Employer Shared Responsibility Q&A & Mandate Penalties Under the ACA

Certain employers are subject to the employer shared responsibility provisions under the ACA. Under these provisions, such employers may be penalized for: 1) not providing minimum essential coverage to their full-time employees and dependents, or 2) not providing coverage that is affordable and that provides minimum value. On February 10, 2014, the Internal Revenue Services (IRS) and the Department of the Treasury issued a final rule implementing the employer shared responsibility requirements under section 4980H of the Internal Revenue Code.

When does the employer responsibility provision take effect?

- Although the requirements are effective beginning January 1, 2014, overall enforcement has been delayed to January 1, 2015, with an additional enforcement delay added for employers with 50 to 99 full-time or full-time equivalent employees. For those employers, the requirements will not be enforced until plan years with effective dates on or after 1/1/16, if certain conditions are met.
- Transitional relief is also available for employers with 100 or more full-time or full-time equivalent employees. For these employers who provide coverage that is affordable and meets minimum value to at least 70 percent of full time employees in 2015 and at least 95 percent in 2016 and beyond, the 4980(H) penalties will not be triggered.
- For a calendar year, employers who employ fewer than 50 full-time employees and full-time equivalents in the prior calendar year are not subject to the employer shared responsibility provisions.

What constitutes "affordable" coverage?

- Coverage that would cost an employee more than 9.5 percent of their annual household income is considered unaffordable.
- Three optional safe harbors exist to assist the employer in determining affordability: Form W-2 wages safe harbor, rate of pay safe harbor and federal poverty line safe harbor.

What constitutes coverage that provides minimum value?

- A plan that covers at least 60 percent of the total allowed cost of benefits that are expected to be incurred under the plan is considered to provide minimum value
- The HHS and the IRS have published various methods that may be utilized to determine minimum value

What triggers a 4980(H) penalty?

- A 4980(H) penalty may be triggered if at least one of an applicable large employer's full-time employees receives a premium tax credit through the marketplace
- If no full-time employee receives a premium tax credit, the employer will not be subject to an employer shared responsibility payment

What is an employer for purposes of these provisions?

- An employer subject to the employer responsibility provisions is an "applicable large employer". An applicable large employer employs on average at least 50 full-time employees (including full-time equivalents) during the preceding calendar year.
- The final rule includes transitional relief for purposes of the applicable large employer determination for the 2015 calendar year, which allows employers the option to determine their status by reference to a period of at least six consecutive calendar months in the 2014 calendar year.
- All employees are counted (with a limited exception for certain seasonal workers) for determining status, including those exempt from the Individual Shared Responsibility provision and those eligible for other coverage such as Medicare or Medicaid.

Who is counted as a full-time employee and a full-time equivalent employee?

- A full-time employee is one who works an average of at least 30 hours per week (or 130 hours of service in a calendar month).
- A "look-back measurement method" may be used to determine an employee's full-time status during a future period. This method is for determining liability only.
- Different approaches can be used for other circumstances such as employees who work variable hour schedules, seasonal employees and employees of educational organizations
- Full-time equivalent employees (those working less than 30 hours per week) are used to determine an employer's status as an applicable large employer. An employer's number of full-time equivalents is determined by adding the hours that are worked by each full-time equivalent employee for the month (but no more than 120 hours per employee) and then dividing by 120.

Are there special rules if the employer employs "seasonal employees" or "seasonal workers"?

- The terms "seasonal worker" and "seasonal employee" are both used in the Employer Shared Responsibility provisions but in two different contexts.
- The term "seasonal worker" is relevant for determining whether an employer is an applicable large employer. An employer will not be considered to employ more than 50 full-time employees if: a) its workforce exceeds 50 full-time employees for 120 days or fewer during the calendar year, and b) the employees in excess of 50 employed during the 120-day period were seasonal workers. Seasonal workers are workers who perform labor or services on a seasonal basis, as defined by the Secretary of Labor. Employers may apply a reasonable, good faith interpretation of the term "seasonal worker."
- The term "seasonal employee" is relevant for determining an employee's status as a full-time employee under one of the methods for determining full-time employee status - the look-back measurement method. A seasonal employee means an employee in a position for which the customary annual employment is six months or less and for which the period of employment begins yearly in approximately the same part of the year.

What is the penalty for not offering minimum essential coverage?

- If an applicable large employer does not offer minimum essential coverage to its full-time employees (and their dependents unless the employer qualifies for the 2015 dependent

coverage transition relief), the employer will be subject to a monthly penalty if any full-time employee receives subsidized coverage through an exchange. Generally, an employee may qualify for subsidized coverage through an exchange if his or her household income is less than 400 percent of the Federal Poverty Level.

- The penalty for not offering coverage is generally equal to the number of full-time employees the employer employed for the month (not counting the first 80 in 2015, 30 in 2016 and following), multiplied by 1/12 of $2,000.00. Only full-time employees (not full-time equivalents) are counted for purposes of calculating the penalty. The penalty may be indexed for inflation each year.
- The final rule provides for transition relief allowing an employer to satisfy the requirement to offer minimum essential coverage by offering coverage to 70 percent of its full-time employees and their dependents in 2015 and 95 percent of its full-time employees and their dependents (or, if greater, to five employees) in 2016 and beyond. This does not alleviate the potential liability under the affordability prong, discussed below.

What is the penalty for providing minimum essential coverage that is not affordable?

- If an applicable large employer offers its full-time employees (and their dependents unless the employer qualifies for the 2015 dependent coverage transition relief) the opportunity to enroll in minimum essential coverage, the employer may be subject to a penalty if the employer-sponsored coverage does not provide "minimum value" or is "unaffordable" and one or more full-time employees receive subsidized coverage through an exchange.
- Generally, employees who are eligible for employer-sponsored coverage are not eligible to receive subsidized coverage through an exchange. However, an employee may qualify for subsidized coverage through an exchange if his or her household income is less than 400 percent of the Federal Poverty Level and: a) the employer does not pay at least 60 percent of the allowed costs under the employer-sponsored plan (the coverage does not provide "minimum value), or b) the employee's required contribution for coverage exceeds 9.5 percent of the employee's household income (the coverage is "unaffordable").
- The penalty for not offering coverage that is affordable or that provides minimum value is generally equal to the number of full-time employees receiving subsidized coverage through an exchange for that month multiplied by 1/12 of $3,000.00. However, the penalty will not be greater than the penalty that would apply if the employer offered no coverage at all. Only full-time employees (not full-time equivalents) are counted for purposes of calculating the penalty. The penalty may be indexed for inflation each year.

Do these penalties apply to employers employing part-time employees?

- Part-time employees (those that work on average less than 30 hours per week) are counted as full-time equivalent employees for purposes of determining whether an employer is a large employer subject to these penalties. However, part-time employees are not counted for purposes of calculating the actual penalty amount. An employer will

not pay a penalty for a part-time employee, even if that employee receives subsidized coverage through an exchange.

When is the mandate in effect for non-calendar year plans? Is there any transition relief available for non-calendar year plan years?

- The general rule is that the employer mandate applies by calendar year, not plan year. So, the first year it is effective is 2015. The rule specifically addresses transition relief available for non-calendar year plans for the period before the first day of the first non-calendar year plan year beginning in 2015 as long as certain conditions are met. To qualify for the transition relief summarized below, the employer must have maintained the non-calendar year plan(s) as of 12/27/12 and must not have changed their plan year after 12/27/12 to begin at a later calendar date:
    - An employer will not be subject to a potential penalty for any month prior to the first day of the 2015 plan year with respect to any employees who are eligible for coverage on the first day of the 2015 plan year under the eligibility terms of the plan as of 2/9/14, as long as they are offered affordable minimum value coverage no later than the first day of the 2015 plan year.
    - If the employer had at least one quarter of all its employees covered under the non-calendar year plans (measured as of any date in the 12 months ending on 2/9/14) or offered coverage under those plans to one third or more of all its employees during the open enrollment period that ended most recently prior to 2/9/14, the employer will not be subject to a potential penalty for any month prior to the first day of the 2015 plan year with respect to employees who would not have been eligible for coverage under any group health plan maintained by the employer as of 2/9/14 but who are offered affordable minimum value coverage no later than the first day of the 2015 plan year.
    - If the employer had at least one-third of its full-time employees covered under the non-calendar year plans (measured as of any date in the 12 months ending on 2/9/14) or offered coverage under those plans to one half or more of its full-time employees during the open enrollment period that ended most recently prior to 2/9/14, the employer will not be subject to a potential penalty for any month prior to the first day of the 2015 plan year with respect to full-time employees who would not have been eligible for coverage under any group health plan maintained by the employer as of 2/9/14 but who are offered affordable minimum value coverage no later than the first day of the 2015 plan year.

How are dependents defined for purposes of the employer responsibility provision?

- Under the final rule on employer responsibility, the term "dependent" is defined to mean a child (as defined in Section 152(f)(1)) of an employee who has not attained age 26.
- A dependent does not include the spouse of an employee.
- A dependent of a full-time employee who receives a premium tax credit on the exchange will not affect an employer's liability under these provisions. An employer will potentially be liable for a penalty only if a full-time employee receives a premium tax credit.

Are there transitional rules related to the offer of dependent coverage?

- Yes, under the final rules, if an employer does not offer dependent coverage currently, it will not be liable under the employer responsibility provision in 2015 in this regard so long as the employer takes steps during its 2014 or 2015 plan year toward offering such coverage.
- This dependent coverage transition relief applies for the 2015 plan year for plans where: 1) dependent coverage is not offered 2015 and had not been offered in either 2013 or 2014, 2) dependent coverage is offered but does not constitute minimum essential coverage, or 3) dependent coverage is offered for some but not all dependents.

For More Information or Assistance with The Patient Protection & Affordable Care Act ("ACA" aka "Obamacare") Contact:

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