months, you could be subject to an assessable payment under pay or play!

Safe Harbor for Variable Hour and Seasonal Employees

For variable hour and seasonal employees you may use safe harbor measuring periods. An employee is considered a variable hour employee if, based on the facts and circumstances at the date the employee begins providing services (the start date), you cannot determine

whether the employee is reasonably expected to work on average at least 30 hours per week (or 130 hours a month).

The following safe harbors may be used to determine an employee's full-time status by looking at the time worked by the employee during a pre-defined "lookback measurement period." This is called a "standard measurement period" for "ongoing employees" and an "initial measurement period" for new employees.

If you determine that the employee worked full-time during the measurement period, then you must treat the employee as full-time during a "stability period," regardless of the number of the hours he or she actually works during the stability period. You may also use an optional "administrative period" between the measurement and stability periods to notify and enroll employees.

Can the Employer's Standard Measurement Period Vary by Employee Groups?

Yes, you can set up different measurement periods for each of the following groups:

- Collectively bargained and non-collectively bargained employees;
- Salaried and hourly employees; and
- Employees of different entities

Safe Harbor Basics: Testing of Ongoing Employees

An ongoing employee is an employee who is employed during an entire standard measurement period. You must choose a standard measurement period that can be no less than 3 and no more than 12 consecutive calendar months and must choose the particular months you will use. In addition, you may use the beginning and end of the payroll period as the beginning and end of the standard measuring period, so long as the payroll periods are one week, two week or semi-monthly periods.

What if the Employee is Full-Time During the Standard Measurement Period?

If you determine that the employee averaged at least 30 hours a week during the standard measurement period, then the employee must be treated as full- time during the subsequent stability period that is at least 6 months long and no shorter than the standard measurement period.

What if the Employee is not Full-Time During the Standard Measurement Period?

If you determine that the employee was not full-time during the standard measurement period, then you may treat the employee as not full-time during a stability period that is no longer than the standard measurement period. So even if this part-time employee enrolls in government subsidized coverage through an exchange during the stability period, the employee would not trigger either a No Coverage Penalty or Non-Compliant Coverage Penalty.

What is the Optional Administrative Period for Ongoing Employees?

At your option, you may use an administrative period of up to 90 days between the end of the standard measurement period and the beginning of the associated stability period. The administrative period must overlap the stability period *for the prior year* so there is no gap in coverage.

Safe Harbor Basics - Testing New Employees

For this purpose, a “new employee” is any employee who is not employed during an entire standard measurement period.

What is the Safe Harbor for <u>New</u> Variable Hour and Seasonal Employees

Under this safe harbor, employers must choose an "initial measurement period" of not less than 3 and not more than 12 consecutive months for each employee. The period can begin anytime from the employee's start date and the first day of the month following the employee's start date.

What if the Variable Hour or Seasonal Employee <u>is Full-Time</u> During His Initial Measurement Period?

If you determine that the employee averaged at least 30 hours of service per week during the initial measurement period, the employee has to be treated as full-time during a subsequent initial stability period. The stability period must be the same length as the stability period for ongoing employees (which must be at least six consecutive and no shorter than the measuring period) and begin immediately after the initial measurement period and any associated administrative period.

A measuring period will not be considered as designed to avoid compliance with the Affordable Care Act's prohibition of waiting periods of more than 90-days if for those determined to work full-time during the measuring period, coverage is made effective no later than 13 months from the employee's start date, plus, 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. This assumes that any waiting period after the end of the measuring period does not exceed 90 days.

What is the Optional Administrative Period for New Variable/Seasonal Employees?

You can use an administrative period if such period does not exceed 90 days. In this case, the 90-day period is required to include any periods of time between the employee's start date and the date the employee is first offered coverage under the employee's group health plan minus the initial measurement period. For example, if you begin the initial measurement period on the first day of the month that follows the employee's start date, the period of time between the start date and the first day of the next month must be included in determining the 90-day limit.

There is a maximum limit on the combined initial measurement period and any administrative period the employer adopts. The initial measurement period and administrative period together 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 end of the 13th calendar month following the employee's start date).

What if the Variable Hour or Seasonal Employee is not Full-time During the Initial Measurement Period?

If you determine that the employee was not full-time during the initial measurement period, then the employee may be treated as not full-time for the next stability period. The stability period may not exceed the shorter of: the initial measurement period plus one month; or the remainder of *the standard measurement period for ongoing employees* (plus any associated administrative period) in which the initial administrative period ends.

The proposed regulations also include special rules that apply when a variable hour employee changes employment status during his initial measuring period.

What Rules Apply When New Variable or Seasonal Employees Transition to Ongoing Status?

Once an employee who has been employed for an initial measurement period has also been employed for an entire standard measurement period, the employee is also tested for full-time status as an ongoing employee, beginning with that standard measurement period.

For example, assume an employer with a calendar year health plan uses November 1 – October 31 as its standard measuring period for ongoing employees, and also a one-year initial measurement period for new employees that begins on the employee's start date. New variable hour employee, Newby, starts work on February 12, 2014. Employer would first test Newby's status as full-time during his initial measurement period running from February 12, 2014 – February 12, 2015. Newby would be tested again, *as an ongoing employee*, for *the standard measuring period* beginning on November 1- 2014 and ending on October 31, 2015 (assuming that he remains employed).

What if an Employee Tests as Full-Time During the Initial Measurement Period but is Not Full-Time During any Overlapping or Immediately Following Standard Measurement Period?

An employee who tests as full-time during his initial measurement period but not full-time during an overlapping or immediately following standard measurement period for ongoing employees, must still continue to be treated as full-time until the end of the stability period associated with his initial measurement period.

What if the Employee Tests as Not Full Time During Initial Measurement Period but Full-Time During any Overlapping or Immediately Following Standard Measurement Period?

An employee who is determined not to be full-time during his initial measurement period, but is determined to be a full-time employee during the overlapping or immediately following standard measurement period, must be treated as a full-time employee for the entire stability period that corresponds to the ongoing employee standard measurement period (even if that stability period begins before the end of the stability period associated with the initial measurement period).

Measuring Periods for 2013

In order to use the safe harbors for "stability" periods in 2014, employers will need to track employee hours during measuring periods in 2013.

Employers wishing to use 12 month measuring periods may, solely for corresponding 12 stability periods in 2014, use a measuring period in 2013 shorter than 12 months. The measuring period must be at least six months long, begin no later than July 1, 2013 and end no earlier than 90 days prior to the first day of the plan year beginning on or after January 1, 2014. As a practical matter, you must begin to track employee's hours *by no later than June 1, 2013* for a six month period ending November 30, 2013 in order to conduct an open enrollment period in December 2013 for the 2014 Plan Year.

The It's Cheaper and Simpler to Give Coverage Approach

Because of the administrative burdens and additional expenses associated with establishing the measuring and stability periods, some employers with variable hour employees may simply decide to offer all of them health coverage under a minimum value plan that is affordable for the employee-only coverage level under one of the Affordability Safe Harbors. This "cover them all" approach should also avoid any penalties.

Compliance Date

Employers generally must be in compliance by January 1, 2014.

Later date in Certain Cases of Employers with Non-Calendar Year Plans (Fiscal Year Plans) in effect on December 27, 2012

Employers with fiscal year plans in existence on December 27, 2012 will not be subject to penalties for months in 2014 prior to the first day of the 2014 fiscal plan year for any full time employee who would have been eligible under the plan's terms in effect on December 27, 2012—provided that the employee is offered coverage that is affordable and provides minimum value starting no later than the first day of the fiscal 2014 plan year.

Employers having at least 1/4 of all employees covered under one or more non-calendar year plans with the same plan year as of December 27, 2012, or where coverage is offered to at least at least 1/3 of all employees during the most recent open enrollment period prior to December 27, 2012, will not be subject to penalties before the first day of the fiscal 2014 Plan Year with respect to employees who: (1) are offered affordable, minimum value coverage under the fiscal year plan by no later than the first day of the 2014 plan year; and (2) were not eligible for coverage under a calendar year plan in effect on December 27, 2012 .

Cafeteria Plan Changes in Election for Non-Calendar Year Plans

The regulations permit employees in non-calendar year cafeteria plans to drop employer coverage in favor of an exchange plan and to add employer coverage to avoid the individual mandate penalty during 2014 so long as the plan is amended by December 31, 2014.

CONCLUSION

The pay or play rules apply only to employers who satisfy the ACA's definition of "large" employer, determined on a controlled group basis. Remember, these rules are NOT an either/or proposition. You can Pay, Play, or both, tailored to your particular business, its needs, and bottom line. And remember there is more than one "playing field" if you decide to Play.

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