SEYFARTH SHAW LLP
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Health Care Reform Management Alert Series

Issue 20

IRS Request for Comments on 2014 PPACA Provisions

This is the twentieth issue in our series of alerts for employers on selected topics in health care reform. (Click *here* to access our general summary of health care reform and other issues in this series) This series of Health Care Reform Management Alerts is designed to provide an in-depth analysis of certain aspects of health care reform and how it will impact your employer-sponsored plans.

On May 3, 2011, the Internal Revenue Service (IRS) issued Notice 2011-36 (the "Notice"), requesting comments on several Patient Protection and Affordable Care Act (PPACA) provisions that are effective in 2014, including (1) the penalties for failure to offer affordable coverage (the "Play or Pay Penalty"), (2) the prohibition on waiting periods in excess of 90-days, and (3) the requirement that large employers automatically enroll full-time employees for health care coverage. The Notice offers a glimpse into how the IRS intends to interpret these provisions following the close of the comment period. The IRS cautions, however, that the Notice should not be construed as guidance, and no inference should be drawn from the proposed rules and definitions. Comments must be submitted by **June 17, 2011**. This Alert summarizes the Notice and briefly explains how to submit comments.

Pay or Play Penalty

Starting in 2014, under the shared responsibility provisions of the Internal Revenue Code (Code), applicable large employers must:

1. Provide "minimum essential coverage" for full-time employees or pay a penalty equal to $2,000 multiplied by the total number of full-time employees; and

2. Offer "affordable coverage" (the employer's share must equal at least 60% of the actuarial value and the cost of single employee coverage cannot exceed 9.5% of any employee's household income) or pay a penalty equal to $3,000 multiplied by the number of full-time employees who receive a premium subsidy or tax credit for health coverage obtained through an exchange.*

The Notice provides that the proposed regulations will clarify that an employer offering coverage to substantially all of its full-time employees will not be subject to the penalty under item #1 for failing to offer coverage. Comments are requested on the employer shared responsibility provisions in general and on whether there are other situations where the penalty under item #1 should apply to employers who exclude certain categories of employees from coverage, such as nonresident aliens or seasonal employees.*

The IRS proposes the following definitions under the Notice:

- **Employer.** Employer would include all members of a controlled group or affiliated service group.

- **Employee.** Employee would include any workers who qualify as employees under the common-law test, which can, in some instances, include leased employees.

* PPACA originally contained an additional requirement that employers provide certain employees with a "free choice voucher" to purchase coverage through the exchanges, but that requirement was eliminated in the last minute budget deal, passed in early April.

- **Hours of Service.** Hours of service would include the hours for which an employee is paid for services performed, or hours for which an employee is entitled to payment even though no duties are performed (e.g., vacation, illness, etc.). For hourly employees, employers would calculate actual hours of service from records of hours worked. For non-hourly employees, the IRS proposes allowing employers to choose between a number of methods for calculating hours of service, including: (1) actual hours of service, (2) days-worked equivalency, or (3) weeks-worked equivalency.

Determining Whether An Employer is a Large Employer. Applicable large employer is defined in the Code as an employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year, unless: (1) the workforce exceeded 50 full-time employees for 120 days or less, and (2) the employees in excess of 50 during such 120-day period were seasonal workers. Full-time equivalent employees (FTEs) are also counted.

A full-time employee is an employee who is employed on average of at least 30 hours per week. The Notice contemplates an alternative standard of 130 hours per month. The number of FTEs is determined by dividing the aggregate number of hours of service of employees who are not full-time by 120.

Methods for Determining Full-Time Employees. While part-time employees may be considered in determining whether an employer is an "applicable large employer," only full-time employees are required to be offered coverage. Because a determination of full-time status on a monthly basis may cause practical difficulties for employers who attempt to avoid a Pay or Play Penalty, in the Notice the IRS proposes a flexible alternative for determining full-time status. The IRS suggests using a look-back/stability period during which the employer would determine full-time status by looking back at a defined period of anywhere between three and twelve months to determine whether the employee averaged 30 hours per week (or 130 hours per month). If the employee is determined to be a full-time employee, the employer would then be required to provide coverage for a subsequent stability period, which would be at least six months long and no shorter than the look-back period. Unless the employee terminates service during the stability period, the employer would be required to continue providing coverage, even if the employee dropped below full-time status. The IRS requests comments on possible alternative methods of determining full-time status.

90-Day Waiting Period

Starting in 2014, PPACA prohibits employers from imposing a waiting period for health coverage that exceeds 90 days. The Notice requests comments on how the 90-day rule should apply to a number of hypothetical situations. Many of these hypotheticals demonstrate that the IRS is considering allowing employers to start the 90-day waiting period from a date other than an employee's date of hire (e.g., the 90-day waiting period would instead begin once the employee is otherwise eligible to enroll under the terms of the plan). The Notice also requests comments on:

1. What other service-based eligibility conditions employers currently impose that could pose compliance concerns;

2. Whether the waiting period provision should require aggregation of discrete periods of service; and

3. How the Play or Pay Penalty should coordinate with the 90-day waiting period.

Automatic Enrollment

PPACA requires employers with 200 or more full-time employees to automatically enroll all new full-time employees for health care coverage. While the Department of Labor is primarily responsible for drafting regulations relating to this provision

(guidance is expected by 2014), the IRS is collaborating in defining full-time employee and requests comments regarding that definition.

Employer Action Steps

Comments must be submitted by June 17, 2011. Comments may be emailed to *Notice.comments@irscounsel.treas.gov* (reference "Notice 2011-36" in the subject line) or mailed to:

CC:PA:LPD:PR (Notice 2011-36)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

If you have any questions regarding IRS Notice 2011-36 or would like assistance preparing comments to IRS Notice 2011-36, contact your Seyfarth Shaw LLP attorney or any Employee Benefit attorney listed on our website, or send your questions to HealthReform@seyfarth.com.