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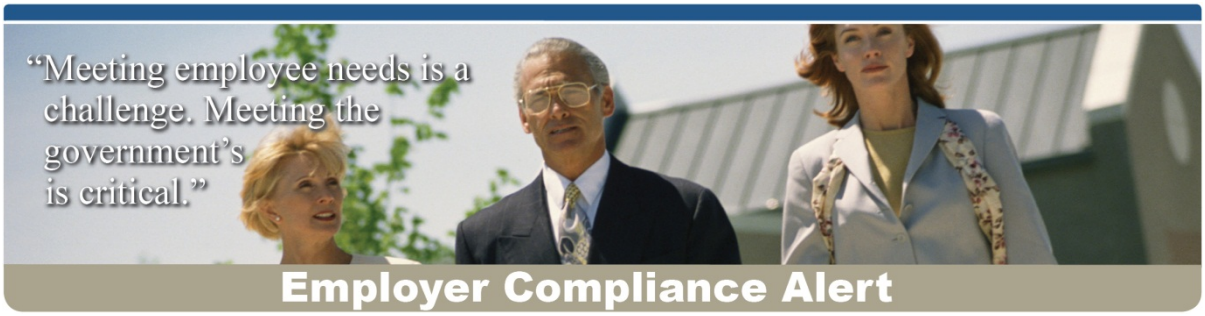

Important Transition Relief for Non-Calendar Year Plans

Date: 04.12.2013

The January 1, 2014 effective date of the Pay-or-Play requirements under health care reform presents special issues for employers with non-calendar year plans. Prior to the release of the proposed regulations under the shared responsibility rules, employers with non-calendar year plans would either need to comply with the Pay-or-Play requirements at the beginning of the 2013 plan year or change the terms and conditions of the plan mid-year in order to comply.

Recognizing that compliance as of January 1, 2014 caused a special hardship for non-calendar year plans, the proposed regulations, provide special transition relief. Employers with non-calendar year plans in existence on December 27, 2012 can avoid the Pay-or-Play penalties for months preceding the first day of the 2014 plan year (the plan year beginning in 2014) for any employee who was eligible to participate in the non-calendar year plan as of December 27, 2012 (whether or not they actually enrolled).

Under this relief, the employer would not be subject to Pay-or-Play penalties for any such employees until the first day of the plan year beginning in 2014, provided they are offered coverage that is affordable and provides minimum value as of the first day of the 2014 plan year. The relief also provides an employer maintaining a non-calendar year plan with additional time to expand the plan's eligibility provisions and offer coverage to employees who were not eligible to participate under the plan's terms as of December 27, 2012.

If the employer had at least one-quarter of its employees (full and part-time) covered under a non-calendar year plan, or offered coverage under a non-calendar year plan to one-third or more of its employees (full and part-time) during the most recent open enrollment period prior to December 27, 2012, it will not be subject to Pay-or-Play penalties for any of its employees until the first day of the plan year beginning in 2014.

For purposes of determining whether the plan covers at least one-third (or one-quarter) of the employer's employees, an employer can look at any day between October 31, 2012 and December 27, 2012. Again, this transition relief is dependent upon the plan offering affordable, minimum value coverage to these employees no later than the first day of the 2014 plan year.

This important transition rule raises the question of what is considered to be a plan's plan year.

- If a plan is not required to file an Annual Report, Form 5500, as is the case with a fully insured plan with fewer than 100 participants, or the plan has failed to prepare a summary plan description that designates a plan year, the plan year generally will be the policy year, presuming that the plan is administered based on that policy year.
- If a policy renews on January 1 and any annual open enrollment changes take effect January 1, the plan year likely will be deemed to start January 1.
- If the policy renews on July 1, however, and open enrollment changes become effective on January 1 of each year, the lack of a summary plan description leaves the plan year determination open to question. The employer in this situation may want the plan year to start on July 1 in order to delay the date on which the plan has to comply with the requirements under health care reform.
- If the plan is administered on a calendar-year basis, however, the government could reasonably argue that the plan year is the calendar year. Employers should be taking steps now to identify the plan year for their group health plan(s) in order to ensure that they are timely complying with the applicable requirements under health care reform.
- If the employer has prepared and distributed a summary plan description for its group health plan or the plan files an Annual Report, Form 5500, the plan year has already been identified.
- If the employer has not complied with the ERISA disclosure and/or reporting requirements, then additional analysis of the 12-month period over which the plan is administered and operated is needed to identify the plan year. That analysis should take place now and not when an auditor asks the question.

For employers in this situation, it would be advisable to adopt a plan document to address this issue. Since insurance companies are not directly subject to ERISA, their policies may not contain all of the provisions necessary to meet ERISA's disclosure requirements.

- An insurance policy typically does not contain certain desired provisions describing the relationship between the employer and plan participants. Such provisions might include the employer's indemnification of its employees who perform plan functions, the employer's right to amend the plan, a description of the plan's enrollment process, and the allocation of the cost of coverage between the employer and participants.
- A wrap plan can address these issues, as well as enable an employer to aggregate all its welfare benefits under a single plan so that a consolidated Annual Report, Form 5500 may be filed for all ERISA welfare benefit plans subject to annual reporting obligations.

Jackson Lewis LLP