Strategic Implementation of Employer Shared Responsibility Rules

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consultants in human resources

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Your Presenters

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Agenda

- Welcome
- Overview of the Employer Shared Responsibility Rules
  - Impact on Corporate Structure
  - Practical Application of Measurement, Administrative & Stability Periods
  - Time Line Examples
- Questions & Answers
- What We'll Cover in Our Next Webinar

What is an Applicable Large Employer?

- Do you have more than 50 full-time equivalent employees?
- Does breaking up my company into smaller pieces help me avoid the 50 FTE threshold?
  - Aggregation rules combine all related entities to determine if an employer is an Applicable Large Employer
- What if I outsource my employees to a staffing/employee leasing organization?

Two Potential Penalties Under 4980H

- 1st penalty tax is assessed for failing to offer minimum essential health coverage to at least 95% of your full-time employees (FTEs) and their dependents
- 2nd penalty tax is assessed when the coverage offered does not meet a minimum value test (must cover at least 60% of allowable expenses) and/or the employee contributions charged for single FTE coverage is unaffordable (i.e. exceeds 9.5% of employee's household income)
- Both penalties are not tax-deductible

Penalty for Not Offering Coverage

- 1st penalty is $2,000 X # actual FTEs minus 30 X 1/12 for each month health coverage was not offered
  - Assessed only if FTE receives a premium subsidy to purchase coverage through the exchange or "marketplace"
  - If employee was offered coverage, but declined, their waiver will not trigger a penalty even if they enroll on the exchange
  - "Dependents" does not include spouses

Penalty for Not Offering Coverage

- The 30 employee reduction for purposes of calculating the penalty is allocated ratably across all entities
- Any penalties are imposed separately upon each entity comprising an applicable large employer

Failure to Offer Health Coverage Safe Harbor

- Provided employer offers coverage to at least 95% of its full-time employees, then 1st penalty tax is not triggered
- Failure to offer coverage is not required to be inadvertent; strategic exclusions may be considered
- Only applies to 1st penalty tax

A New Wrinkle on the 2nd Penalty Tax

- If one or more FTEs who are not offered coverage receive federal premium subsidies when they enroll in the exchange, then you are assessed the 2nd penalty tax
  - As long as this number of FTEs is less than 5% of your total FTEs, the tax ($3,000) applies only to the employees who enroll on the exchange—not to all your FTEs

More on the Definition of Dependent

- See IRC Section 152 (f)(1)
  - Children who are under age 26, including foster children
  - Employers have until 2015 to modify their plan documents to meet this expanded definition, but are expected to comply in 2014 as new employees are enrolled and employees participate in open enrollment
  - Remember, for purposes of 4980H, “dependents” does not include spouses

Penalty if Coverage is Unaffordable

- 2nd penalty is $3,000 X actual # FTEs who receive a federal premium subsidy X 1/12 for each month health coverage is not affordable
- There are 3 safe harbors regarding affordable coverage for the single FTE
- Only one employer-offered plan must satisfy the minimum value and affordability requirements

Approved Safe Harbors

If any of these safe harbors are satisfied, you will not be subject to a penalty tax for unaffordable coverage:

- W-2 Safe Harbor: FTE employee contribution for single coverage does not exceed 9.5% of employee's W-2 wages (Box 1)
- Rate of Pay Safe Harbor: FTE's hourly rate X 130 hours does not exceed 9.5% of this computed monthly wage
- Federal Poverty Line Safe Harbor: FTE's contribution does not exceed 9.5% of the FPL for an individual ($11,490)

Who is a Full-time Employee?

- The employee averages at least 30 hours/week during a calendar month; or at least 130 hours/month
- Include hours actually worked plus hours for which the employee is entitled to pay because of sick leave, holiday, vacation, military duty, etc.

What is a Variable Hour Employee?

- If you can't determine on their hire date whether the person will work at least 30 hours/week, the person is considered a "variable hour employee"
- If you expect the person to work at least 30 hours/week, but their employment is of limited duration, they may also be considered a "variable hour employee"
  - Available under Transition Rule through 2014

What About Seasonal Employees?

- For now, “seasonal” remains undefined
- For 2014, use “reasonable, good faith interpretation” of the term “seasonal employee”
- For 2015, expect the IRS to define “seasonal employee” as someone who works less than x months (and perhaps other factors)
- More on seasonal employees later when we discuss Termination and Re-Hire

Use of Measurement, Administrative & Stability Periods

- This process is optional for the employer
  - However, employers will want to take advantage of this guidance as a safe harbor in dealing with DOL/HHS/IRS
- Each entity within an Applicable Large Employer may use its own Measurement, Administrative & Stability periods
  - May use different periods for different categories of employees (e.g. union employees)
  - Must be administered uniformly and consistently for all employees in the same category

Refresher on the Ground Rules

- Measurement Period must be at least 3 months and no more than 12 months
- Duration of the Stability Period may not be less than the duration of the Measurement Period, except:
  - If variable hour employee is determined to be FTE, Stability Period must be at least 6 months
- Administrative Period can not exceed 90 days and is included in the overlapping Stability Period

Transitioning from 2013 to 2014

- If you want to use a Stability Period of 1/1/2014-12/31/2014, then use a Measurement Period that:
  - Is not less than 6 months long
  - Begins no later than 7/1/2013
  - Ends no earlier than 90 days before 1/1/2014
  - For example, Measurement Period can start 4/1/2013 and Administrative Period can start 10/1/2013
- What happens if you have a fiscal year?

Key Points for Ongoing Employees

- Defined as employee who has been employed at least one Standard Measurement Period (SMP)
- If status of employment changes before the end of a Standard Stability Period (SSP), the change does not affect the person's status as an FTE (or not an FTE) for the remaining portion of the SSP

Key Points for New Employees

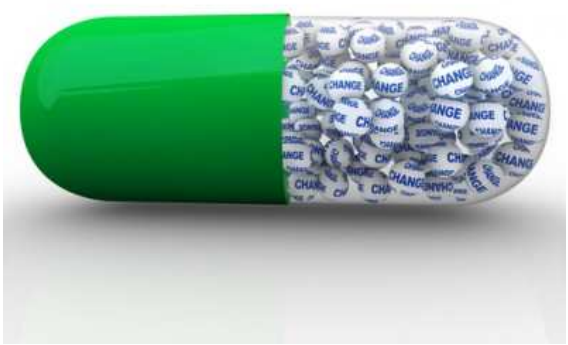
- If person is expected at date of hire to be FTE, they must be offered health coverage within 1st 3 full calendar months of employment; otherwise a penalty tax would be applicable:
  - For those 3 months; and
  - Any subsequent months coverage was not offered
- If person is considered variable hour or seasonal employee, the Initial Measurement Period (IMP) is between 3 and 12 months that begins on any date between employee's start date and 1st calendar month following start date

Key Points for New Employees

- The IMP and any Initial Administrative Period (IAP) may not extend beyond last day of 1st calendar month beginning on or after 1st anniversary of employee's start date, i.e. effectively 13 months

Transitioning from New Employees into Ongoing Employees

- Each new variable hour or seasonal employee must be tested at end of 1st full SMP at the same time and under the same conditions as ongoing employees



Transitioning from New Employees into Ongoing Employees

- After person has been determined to be FTE during IMP, if this person does not satisfy the FTE status requirements during 1st applicable SMP (this will overlap at some point with the IMP and ISP), then his/her status as FTE would end at the expiration of ISP, and the person would not be FTE through the end of 1st applicable SSP

Transitioning from New Employees into Ongoing Employees

- If variable hour employee fails to satisfy FTE status requirements during IMP, the ISP ceases at the end of 1st full SMP and SAP, causing employee to transition seamlessly into the process for evaluating ongoing variable hour employees

What Happens in the Event of Termination and Re-Hire?

- Person is treated as new employee under 2 conditions:
  - 1st, they did not have an hour of service for the employer for at least 26 consecutive weeks immediately preceding date of re-hire; or

What Happens in the Event of Termination and Re-Hire?

- Employer uses the optional "Rule of Parity"
  - Person did not have an hour of service during period that is at least 4 consecutive weeks and exceeds the employee's period of employment that immediately preceded date of termination

Use of Seasonal Employees

- 12-month IMP
  - IAP of 30 days (an AP may be up to 90 days, but together the IMP and the IAP may not exceed 13 months)
  - Seasonal Employee (using good faith interpretation of that term in 2014) may work <u>any</u> amount of hours during the 1st 6 months of their IMP (which commences on their DOH or by the 1st day of the month following DOH)
  - Terminates employment at the end of 6 months

Use of Seasonal Employees

- If Seasonal Employee's absence before re-hire is at least 26 weeks, employer may treat this person as new Seasonal Employee upon re-employment
  - May disregard their prior hours of service; and
  - May require commencement of new IMP upon re-hire
- As long as Employer cannot reasonably determine they will exceed 30 hours/week during IMP

Determining Average Hours for Educational Organizations

- You may use 1 of 2 methods in dealing with employment breaks of at least 4 consecutive weeks relating to non-working weeks under an academic year:
  - Exclude the employment break when calculating hours during the measurement period; or
  - Credit employee with hours during break at a rate = his/her average hours during measurement period that is not part of break
- No more than 501 hours can be excluded or credited per employee in a calendar year

Special Considerations for Hospitals

- Many hospitals use per diem or as-needed nurses and other personnel to work difficult-to-fill shifts or to help in peak occupancy situations
- In most cases, benefits are not extended to these per diem employees, even though some may average more than 30 hours/week

Special Considerations for Hospitals

- Hospitals may consider using 5% safe harbor for the 1st penalty tax to identify small core group of per diem employees to continue working their shifts as before
  - Their hours are not reduced; thus staffing needs are met and patient satisfaction upheld
  - Health benefits are not offered
  - If one or more of these per diem employees goes to the exchange and receives a subsidy, the penalty is limited to $3,000/person

Measuring Hours of Non-Hourly Employees

- What about Salaried/Exempt employees working part-time?
  - For non-hourly employees, use days worked (8 hours/day) or weeks worked (40 hours) equivalency methods
  - Under no circumstances may these methods be used if doing so would understate amount of hours non-hourly employee worked

Time Line Examples

- Assumptions:
  - 1st Measurement Period: 4/1/2013-9/30/2013
  - 1st Administrative Period: 10/1/2013-12/31/2013
  - 1st Stability Period: 1/1/2014-12/31/2014 (allowed with proposed Transition Rule)
  - SMP: 10/1-9/30
  - SAP: 10/1-12/31
  - SSP: 1/1-12/31
  - IMP for new variable hour employees is 1 year
  - IAP is 1 month

Time Line Examples

- Our Hypothetical Examples will include:
  - Current ongoing FTE A
  - Current ongoing variable hour employee B
  - New FTE C
  - New variable hour employee D
  - New seasonal employee E

Who am I?

I started work today (March 15, 2014). My employer can't reasonably determine that I will work an average of 30 hours a week or more.

How does this affect me?

My Employer measures my hours over the Initial Measurement Period (Ending March 14, 2015).

If I work less than an average of 30 hours per week, then my Employer does not need to offer health coverage for the Initial Stability Period.

If I work more than an average of 30 hours per week, then my Employer must offer health coverage for the Initial Stability Period (Ending April 14, 2016) assuming a short administrative period of 30 days.

What happens to me on January 1, 2016 (If I work less an 30 hours per week on average) or April 15, 2016 (If I work more than 30 hours per week on average) is determined by my first full standard Measurement Period (October 1, 2014 through September 30, 2015).

Who am I?

I am a current ongoing employee who regularly works 40 hours per week. My employer can reasonable determine that I will satisfy the 30 hours of service per week average threshold.

How does this affect me?

My employer must offer me (and my dependents) health coverage beginning on January 1, 2014.

Who am I?

I am a new full-time employee. I started work today (March 15, 2014).

How does this affect me?

My Employer can reasonably determine that I will work on average 40 hours per week. My employer has until June 30, 2014 to offer me coverage (and my dependents) and enroll me (if I want coverage) to avoid a penalty tax.

Who am I?

I am a current hourly employee who works approximately 25 hours per week. I am called a "Variable Hour Employee" under the Regulations.

How does this affect me?

My employer tracks my hours of service over the First Measurement Period.

I worked only an average of 26 hours per week during the First Measurement Period.

I missed it.

Who am I?

I am a new Seasonal Employee hired on June 1, 2014 and I am working through September. I will be rehired in June of 2015.

How does this affect me?

Since I am a "Seasonal" Employee, my Employer knows I am going to terminate in September, and can reasonably determine that I am unlikely to average over 30 hours per week over the 12 month measurement period.

Since it is more than 26 weeks since my last hour worked for the Employer, when I am rehired on June 1, 2015, my Employer can treat me as a new Seasonal Employee and disregard my former hours of work.

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Questions & Answers

Presentation slides, an audio recording and Q&A transcript can be found on the Findley Davies website, www.findleydavies.com (Resource Center, Webinars) or www.slk-law.com.

Our Next Webinar

- Proposed Wellness Rules
- IRC 6056 Reporting Requirements
- Eligibility Definitions for HIPAA-excepted Benefits
  - Dental
  - Vision
- Other Ancillary ACA issues

Thank You

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FAQ – Health Care Reform Shared Responsibility Rules

Based on questions posed during 3.21.13 webinar

1. **Does membership in an industry association cause any issue with the aggregation rules to determine applicable large employer status?**

   No. An employer's common ownership with other entities meeting certain percentage thresholds is required (generally 80% common ownership). Caution –– There may be attribution of ownership between family members, estate planning trusts, and other entities.

2. **Does buying health care coverage through an association plan result in aggregation of the purchasing employers for determining applicable large employer status?**

   No. As with question 1, there has to be a commonality of ownership among employers to have aggregation.

3. **Does the 60% contribution requirement apply to dependent's costs?**

   The 60% number relates to the minimum value requirement. A minimum value plan must cover an actuarially determined amount of at least 60% of allowable benefits.

4. **May we use a combination of the affordable plan safe harbors? We don't have to choose one specific safe harbor, correct?**

   Yes. The regulations permit an employer to apply one OR MORE of the safe harbors as they choose.

5. **If using the W-2 safe harbor, which year's W-2 applies (e.g., W-2 from the prior year)?**

   The W-2 safe harbor is applicable to the year's current wages; thus, the W-2 safe harbor for the 2014 Calendar Year would be based on Box 1 of the W-2 applicable to the 2014 W-2 wages. This may result in a practical issue if the employer desires to establish employee contributions for 2014 open enrollment. As of October 2013 (the beginning of what might be the Administrative Period used for determining who to offer coverage), an employer would only have the 2012 W-2 information to utilize. Therefore, one of the other two safe harbors may be more useful for planning purposes for prospective years.

6a. **Question on part-time employees. We offer coverage to our full-time employees - they pay 10% of the premiums - not anywhere close to 9.5% of their income. However, our part-time employees that work 30 hours or more but less than full-time are also offered coverage, but they pay 100% of the premium. Did the presenters just say that was OK?**

6b. **Could we have a minimum value plan that we offer to part time employees who work more than 30 hours in which the premium would be paid 100% by the employee for this group only?**

   An employee who averages more than 30 hours per week will be considered a "Full-Time Employee" for purposes of these rules. If the Part-Time Employee averages less than 30 hours per week, as determined by applying the measurement period to them as a "variable hour employee," then the employer has no obligation to offer health coverage under a minimum value affordable plan.

   If the employer offers a minimum value affordable plan to an employee, then the employer could also offer an additional plan (which would not necessarily meet the minimum value or affordable coverage requirements) that would require the employee to pay 100% of the premium.

7. **I'm confused on the 125 comments. If an employer uses the same rate for all employees (i.e., not based on % of compensation), is there a discrimination test issue?**

   There are non-discrimination rules with respect to eligibility and benefits for a 125 plan. Simplified, benefits non-discrimination is analyzed by dividing the value of benefits provided the employees through a 125 plan by the employee's compensation. Much like a 401(k) plan test, the average for the highly compensated participants is compared to the non-highly compensated participants. Disregarding all other benefits the employee may elect under the 125 plan and just focusing on the health care benefits, using the "same rate" (i.e. the same contribution amount) for each participant will result mathematically in the average for highly compensated employees being less than for the non-highlys. That is a good outcome; it demonstrates that the benefits do not favor the highlys.

   Practically speaking, however, the "typical" 125 plan will have multiple benefits available and some eligible employees will elect "zero," so the averages and the ultimate comparison is more complicated. Health care contributions are just one variable in a more complicated testing setting.

8. **With respect to different categories of employees, can you treat separate unions differently (e.g. teachers vs. classified workers custodians, bus drivers, cafeteria workers) or should all union employees be viewed in the same category?**

   Yes, different union groups with separate contracts can be treated separately for the measurement / administrative and stability periods.

9. **An example gave the "Administrative Period" as October 1 to December 31 - isn't that a 91 day administrative period?**

   The government regulations provide for this 3 month period. While the applicable statute requires that the eligibility period not be more than 90 days, the government appears to be providing some "wiggle room" or rounding for meeting this eligibility standard. In fairness, most of us would probably think that 3 months is the equivalent of 90 days. The government indicated that they were trying to create regulations that enforced the law, but conformed, to some extent, to administrative practices of employers. Enrollments and commencing benefits as of the beginning of a month are fairly typical.

10. **What is the best measurement of time for an employer who has a high turnover rate for employees working between 30-40 hours?**

    Employees who the employer knows will work more than 30 hours per week will be "full-time" employees to whom the employer will have to offer coverage. The regulations specifically decline to give any allowance for high turnover positions. The measurement period is only applicable to the variable hour employee, i.e. the employee who the employer is unsure will work on average more than 30 hours per week. An employer may wish to reduce high turnover positions to less than 30 hours per week average to apply the variable hour employee measurement period.

11. **If an employee has gone to full-time for a measurement period and then goes back to part-time hours then resigns or becomes terminated. Since they received full-time benefits at one time, will they be eligible for COBRA?**

    If the employee is currently receiving health benefits, and then, either terminates or loses eligibility due to falling below 30 hours per week average as a variable hour employee, the employee would have COBRA rights arising out of the termination of coverage. If the employee is offered health benefits, and declines, and then becomes ineligible, there would be no COBRA rights.

12. **If our seasonal employees come and go based on several peak periods, do we use the 30/130 hour measure over a 12 month period for coverage determination?**

Assuming the employer has adopted a 12 month measurement period, and the seasonal employee does not have a 26 week break in service (no hours worked or entitled to be paid) or the "Rule of Parity," (a break of 4 weeks or more that exceeds the employees previous term of service) applies and the break is not of sufficient duration to result in that employee's pre-termination service being disregarded and causing the "seasonal" employee to be treated as a new employee, then you would determine their full-time employee status based on the results during the applicable measurement period.

Note - the measurement period counts actual hours worked for hourly employees. The 30 hour per week and 130 hours per month standards are used to determine Full-Time Employee status.

13. **Please clarify that the 6 month 1st Measurement Period in your example is just that, an example. This period could actually be 12 months if employer chooses.**

    The 6 month measurement period in the Time Line examples was meant to illustrate the available *transition* that permits the first measurement period in 2013 to be at least 6 months and result in a stability period of 12 months.

14. **How do we handle elected officials?**

    An elected official would be treated as a new employee under these rules when first elected. Assuming the elected official was reasonably determined to be a full-time employee, the employer would have 3 months to offer coverage. An employer may extend health benefits to employees who are not Full-Time Employees in its discretion.

15. **If an employee is offered coverage after the end of their initial measurement period, doesn't the 30 day limit affect when their coverage must begin? I seem to hear you say that we only have to worry about offering coverage, not when coverage must begin. Please clarify.**

    The employer has to offer coverage to the Full Time employee within the 90 day period and there has to be the opportunity for that coverage to commence immediately thereafter, but coverage commencement can be conditioned on the employee completing and submitting enrollment forms. For example, if the employer imposes a 90 day eligibility period, provides enrollment forms on the 75th day with an explanation that coverage commences only when the forms are submitted (but as early as that 91st day), if the employee delays submitting forms until the 120th day, coverage can commence on that 120th day. That the coverage commences more than 90 days after DOH does not mean the employer has not properly *offered* coverage within the requisite 90 days. Again, it is the *offer* of coverage that may commence immediately after the 90 day eligibility period which is determinative.

16. **Can we allow an employee to sign a waiver for health coverage so that the employee can work more than 30 hours/week?**

    If the employee is a full-time employee, the employer must offer coverage. Disregard the exception that the government created that allows the employer to exclude up to 5% of the full-time workforce. So, a waiver by that employee who works more than 30 hours per week and who is considered Full-Time will not protect the employer from the penalty tax for failure to offer coverage.

    Caution: There is an esoteric legal question whether the employer could ask for such a waiver - would asking imply that there really is no offer of coverage?

17. How do I treat seasonal employees that work more than 1 job for us throughout the year? i.e. they work 1 job through the school year, then they work a summer camp and then go back to the other job once school starts. As long as they stay under 30 hours, I do not have to offer coverage, correct?

This question really presents the "variable hour employee" situation. As noted, the government is struggling with how to define "Seasonal employee." With facts as presented, if the variable hour employee does not work on average more than 30 hours per week during the applicable measurement period, coverage will not have to be offered.

18. What about employers who contribute on behalf of employees to Taft Hartley multiemployer health and welfare plans?

An Applicable Large Employer will not be treated as failing to offer health coverage with respect to a full-time employee (and the employee's dependents) if (1) the employer is required to make a contribution to a multiemployer plan with respect to the employee pursuant to a collective bargaining agreement or participation agreement (2) coverage is offered to the employee (and the employee's dependents), and (3) the coverage is affordable and provides minimum value.

The employer may wish to seek confirmation from the multiemployer plan that the coverage is affordable and provides minimum value, but as a practical matter, most multiemployer health and welfare plans will likely satisfy each of these tests.

19. If an employee averaged 30 hours per week during the measurement period, but cuts back to one day a week, do we still have to offer health coverage during the stability period? What if the employee is working more than 30 hours per week with another employer, but our health benefits are better?

Technically, the employer's obligation to extend an offer for health coverage would remain throughout the applicable stability period. In the fact pattern in which the employee works for another employer with lesser benefits illustrates the fact that an employee may be a full time employee for purposes of these rules for more than one employer.

20. What is the effect this will have on our intern/co-op programs?

The employer may possibly define the interns as "seasonal employees" using a reasonable employer-determined definition. The employer would then determine whether the intern was reasonably likely to satisfy the 30 hour per week average, taking into account that the internship will likely end, and averaging the hours over the entire measurement period. If it is unable to make a determination, the intern's hours would be measured over the Initial Measurement Period.

If the intern does not meet a reasonable definition of "seasonal employee" the intern would be treated as a variable hour employee. In 2015, the employer could not assume the intern's employment would terminate prior to the initial measurement period.

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