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HOW TO TELL WHO GETS TO PLAY SO YOU DON'T PAY

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Late on a Friday, just before escaping for Labor Day weekend, the IRS, Department of Labor, and Department of Health and Human Services provided two pieces of guidance on two of health care reform's more important provisions: determining full-time status of employees for purposes of the employer "play or pay" penalty and the 90-day waiting period requirement. The two pieces of guidance refer to one another, so it is important to understand them both. In addition, while neither piece of guidance takes effect until 2014, sponsors of health plans should begin planning now to address these pieces of guidance. We addressed the 90-day waiting period guidance last Friday and this post will address the "play or pay" guidance.

Overview

For those unfamiliar, beginning in 2014, the Patient Protection and Affordable Care Act provides that any employer with more than 50 full-time employees must offer coverage that is "affordable" and provides "minimum value" or pay a penalty. Coverage is "affordable" if the premium cost to an employee is no more than 9.5% of the employee's household income. The IRS has stated previously, and reaffirmed in this notice, that employers may use the employee's wages reported on Form W-2 instead of actual household income. A plan provides minimum value if it covers at least 60% of the total allowed cost of benefits under the plan.

If an employer fails to offer any coverage, and one employee receives a premium tax credit or cost-sharing reduction for health insurance purchased through a health insurance exchange, that 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. An employer who offers coverage that is either unaffordable or fails to provide minimum value 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, the penalty described in the preceding sentence).

Generally, any employee who works an average of at least 30 hours per week is full-time. However, what about employees who work variable or seasonal schedules? IRS Notice 2012-58 tries to answer that question.

The Guidance

Overview and Considerations. In broad terms, the Notice provides a safe harbor under which an employer establishes periods for measuring employee hours. Then, if an employee is determined to average at least 30 hours per week during the measurement period, the employee must be treated as full-time for a specified period after the conclusion of the applicable measurement period (called the "Stability Period"). This avoids employees being full-time one week and not full-time the next, for example, which would create significant administrative headaches.

The Notice does not address plan documentation. However, plan sponsors wishing to take advantage of the measurement and Stability Periods will need to incorporate such periods into the eligibility provisions of their plan documents in order to avoid PPACA's penalties. This will allow employees who become, or cease to become, eligible for coverage by reason of a change in full-time, part-time or seasonal status to change their coverage and contribution elections.

Employers can rely on the guidance in the notice at least through the end of 2014. Any guidance that is more restrictive will not apply until January 1, 2015, at the earliest. However, because the penalty first applies in 2014, an employer looking to have a 12-month Stability Period needs to start getting systems in place soon to measure hours for part-time employees to have the evidence to back up its determinations in 2014.

The specifics of the guidance are after the cut.

Important Definitions. With that overall construct in mind, the Notice creates some terminology that's important to understand:

- "Standard Measurement Period" is the period over which an existing employee's average hours per week are measured. This period can be as short as 3 months or as long as 12 months.
- "Initial Measurement Period" is the period for which a new employee's average hours per week are measured. This can also be as short as 3 months or as long as 12 months. This applies to employees who are not employed at the beginning of a Standard Measurement Period. The length of the Initial Measurement Period can be different from the length of the Standard Measurement Period.
- "Stability Period" is the period during which an employee has to be treated as either full-time or not full-time, depending on his/her average hours during the measurement period. This must be the same for both new and existing employees. The Stability Period also cannot be more than one month longer than the Initial Measurement Period.

For Existing Employees. For an employee employed continuously from the beginning of a Standard Measurement Period, the employer will measure his/her hours over that period. If he or she works an average of 30 hours per week over that period, he or she must be treated as a full-time employee for the following Stability Period.

- If the employee is determined to be full-time, the Stability Period must be at least 6 months long and cannot be shorter than the Standard Measurement Period.
- If the employee is determined not to be full-time, the Stability Period cannot be longer than the Standard Measurement Period.

As a practical matter, the fact that the length of the Stability Period can vary based on whether or not the employee is full-time means most employers are likely to pick a 12-month Standard Measurement Period and a 12-month Stability Period for all employees. This will ease the compliance burden for many employers by providing a single, uniform Stability Period.

Administrative Period. The rules allow the Standard Measurement Period and the Stability Period to be separated by up to 90 days for administrative issues (such as notifying employees of eligibility and having open enrollment). For example, an employer can have a Standard Measurement Period that runs from October 15 to the following October 14 and a Stability Period that coincides with a calendar plan year of January 1 to December 31.

Take an example: two employees work for you. The first one (Employee A) works more than 30 hours/week over the Standard Measurement Period from October 2, 2012 to October 1, 2013. The other (Employee B) does not. During the following Stability Period (January 1, 2014 through December 31, 2014), you will not be subject to a penalty for failing to offer coverage to Employee B. You may, however, be subject to a penalty if you fail to offer coverage to Employee A.

For the Newbies. New employees have slightly different rules. If an employee is reasonably expected to work full-time on the date of hire, then an employer should treat the employee as such. However, if it cannot be determined whether an employee is reasonably expected to work an average of 30 or more hours per week, then the notice provides a safe harbor for determining whether the new employee is considered full-time. These rules also apply to seasonal employees who may work more than 30 hours per week for a seasonal period, and less thereafter.

Under the safe harbor, the employer establishes an Initial Measurement Period to determine the average hours an employee works. Employers are also allowed 90-days for administrative issues, but there is a limit: the Initial Measurement Period and the 90-days for administration, combined, 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, if an employee is hired on April 5, 2013, the Initial Measurement Period and the 90-days for administration cannot go beyond May 31, 2014.

Here's an example of how this could work: say you use 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. You hire an employee on May 10, 2014. The employee's Initial Measurement Period runs from May 10, 2014 through May 9, 2015. Assume the employee works an average of 30 hours per week during this Initial Measurement Period. This employee will be treated as full-time. To avoid play or pay penalties, you would need to offer coverage to the employee for a Stability Period that runs from July 1, 2015 through June 30, 2016.

The examples in the Notice state that an employer who does not offer coverage in accordance with these rules could be subject to "play or pay" penalties and be assessed a penalty for failing to comply with the 90-day waiting period limit rules. The penalties for failing to comply with those rules are $100/day/person tax and possible enforcement action from the Department of Labor or lawsuits by participants. Therefore, the stakes for failing to offer coverage to these variable hour or seasonal employees are higher than just the play or pay penalties. Some helpful examples on how compliant waiting periods may be designed are set forth in the 90-day waiting period guidance, IRS Notice 2012-59.

Additional Help. The Notice provides that employers may use Initial and Standard Measurement Periods and Stability Periods that differ either in length or in their starting and ending dates for the following categories of employees: (1) collectively bargained employees and non-collectively bargained employees; (2) salaried employees and hourly employees; (3) employees of different entities; and (4) employees located in different States.

The Notice also makes it clear that no penalty will be assessed during 90-day waiting periods for employees who are reasonably expected to be full-time on date of hire. In other words, there is no penalty for failing to offer coverage to full-time employees during the 90-day waiting period. This is a helpful clarification.

MEET THE TEAM

Keith J. Kehrer

St. Louis / New York

keith.kehrer@bclplaw.com
+1 314 259 2063