Stacking Transition Relief under the Final Employer Shared Responsibility Regulations

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As we have recounted on this blog, employer shared responsibility rules under the Affordable Care Act originally were meant to go into effect on January 1, 2014, but have been put on hold two times. The first time was in early July 2013 pursuant to IRS and White House bulletins later set forth more formally in IRS Notice 2013-45, and the stated purpose was to allow carriers and employers more time to understand and prepare for minimum essential coverage (MEC) and applicable large employer (ALE) reporting duties otherwise slated to begin in 2014.

The IRS Notice simply provided that both the employer shared responsibility provisions for applicable large employers (and information reporting related to same) would not apply in 2014 but would be "fully effective for 2015." It was silent on transition guidance contained in proposed regulations issued in December 2012, and thus left employers who had planned to rely on the transition guidance (including delayed start dates for non-calendar year plans) in temporary limbo.

This limbo period ended with the release of the final employer shared responsibility regulations ("Final Regulations"), which were published in the Federal Register on February 12, 2014. The Final Regulations carry forward the transition relief set forth in the proposed regulations and expand on it in several ways. This post summarizes the transition relief and explains some ways in which applicable large employers can "stack" the relief by using more than one type of transition relief at a time. As with all my posts, this is for readers' general information and is not intended to be relied upon in any specific factual setting.

By way of introduction I am going to assume that readers are familiar with basic definitions under the ACA including "applicable large employer" or "ALE," full-time employee," and "full-time equivalent or FTE". I am also going to assume reader familiarity with "assessable payments" under Internal Revenue Code ("Code") Section 4980H(a) and (b). Readers who are not familiar with those terms and rules can find definitions in this helpful IRS Frequently Asked Questions list, or by searching in my blog.

Additional Delay to 2016 for Mid-Sized Applicable Large Employers

The final regulations describe an additional year's enforcement delay – from 2015 to 2016 – for mid-sized applicable large employers – those who average between 50 and 99 full-time employees, including FTEs, over their chosen 2014 measurement period. For the enforcement delay to apply, an ALE must meet the full-time employee size requirement and each of the following additional requirements:

- They must not modify their plan year after February 9, 2014 to start at a later date.

- They must also make two written certifications as part of their ALE reporting due in early 2016. Specifically they must certify that:
  - between February 9, 2014 and December 31, 2015 they have not reduced the size of their workforce or overall hours of service other than for "bona fide" business reasons, which include sale of a division, changes in the economic marketplace in which the employer operates, or terminations for poor performance.
  - they did not "eliminate or materially reduce" group health coverage that was in place on February 9, 2014 over the "coverage maintenance period" which ends December 31, 2015 for calendar year plans, and on the last day of the 2015-2016 plan year for non-calendar year plans. "Material" reduction means a 5% or greater reduction in the dollar amount of the employer contribution towards individual premiums, or any reduction in the percentage of the employer's share.

Mid-sized employers that qualify for the relief and meet the necessary criteria will not be subject to employer shared responsibility taxes until January 1, 2016, or the first day of their non-calendar plan year beginning in 2016.

New Transition Relief for ALEs with 100+ Full-time Employees

In 2015, employers who on average employ 100 or more full-time employees, including FTEs, over their chosen 2014 measurement period will not be subject to the "no coverage" pay or play penalty (IRC § 4980H(a)) if they offer minimum essential coverage to at least 70% of their full-time employees. The offer of coverage includes dependents, subject to transition relief outlined below. The permitted percentage of excluded full-time employees (30%) shrinks back down to the "greater of 5% or 5 employees" in 2016 and subsequent; i.e. MEC must be offered to at least 95% of full-time employees.

Further, if the 4980H(a) tax does apply in 2015 (because the employer fails to offer MEC to at least 70% of full-time employees), the employer may calculate the tax after excluding the first 80 full-time employees. The excluded group shrinks back town to 30 in 2016 and subsequent.

Note that the IRC § 4980H(b) "some coverage" penalty will still apply if the coverage that is offered to at least 70% of full-time employees is either unaffordable or less than minimum value. However, the (b) penalty can never exceed what the (a) penalty would have been, had no coverage been offered.

This relief applies to the 2015 calendar year and to non-calendar year plans for their 2015-2016 plan year.

Non-Calendar Year Transition Relief

The proposed regulations provided that ALEs that maintained a non-calendar year group health plan as of December 27, 2012 (just prior to release of the advance copy of the proposed regulations) would not be subject to employer shared responsibility penalty taxes between the original employer shared responsibility start date of January 1, 2014 and the beginning of their 2014-2015 non-calendar year plan, provided that certain conditions were met. So, for instance, an employer that maintained a July 1 – June 30 plan as of December 27, 2012 would not be subject to excise taxes for failing to offer its full-time employees affordable, minimum value coverage between January 1, 2014, and June 30, 2014. It would be subject to them for July 1, 2014 onward.

The non-calendar plan year transition relief offered under the proposed regulations has been extended to prevent application of penalties from January 1, 2015 to the first day of the 2015-2016 non-calendar plan year for certain qualifying applicable large employers. The relief is only available if the employer maintained a non-calendar plan year as of December 27, 2012 and since that time has not changed the plan year to start as a later date.

This is not "across the board" transition relief for all employers with non-calendar plans. Instead, it only applies with respect to full-time employees who would have joined the plan as of the first day of the 2015-2016 non-calendar year plan, or in instances where, prior to issuance of the regulations, a non-calendar year plan already covered a substantial percentage of its employees. The specifics of these relief provisions are as follows:

- Under "Eligible Employee" Relief, no pay or play penalty will be imposed with regard to full-time employees who, *under plan rules that were in place on February 9, 2014,* will be eligible on the first day of the 2015-2016 plan year.
- Under "Substantial Percentage" Relief, no pay or play penalty will be imposed with regard to any full-time employees (whether or not they would become eligible in 2015 under current plan terms) if the employer:
    - actually covered at least 25% of its total employees under one or more non-calendar year plans as of any date during the 12 months ending February 9, 2014; or
    - offered coverage to at least 33.33% of its total employees during the most recent open enrollment period prior to February 9, 2014.

This transition relief is adapted from relief set forth in the preamble to the proposed shared responsibility regulations. The final regulations add a variation on the theme of the "Substantial Percentage" Relief, measured only with regard to full-time employees, as follows:

- No pay or play penalty will be imposed with regard to any full-time employees (whether or not they would become eligible in 2015 under current plan terms) if the employer:
    - actually covered at least 33.33% of its full-time employees under one or more non-calendar year plans as of any date during the 12 months ending February 9, 2014; or
    - offered coverage to at least half (50%) of its full-time employees during the most recent open enrollment period prior to February 9, 2014.

Non-calendar plan year transition relief is not available with regard to full-time employees eligible under a calendar year plan maintained by the same employer.

Other Transition Relief

Definition of ALE Status and Full-Time Employee Count

For the 2015 calendar year, an employer may measure its status as an ALE (and its full-time employee headcount) by counting full-time employees and FTEs over a period of at least 6 consecutive months in 2014, starting no later than July 1, 2014. However, if the ALE is relying on the seasonal worker exception to ALE status, it must measure full-time and FTEs over all of 2014, not the shorter six-month period. For 2016 and subsequent, ALE measurement and full-time employee headcounts must occur over an entire 12 month period.

Transitional Measurement Period

The proposed and final employer shared responsibility regulations contain special rules applicable to seasonal employees and "variable hour" employees, meaning employees who the employer cannot, at the time of hire, accurately class as full-time or part-time. These rules are primarily of use in the retail and hospitality sectors. They allow an ALE to measure a new employee's working hours over a retroactive measurement period, and, based on hours worked during that time, lock in the employee as eligible or ineligible for group health coverage for a subsequent "stability period," regardless of the hours he or she works during the stability period.

The rules generally do not allow a lock-in stability period to be significantly longer than the retroactive measurement period it is teamed with. However, just for purposes of stability periods beginning in 2015, employers may adopt a transitional measurement period ("TMP") in 2014 that is shorter than a year, but at least 6 consecutive months long, and still use a 12 month stability period in 2015. Because the same rules require that there be a period of at least 90 days between the end of the TMP and the beginning of the stability period, employers who want the 2015 calendar year to serve as a stability period should begin their TMP no later than April 1, 2014. (April 1 – September 30 TMP followed by October 1 – December 31 transition period, with stability period beginning January 1, 2015).

Transition Relief re: First Payroll Period in 2015

Solely for January 2015, the final regulations provide that no pay or play penalty will apply between January 1, 2015 and the first day of the first payroll period in January 2015. This will allow employers to start group health coverage on a payroll period cycle. No comparable relief is offered for non-calendar year plans.

Transition Relief re: Dependent Coverage

Generally to avoid pay or play penalties, an ALE must offer coverage to a full-time employee's dependents, although, unlike individual coverage, the dependent coverage on offer does not need to be "affordable." Extending earlier transition relief in the proposed regulations, the final regulations provide that an ALE that currently does not offer dependent coverage but that "takes steps" towards offering such coverage during its 2015 plan year will not be assessed a penalty related to dependent coverage. This transition relief will not apply to the extent that employers offered dependent coverage either during the 2013 or 2014 plan year; in other words an ALE may not use the transition relief if it formerly offered, than terminated, dependent coverage. As defined above, “dependents” for this purpose mean biological or adopted children to age 26.

Stacking Transitional Relief

The preamble to the final regulations specifically state that applicable large employers can combine or, as described here, “stack” different types of transitional relief under certain circumstances. Note that ALEs who qualify for the mid-sized employer transition guidance, and who therefore have no pay or play responsibilities in 2015, will not need and cannot use transition relief for non-calendar year plans, or any of the “Other Transitional Relief” described above with the exception of the first listed – counting full-time employees over a period of at least 6 consecutive months. This is described in example 2, below. Non-calendar plan year relief may also apply.

The following examples illustrate potential stacking techniques:

- Non-Calendar Year and 100+ ALE Relief

A graphic design firm with 100 full-time employees (including FTEs) has had an April 1- March 31 non-calendar plan year since December 27, 2012 and has not changed plan years to delay the starting date.

The firm offered coverage to 50% of its full-time employees between February 9, 2013 – February 9, 2014 so it qualifies for non-calendar year transition relief and will <u>not</u> be subject to a pay or play penalty from January 1, 2015 through March 31, 2015.

In addition, for the April 1, 2015 through March 31, 2016 plan year, the firm will not be subject to the “no coverage” penalty so long as it covers at least 70% of its full-time employees. Penalties could still apply if the offered coverage is unaffordable or does not provide minimum value.

- Mid-Sized Employer and ALE Measurement/Full-Time Headcount Relief

A company with three bakery locations has about 75 employees in total. It believes it might qualify for the shared responsibility transition relief available in 2015 to mid-sized employers. To determine its status as an applicable large employer, it counts full-time and full-time equivalent employees over a six-month period in 2014 (May to October). During that time it averages 60 full-time employees, including full-time equivalents, per month. Thus it is an ALE and eligible for the mid-sized employer transition relief. Between February 9, 2014 and December 31, 2014, the end of its plan year, it does not reduce its workforce other than for terminations due to poor performance and does not reduce employees’ overall hours of service. Also during that time, it maintains group health coverage on the same terms that were in place as of February 9, 2014. The bakery company will be exempt from assessable payments for the 2015 calendar year. It must make attestations related to workforce and coverage maintenance, in its ALE reporting due early in 2016.

- Mid-Sized Employer and Seasonal Worker Exception.

Same facts as above, but the employer is a vineyard with a single location. It has a seasonal work flow so counts its full-time employees and FTEs over each month of 2014. It finds that it exceeded 50 full-time employees, including FTEs, on fewer than 120 days in 2014 (mainly during harvest time) and, during that time, the employees that exceeded the 50 full-time limit were seasonal workers (harvesters). The employer is not an ALE for 2015 and does not need the transitional relief for mid-sized employers.

- 100+ ALE Relief and Dependent Coverage Relief

Same facts as the graphic designer example except the employer has a calendar year plan. The firm offers coverage in 2015 to 75% of its full-time employees and the coverage is affordable and provides minimum value. Therefore assessable payments would be due only with regard to dependent coverage. The employer takes steps towards 2015 to provide dependent coverage, and did not earlier provide, then stop, dependent coverage. The employer will not be subject to assessable payments in 2015.

http://www.irs.gov/pub/irs-drop/n-13-45.PDF

http://www.gpo.gov/fdsys/pkg/FR-2014-02-12/pdf/2014-03082.pdf

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http://www.irs.gov/uac/Newsroom/Questions-and-Answers-on-Employer-Shared-Responsibility-Provisions-Under-the-Affordable-Care-Act