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Employer Compliance Alert

AGENCIES ISSUE GUIDANCE ON AUTOMATIC ENROLLMENT, EMPLOYER MANDATE, AND WAITING PERIODS

On the same day that they released final regulations on the Summary of Benefits and Coverage (see our recent [Compliance Alert](#) on SBCs), the Departments of Labor, Health and Human Services, and Treasury (the Departments) also issued a joint set of frequently asked questions (FAQs) addressing various topics under the Affordable Care Act (ACA). [IRS Notice 2012-17](#) (which was issued in substantially identical form by the other two Departments) provides guidance on automatic enrollment, employer shared responsibility, and waiting periods, as well as suggestions regarding various approaches the Departments are considering proposing in future regulations.

Automatic Enrollment

The ACA provision on automatic enrollment requires certain large employers (those with more than 200 full-time employees) to automatically enroll new full-time employees in one of the employer's health benefit plans (subject to any legally permissible waiting period), and to continue the enrollment of current employees in a health benefit plan. It further requires notice and an opt-out opportunity for employees who have been automatically enrolled.

The Department of Labor had previously indicated that it intended to issue regulations on the automatic enrollment rules before 2014. In what will likely come as welcome relief to many large employers, Notice 2012-17 indicates that, in order to ensure coordinated guidance and a smooth implementation process, the DOL has concluded that regulations implementing the ACA's automatic enrollment provisions will not be ready to take effect by 2014. Until such regulations are finalized, employers are not required to comply with these automatic enrollment provisions.

Employer Shared Responsibility

Another key element of the ACA is the employer "shared responsibility" provision. This provision, currently scheduled to take effect in 2014, would assess a penalty against certain "applicable large employers" (those with 50 or more full-time employees) that either fail to offer "minimum essential coverage" to their full-time employees, or that offer coverage that is "unaffordable" relative to an employee's income. "Full-time" is defined to mean an employee who is employed an average of at least 30 hours per week.

Knowing which employees count as full-time is critical for employers in determining whether they are subject to the shared responsibility provision. In certain industries where employee hours fluctuate each week (such as retail and hospitality), employers have been struggling to understand how the new rules will apply to them.

The FAQs indicate that the Departments intend to issue guidance that would allow employers to use a "look-back/stability period safe harbor" for purposes of determining whether a current employee has averaged at least 30 hours of service per week during the measurement period. As described in an earlier [IRS Notice](#), under this approach, an employer would be

permitted to determine each employee's full-time status for a defined *prospective* period (the stability period) by measuring that employees' hours over a defined *retrospective* period (the look-back period). The Departments anticipate that future guidance will allow look-back periods and stability periods of up to 12 months.

The Departments also intend to issue guidance on how to handle newly-hired employees. The FAQs specifically propose a methodology for determining full-time status in situations where, based on the facts and circumstances, it cannot reasonably be determined whether a newly-hired employee is expected to work full-time.

Waiting Periods

Under the ACA, effective for plan years beginning on or after January 1, 2014, a group health plan may not have a waiting period that exceeds 90 days. The ACA's statutory language raised many questions regarding how this 90-day limit on waiting periods should be measured. Notice 2012-17 continues to leave many of those questions unanswered, but it confirms that future regulations will incorporate the existing regulatory definition of "waiting period."

Under those existing regulations, a waiting period is defined as the period that must pass before coverage for an employee or dependent *who is otherwise eligible* to enroll under the terms of a group health plan can become effective. This suggests that other eligibility conditions that are not based solely on the lapse of a time period (such as full-time vs. part-time status, or bona fide job categories) will still be permitted. In fact, the FAQs specifically state that nothing in the waiting period rules will require employers to offer coverage to part-time employees or to any other specific category of employees.

The FAQs also confirm that the Departments intend to issue guidance addressing the coordination of the employer shared responsibility provision with the 90-day waiting period limitation. That guidance is expected to provide that, at least for the first three months following an employee's date of hire, an employer will not be subject to a shared responsibility tax penalty merely because it fails to offer coverage to the employee during the waiting period.

Next Steps

This interim guidance may be helpful to employers that are trying to project the financial effect that some of the ACA provisions will have on them in 2014 and beyond. However, because the FAQs are not binding and employers cannot rely on them, additional guidance will be necessary before employers can confirm their final strategies for compliance.

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