SHUMAKER
Shumaker, Loop & Kendrick, LLP

BENEFITS AND COMPENSATION ALERT

January 31, 2013

IRS ISSUES PROPOSED REGULATIONS ON THE "EMPLOYER SHARED RESPONSIBILITY" PENALTIES FOR NOT PROVIDING HEALTH COVERAGE IN 2014; DOL DELAYS MARCH 1 PARTICIPANT NOTICE REQUIREMENT

To make certain that 2013 will be as exciting as 2012, on January 2 the US Treasury issued proposed regulations under section 4980H of the Internal Revenue Code ("Code"), which was added to the Code by the Patient Protection and Affordable Care Act, as amended ("Act"). These regulations detail the "shared responsibility" penalties for covered employers who fail to provide their employees with adequate group health coverage in 2014 and later years. While these are not final regulations, employers may rely on them until such time as the Internal Revenue Service ("IRS") issues final regulations or additional guidance. These regulations provide needed detail about several previously open questions concerning the obligations of covered employers, including how an employer determines whether it is subject to the Act's group health plan mandate. While these "pay or plan" requirements do not go into effect until January 1, 2014, covered employers must make some decisions and take action in 2013 to prepare for next year. The month was capped by the release on January 24 by the Department of Labor's ("DOL") of Frequently Asked Questions on the Act, which heralded the delay of an employer Notice requirement that had been set for March 1, 2013.

BACKGROUND

Section 4980H of the Code generally provides that "applicable large employers" can be assessed substantial tax penalties for failing to provide adequate group health coverage under two circumstances: 1) the employer fails to provide full-time employees and their dependents the opportunity to enroll in employer-sponsored group insurance; or 2) the cost of the health coverage offered is not affordable or the coverage does not meet a minimum value threshold. This section works hand-in-hand with the part of the Act requiring individuals to obtain medical insurance either from their employer or individually (referred to as the "individual mandate").

DETERMINING IF YOU ARE AN "APPLICABLE LARGE EMPLOYER"

Basically, the Act demands that all applicable large employers make available "minimum essential coverage" to all full-time employees or pay penalties if they fail to do so, which will in turn force employees to buy subsidized coverage from the new health insurance exchanges created under the Act to fulfill the individual mandate. This Alert will begin to unpack that statement.

For this purpose, an "applicable large employer" is any employer who has at least 50 full-time employees. An employer determines whether it is an applicable large employer by adding the total number of full-time employees for each calendar month during the prior year, and dividing by 12. If the result is less than 50, the employer is not subject to the Employer Shared Responsibility provisions of the Act. Be aware, if an employer has fewer than 50 full-time employees but is part of a group of organizations related by common ownership (a "controlled group") or an affiliated service group, the employees of all group members are aggregated for the purposes of counting the number of full-time employees.

For this purpose only, the number of "full-time" employees of an employer is determined by totaling the number of both full-time and full-time equivalent ("FTE") employees. This is a different calculation than the one used for calculating the amount of the penalty assessment if the applicable large employer is liable under this section. Further, the guidance provides several different methods to determine FTEs for hourly, salaried, seasonal, foreign and other categories of employees. If you have questions about whether you are an applicable large employer, please contact us to ensure the employee count is conducted accurately.

HOW THE ASSESSABLE PAYMENTS ARE DETERMINED

There are two different ways an applicable large employer could become liable for the penalties under the Act and Code.

- Subsection 4980H(a) liability arises when an employer does not offer full-time employees and their dependents the *opportunity* to enroll in employer-provided coverage under a group health plan (including self-insured plans) which qualifies as "minimum essential coverage" under the IRS rules. This penalty is assessed based on the employer's entire workforce at the time of the violation. In the most basic terms, when the IRS determines that the applicable large employer does not offer minimum essential coverage and any full-time employee uses a premium tax credit to help pay for the coverage from one of the new health insurance exchanges, then the employer will be subject to a penalty equal to the total number of actual full-time employees minus 30, multiplied by $2000, divided by 12. The penalty is then assessed for each month an employee received the tax credit. Note, this penalty is assessed based only on full-time employees, not on FTEs, and the employee count is measured by a different set of rules than used to determine whether the employer is an applicable large employer.

- Subsection 4980H(b) liability arises when an employer's offered group health coverage is either not affordable to a full-time employee or the coverage does not offer "minimum value." This penalty is assessed on a month-to-month basis and is based only on the full-time employees who actually use a premium tax credit to buy health coverage. Coverage is considered affordable if the cost for employee-only coverage is no more than 9.5% of the employee's annual household income. There are several published safe harbors a large employer can take advantage of to ensure that coverage offered is affordable. Minimum value will be measured based upon a calculator being developed by the IRS and the U.S. Department of Health and Human Services. Features of the health plan such as deductibles and co-pays are entered to determine whether the health plan covers at least 60% of the total allowed cost of the benefit expected under the plan. If an employer has one or more

employees who use the premium tax credit to buy health coverage from an exchange because their coverage is either unaffordable or does not provide minimum value, the employer will be assessed a monthly penalty equal to the number of employees receiving the credit in a month, multiplied by 1/12 of $3000.

An employer can only be subject to either subsection (a) or (b) liability in any particular month, but never both. Further, the amount of subsection (b) liability for any month will be capped at the amount of subsection (a) liability that the covered employer could be assessed, so that the penalty for an applicable large employer who offers health coverage cannot exceed the payment that would be owed if they offered no coverage.

The proposed regulations also provide transitional relief for a host of situations, including those employers whose plan year is different from a calendar year, for employers who allow salary reductions through cafeteria plans, for employers who participate in multiemployer plans, and for new employers.

PARTICIPANT NOTICE ON STATE LAW INSURANCE EXCHANGES IS DELAYED

The DOL conceded that employers had insufficient time and guidance to comply with section 1512 of the Act, which had required an applicable employer to provide each employee a Notice no later than March 1, 2013. The Notice would describe in detail the state insurance exchanges and how these affect an employee's right to purchase insurance. The DOL stated that compliance with the Notice requirement is not required until regulations have been issued and become applicable.

THE PRACTICAL EFFECT

Employers must begin measuring their workforce levels for full-time and full-time equivalent employees starting in 2013, in order to understand their health coverage obligations for 2014, even as the DOL has relaxed one pending requirement. .Shumaker's benefits professionals can assist you in determining whether the employer shared responsibility penalties may apply to you, and, if so, how best to measure your workforce, what transitional relief may be available, and which safe harbor(s) you may use to minimize your potential penalties under this section of the Act. Contact one of our experienced benefits attorneys to discuss the implications of employer shared responsibility and what it means for your health plan.

Eric D. Britton	419-321-1348	ebritton@slk-law.com
James. H. Culbreth	704-945-2186	jculbreth@slk-law.com
Gary R. Diesing	419-321-1248	gdiesing@slk-law.com
Vivian C. Folk	419-321-1226	vfolk@slk-law.com
Wyatt J. Holliday	419-321-1355	wholliday@slk-law.com
Susan D. McClay	419-321-1345	smcclay@slk-law.com
Scott D. Newsom	419-321-1438	snewsom@slk-law.com
Bennett H. Speyer	419-321-1456	bspeyer@slk-law.com