ISLER DARE, P.C.

EMPLOYEE BENEFITS UPDATE

March 2014

Counting Your Full-Time Employees and Permitted Waiting Periods Under the Affordable Care Act

Executive Summary

- The shared responsibility provisions of the Affordable Care Act ("ACA") require large employers to offer health coverage meeting certain requirements to substantially all of their full-time employees and their non-spouse dependents or face financial penalties. Large employers can also face financial penalties under the shared responsibility rules if they offer health coverage to their employees and non-spouse dependents, but that coverage is not "affordable" or does not provide "minimum value". Under both scenarios, the penalties apply if at least one employee receives a premium tax credit or subsidy for purchasing insurance on the public healthcare exchange.
- The shared responsibility penalties have been delayed until 2015 for large employers with more than 100 full-time employees, and until 2016 for certain large employers with 50-99 full-time employees (as long as certain conditions are met).
- Recently-issued regulations provide details on (1) counting your employees for purposes of determining if the shared responsibility provisions apply to you, and (2) the permissible length of waiting periods in your group health plans.

What You Should Do

- Use 2014 and any transition period available in 2015 to determine whether you are a large employer subject to the shared responsibility penalties and whether you will use the "monthly measurement" method or the "look-back measurement" method to determine which of your employees are full-time.
- Depending on the measurement method you choose, ensure that you have proper internal controls and procedures in place to count your workers and track their hours.
- Regardless of the size of your workforce, if your health plan maintains a waiting period for otherwise eligible employees, make sure that it does not exceed 90 days, and determine whether you need to amend plan documents, open enrollment materials, or other employee communications to reflect your plan's design.

PART ONE: OVERVIEW OF THE EMPLOYER SHARED RESPONSIBILITY PROVISIONS OF THE ACA

Beginning in 2015, large employers are subject to the employer shared responsibility provisions of the ACA, which impose two types of penalties:

- A large employer must offer minimum essential coverage for substantially all of its full-time employees and eligible non-spouse dependents or face an annual penalty of $2,000 per full-time employee, if at least one of the employer's employees obtains coverage through the public healthcare exchange with a premium tax credit or subsidy.
    - Under new transition rules that were recently announced, "substantially all" means 70% of full-time employees in 2015, and 95% of all full-time employees for 2016 and later years.
    - In calculating this penalty, an employer can exclude the first 80 full-time employees for 2015; for 2016 and later years, an employer can exclude the first 30 full-time employees from these penalty calculations.
    - If a large employer offers health coverage but the coverage is not "affordable" or does not provide the required "minimum value", the shared responsibility penalty is $3,000 for each full-time employee who purchases insurance on the public healthcare exchange and receives a premium tax credit or subsidy. Coverage is "affordable" if the cost of employee-only coverage, on the lowest coverage tier, is less than 9.5% of the employee's annual household income, which can be measured by the employee's W-2 wages.
    - Coverage provides "minimum value" if the plan covers at least 60% of the total allowed cost of benefits that are expected to be incurred under the plan, as determined through actuarial value calculations. Minimum value coverage through an employer-sponsored plan is generally considered equivalent to the "bronze" level coverage that is available on the public healthcare exchange.

I. Are You a Large Employer?

As noted above, only large employers are subject to the employer penalties under the shared responsibility provisions of the ACA. Provided that certain conditions are met, a large employer is an employer with 100 or more full-time and full-time equivalent employees in 2015, and an employer with 50 or more full-time and full-time equivalent employees in 2016 and beyond.

In order to calculate your number of full-time and full-time equivalent employees for 2015:

- Determine the number of your full-time employees by counting your employees who work an average of 30 hours or more per week in each month of 2014.
- Determine the number of your full-time equivalent employees by counting the total number of hours of service for which wages are paid to part-time employees during each month of 2014 (but not more than 120 hours per employee) and divide the total by 120. For purposes of these calculations, an employee is considered "part-time" if he is expected to work an average of less than 30 hours per week.

- Add the total number of full-time employees and full-time equivalent employees for each calendar month of 2014 together, divide by 12, and round down to the nearest whole number. This is the number of your full-time and full-time equivalent employees for 2015, for purposes of determining whether you are a large employer subject to the shared responsibility penalties.

- Solely for 2014, an employer can use a six-month period instead of a 12-month period for determining its large employer status.

- Seasonal employees working less than 120 days in a year are not counted for purposes of determining whether an employer is considered a large employer subject to the shared responsibility penalties.

- All employees in a controlled group of corporations will be considered together for purposes of determining whether each individual member of the controlled group is considered a large employer. However, the employer shared responsibility penalties will be calculated for each controlled group member separately.

You must use a similar method for 2016 and later years.

II. Identifying Full-time Employees for the Shared Responsibility Penalties: Utilizing the Monthly Measurement Method or the Look-Back Measurement Method

Once you have determined whether you are a large employer, you will then need to identify the number of full-time employees that you need to consider for purposes of calculating any potential shared responsibility penalties under the ACA.

These calculations are different from how you calculate the number of full-time employees for purposes of being considered a large employer (as discussed in Part I), and there are two methods available: the "monthly measurement" method or the "look-back measurement" method. Generally, the same method must be used for all employees, but there are certain exceptions.

- The "monthly measurement method": This method requires an employer to determine each employee's status (whether or not the employee is a full-time employee) on a monthly basis. As a practical matter, this approach may not be workable for an employer since it requires the employer to make a month-to-month decision on who must be offered coverage.

- The "look-back measurement method": This method essentially "looks back" to an employee's prior year work history to determine if the employee is a full-time employee. With respect to this "look-back measurement" method, there are three important periods to identify:

  1) *The Measurement Period.* The measurement period is the look-back period used to determine the hours worked for purposes of determining whether the employee is considered "full-time". For ongoing employees (as opposed to new employees), you may use a period of three to 12 months. Once chosen, the same period must be used for all employees. Essentially, you look back over the chosen period to determine the number of hours the employee worked to determine if the employee is a full-time employee. For example, if your measurement period was the 12 calendar months of

2014 and the employee worked an average of 30 hours per week over that time, the employee would be considered a full-time employee for 2015.

The application of the measurement period for a new employee varies depending on whether the employee can be categorized as a temporary, variable hour, seasonal employee, or part-time employee:

- Newly-hired temporary employees that work on a full-time basis must generally be treated as a full-time employee and offered coverage within 90 days following the date of hire, even if they are not expected to be employed for the entire standard measurement period.

- For a new variable hour employee, seasonal employee, or part-time employee, an employer is permitted to use a measurement period from three to 12 months long that begins on the employee's start date. Accordingly, you are not required to provide coverage to such an employee until after the measurement period. For these purposes, a "variable hour employee" is defined as an employee for whom you cannot determine if they will work at least 30 hours per week because the hours are variable or uncertain; a "seasonal employee" is defined as an employee in a position for which the customary employment is six months or less in a year (*i.e.*, the position is typically for a period of six months or less, and begins each calendar year in approximately the same part of the year).

- If a new variable hour, seasonal, or part-time employee has a material change in status during the initial measurement period so that in the new position he or she would have been treated as a full-time employee, then the initial measurement period ends for that employee and the employee must be provided with coverage no later than the first day of the fourth calendar month following the change in status to full-time employee (or, if earlier, the first day of the first month following the end of the initial measurement period and administrative period).

2) *The Stability Period.* The stability period is the period during which an employee is classified as full-time (or not) based on the work history from the measurement period. The stability period must be at least six and no more than 12 consecutive calendar months (and at least as long as the measurement period). Most employers will likely choose to use a stability period that is equal to the measurement period. If you determine that an employee did not work full-time during the relevant measurement period, you can treat the employee as not being a full-time employee during the stability period that follows.

3) *The Administrative Period.* The administrative period is a period of up to 90 days between the measurement period and stability period that an employer may use to determine which employees are eligible for coverage and to notify and enroll employees. However, the measurement period and the administrative period combined may not be longer than 13 months total. For example:

- If an employer uses calendar year 2014 as the measurement period for employees who were hired on or before January 1, 2014, then the

administrative period must end (and the stability period begin) by January 31, 2015.

- If an employer uses the nine-month period between January 1, 2014 and September 30, 2014 as the measurement period for employees who were hired on or before January 1, 2014, plus a three-month administrative period for open enrollment purposes between October 1, 2014 and December 31, 2014, the stability period will begin January 1, 2015.

III. Other Special Considerations

The rules governing the counting of employees for purposes of the employer shared responsibility provisions of the ACA are complex, and there are numerous exceptions and special rules that may apply to your employee population, some of which add flexibility and some of which are restrictive. For example:

- Employers have the option of establishing different measurement and stability periods for groups of employees based on certain permissible categories, such as union and non-union employees, salaried and hourly employees, or employees in different geographic locations.

- If an employee terminates and is rehired within the same measurement period, the employee can be treated as a new employee only if the break in service was at least 13 weeks, or if the rehired employee had a break in service of at least four weeks and that break is longer than the employee's period of service immediately before the break in service.

By calculating the number of full-time employees who would be covered by the employer shared responsibility provisions, you can establish an appropriate paper trail to demonstrate that you offered minimum essential coverage to "substantially all" of your full-time employees. Appropriate calculations can also help you to quantify the potential penalties you may incur if you decide not to offer coverage to substantially all of your full-time employees, or if you offer coverage that does not provide "minimum value" or is not "affordable". Having this data, and comparing the potential penalties to the cost of coverage, will allow you to make an informed decision about the design of your employee healthcare plans for 2015 and beyond.

PART TWO: DESIGNING A PERMISSIBLE WAITING PERIOD UNDER YOUR HEALTH PLAN

The Internal Revenue Service, the Department of Labor and the Department of Health and Human Services also recently issued final regulations on permissible waiting periods for health plans. These rules apply to health plans regardless of whether you are a large employer, and regardless of whether your health plan is considered "grandfathered" from many of the other requirements under the ACA. Under these rules:

- A health plan's waiting period for employees that are otherwise eligible under the terms of the plan (meaning that they have satisfied the plan's substantive eligibility conditions, such as being in an eligible job classification or achieving job-related requirements), cannot be longer than 90 days. All calendar days are counted for the purpose of applying the limit.

- An employer may use an hours-based eligibility period (instead of an eligibility period based on the number of days), so long as the number of hours required for eligibility does not exceed 1,200 hours.

- A former employee who is rehired will be treated as a new hire, subject to a waiting period, as long as the requirement is not a subterfuge for avoiding the 90 day limit (*i.e.,* it is reasonable under the circumstances). This means that employers will have some flexibility in determining whether a rehired employee must satisfy a new waiting period, regardless of whether he previously satisfied the plan's waiting period.

- Employers are also permitted to require that a reasonable and bona-fide orientation period be completed before new employees are eligible under a group health plan, but under a proposed rule, the maximum orientation period would be limited to one month.

For 2014, employers can rely on either the older proposed rules or the new final rules; the final regulations apply for plan years beginning on or after January 1, 2015.

The new guidance means that if you have a waiting period or are considering implementing one, you should ensure that it meets the foregoing requirements and is accurately described in any plan documents, summary plan descriptions or summary of material modifications, open enrollment materials, and any other employee communications.

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The above summary is provided for educational and informational purposes only and is not intended to constitute individualized legal advice for your situation. If you have any questions about the Affordable Care Act, or your employee benefit plans in general, please let us know.

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