P4P … Preparing for PPACA

Session #20:

Proposed Regulations on Employer "Shared Responsibility" Provisions

January 17, 2013

Panelists:

- ***J. Mark Iwry**, Senior Advisor to the U.S. Treasury Secretary and Deputy Assistant Secretary for Retirement and Health Policy*
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American Benefits Council
Preparing for PPACA
Webinar

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IRS Proposed Regulations on Employer Shared Responsibility Provisions

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Seth T. Perretta

Overview

- Applies to "applicable large employers"
- Subject to a nondeductible excise tax for failure to "play"
  - To play for purposes of Code section 4980H(a), must offer "minimum essential coverage" to each "full-time" "employee" and "dependents" (if have subsidy-eligible full-time employees)
  - To play for purposes of Code section 4980H(b), must offer "affordable," "minimum value", "self-only" minimum essential coverage to each full-time employee (if have subsidy-eligible full-time employees)
- Effective January 1, 2014 for employers with calendar year plans; certain transition rules available

Overview

- IRS previously issued Notices 2012-58 and 2012-59
- IRS issued NPRM on December 28, 2012
- NPRM builds on prior Notices, includes many helpful clarifications as well as certain transition rules
- Retains concept of initial/standard measurement and stability periods for use by employers in determining whether certain variable hour employees must be treated as full-time employees

Applicable Large Employer

- An employer that employed on average at least 50 full-time employees (taking into account equivalents) across its controlled group on business days during the preceding calendar year
  - Special transition rule for 2014
  - "Employer" = common law employer
  - Includes successor and predecessor employers
- **Note:** Although must count across controlled group in determining whether an employer is an "applicable large employer", the NPRM provides that the assessable payments apply on a "member" company basis
  - BUT don't forget about nondiscrimination testing under IRC sections 105(h) and 125 and new PHSA section 2716 if attempting to pay or play on a member company basis

Employee

- Defined in the NPRM to mean a common-law employee
- Excluded from the definition are:
  - Leased employees
  - Sole proprietor
  - Partner in a partnership
  - 2-percent S corporation shareholder
- What about foreign employees?
  - Depends on whether have U.S.-sourced income

Minimum Essential Coverage

- Defined by references to IRC section 5000A(f) and "any regulations or other administrative guidance thereunder"
  - As discussed previously, IRC section 5000A fails to expressly reference self-funded, non-grandfathered employer-sponsored coverage
    - Preamble to NPRM indicates that guidance in this regard is forthcoming
    - What will the guidance require of plans that seek to qualify as MEC?

Dependent

- As Chris will discuss, both IRC sections 4980H(a) and (b) reference "(and their dependents)" – NPRM clarifies how this language is read for purposes of both (a) and (b) penalties

- NPRM clarifies that "dependent" means child up to age 26
  - "Child" is defined by reference to IRC section 152(f)(1), which includes:
    - Biological child
    - Adopted child
    - Stepchild
    - "Eligible Foster Child"
  - Employer can rely on employee's representations
  - How does the IRC section 152(f)(1) definition relate to your adult child definition for purposes of market reform compliance?

Affordable

- NPRM makes clear that "affordability" is based on the employee's premium share for self-only coverage
  - Chris is going to discuss certain safe harbors for use by employers in determining affordability
  - Open issues:
    - Whether spouse and dependents can claim IRC section 36B credits in connection with the purchase of exchange-based non-group coverage
    - Treatment of premium incentives or surcharges associated with wellness plans

Minimum Value

- Incorporates by reference the definition of MV in IRC section 36B(c)(2)(C)(ii) and "any regulations or other administrative guidance thereunder"
  - Open issues:
    - Regulations are yet to be issued regarding MV

Determining Full-Time Employee Status

- Full-Time = 30 hours of service/week or 130 hours of service/calendar month
  - "Hour of service" includes:
    - ***Hours Worked.*** Each hour for which the employee is paid, or entitled to payment, "for the performance of duties"; **AND**
    - ***Paid-Time Off.*** Each hour for which the employee is paid, or entitled to payment, for the period of time due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty, or leave of absence
  - NPRM eliminates cap on counting only first 160 hours of paid leave. Now all unpaid leave gets counted
  - Does not include hours if attributable to foreign-sourced income
  - Includes rules for non-hourly and commissions-based employees

Determining Full-Time Employee Status

- If reasonably expected to work full-time schedule, then treat as full-time employee
- If variable hour employee and not reasonably expected to work a full-time employee schedule, then use measurement period and test
- If non-variable hour employee and not reasonably expected to work a full-time schedule, then ?
  - Probably wise to test – see changes in employment slide below

Determining Full-Time Employee Status

- NPRM helpfully allows employers to use a measurement period that is tied to certain payroll periods rather than calendar months
- Additionally, NPRM continues to allow for the use of different measurement/stability periods for the following four categories:
  - Collectively bargained versus non-collectively bargained
  - Each group of collectively bargained employees covered by a separate CBA
  - Salaried employees versus hourly employees
  - Employees whose primary place of employment is in different states
- NPRM does not appear to permit employers to "pay or play" based on these categories

Determining Full-Time Employee Status

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» Seasonal Employees?

- Notice 2012-58 – Not required to make available coverage to seasonal employees even if they work a full-time schedule; Notice permits the use of a good faith interpretation for 2014
- NPRM defines a seasonal employee to mean:

  > "[A] worker who performs labor or services on a seasonal basis as defined by the Secretary of Labor, including (but not limited to) workers covered by 29 CFR 500.20(s)(1) and retail workers employed exclusively during holiday seasons."

- NPRM states that an employer "may apply a reasonable good faith interpretation" for 2014; not limited to agricultural and retail workers
- Preamble to NPRM requests comments and indicates Treasury is considering defining a seasonal employee to be an employee that works less than a specified period of time in a calendar year
  - Reference to regulations under IRC section 105(h) (which defines seasonal as employees "whose customary annual employment is less than 9 months…")

Determining Full-Time Employee Status

- Short-Term Employees
  - Treasury/IRS appears to be distinguishing between seasonal employment and short-term employment
    - Note: Use of up to a 90-day waiting period is permissible
  - Preamble to NPRM indicates concerns by regulators:

    "The Treasury Department and the IRS have been concerned that the potential for abuse and manipulation of any special rules addressing short-term employees might outweigh the considerations of avoiding churning and inefficiency associated with offering coverage to employees whose employment is anticipated to last, for example, no more than four or five months."
  - Preamble to NPRM invites comments

Determining Full-Time Employee Status

- High-Turnover Positions
  - No specific rules in the NPRM
  - Concern by some employers they may be required to offer coverage to employees for a very short period of time
  - Treasury/IRS:
    - Would require complex definition
    - Subject to manipulation
    - Could create incentives to terminate employees to fit within any safe harbor rule
  - Comments are permitted, but must address above concerns

Determining Full-Time Employee Status

- Temporary Staffing Agencies
  - Preamble to NPRM recognizes that it may be difficult for TSAs to track hours of their employees and that many employees of TSAs may in fact be variable hour employees that are not reasonably expected to work a full-time schedule
  - Preamble rejects the use of a presumption of variable hour or non-full-time status – notes concern that a special presumption or safe harbor could encourage "client" employers to use TSAs to avoid application of IRC section 4980H where the client employer is otherwise the common law employer
  - Preamble Invites comments on how a presumption or safe harbor could work
  - Note: Limited to situations where TSA is the common law employer of employee working for client employer

Determining Full-Time Employee Status

» Change in Employment Status for New Employees

- NPRM provides a special rule where an individual is hired as a seasonal employee or variable hour employee that is not reasonably expected to work a full-time schedule, but experiences a material change in position of employment or other employment status during the initial measurement period such that the individual would have been treated as full-time employee from date of hire had he or she been hired into that changed status or position from the start

- NPRM provides that the new employee must be treated as a full-time employee on the earlier of:

  (i) The first day of the fourth month following the change in employment status, OR

  (ii) The first day of the first month following the end of the initial measurement period (and administrative period, if applicable) if the employee worked on average a full-time schedule during the initial measurement period

- A change in employment status for an ongoing employee does not change the employee's status during the stability period

Determining Full-Time Employee Status

- Breaks in Service
  - What happens if an employee incurs a break in service during a measurement or stability period?
    - If the break in service is at least 26 consecutive calendar months for which the employee is not credited with any hours of service, then can treat as new employee upon rehire
    - For periods of less than 26 weeks, employer may apply "rule of parity" and treat the employee as having had a termination of employment and been rehired as a new employee if:
      (i) The period with no credited service is at least four weeks long, AND
      (ii) The period with no credited service is longer than the employee's immediately preceding period of employment
    - If period is less than 26 weeks and rule of parity does not apply, then the measurement and stability period that applied at the time of the employee's termination continues to apply upon rehire

Determining Full-Time Employee Status

- Breaks in Service
  - What happens if an employee incurs a break in service during a measurement or stability period?
    - For certain types of "special unpaid leave", must apply an averaging methodology when measuring full-time hours during the measurement period
    - "Special unpaid leave" includes unpaid FMLA, USERRA, jury duty
    - For employees who have "special unpaid leave," need to either:
      (i) Exclude time on unpaid leave and use average hours worked during measurement period as basis for determination, OR
      (ii) Credit the employee with hours during the unpaid leave at a rate equal to the average weekly rate worked by the employee during the measurement period when not on special unpaid leave

Determining Full-Time Employee Status

- Breaks in Service
  - What happens if an employee incurs a break in service during a measurement or stability period?
    - NPRM includes an anti-abuse rule

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IRS Proposed Regulations on Employer Shared Responsibility Provisions

Christine Keller

January 17, 2013

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Overview
4980H(a): "The Big Penalty"

- If employer offers no coverage to *substantially all* full-time employees (*and their dependents*) and at least one full-time employee receives assistance under Exchange:
  - Must pay annual fee of $2,000 for each full-time employee minus first 30 employees.
  - For example, if employer has 100 full-time employees and one is eligible for premium assistance under the Exchange, employer must pay $2,000 times 70 or $140,000.

Proposed Regulations *"Substantially All"*

- An employer will be deemed to have offered coverage to "Substantially All" full-time employees and their dependents if:
  - Coverage is offered to 95% of Full-Time Employees and their dependents (or, if greater, 5 employees)
  - Failure to offer to 5% need not be inadvertent (i.e., planning opportunity)
  - Does not eliminate penalty for 5%

Proposed Regulations *"(and their dependents)"*

- The employer is required to offer coverage to "dependents"
- Does not include spouse (planning opportunity)
- Does include son, daughter, stepson, stepdaughter, adopted child, child placed for adoption, and foster child up to age 26 (measured on day he/she attains age 26).

Proposed Regulations *"Offer of Coverage"*

- Employee must have an effective opportunity to accept coverage at least once during the plan year to be treated as having been "offered coverage"
  - Electronic offer permissible (IRS safe harbor for electronic media)
  - Facts and circumstances
  - No "offer" for a month unless coverage available for every day of month

Proposed Regulations Penalty Calculation: *"Less 30"*

- If 4980H(a) fee applies, the amount of annual liability is $2,000 x # of full-time employees (less 30)
- Liability for the fee is calculated and assessed based on each member of the controlled group – not on a controlled group basis
- 30 person reduction applied on a pro-rata basis across the controlled group

Overview
4980H(b): "The Lesser Penalty"

- If employer <u>does</u> offer "minimum essential coverage" to full-time employees (and their dependents) and a full-time employee receives assistance under Exchange, employer must pay fee if either test met:
  - Employer coverage not affordable – cost of self-only coverage is more than 9.5% of income; or
  - Plan does not provide 60% actuarial value of benefits.
- Annual fee is the lesser of: $3,000 for each full-time employee receiving premium assistance; or $2,000 for each full-time employee, minus first 30 employees.

Proposed Regulations *"Affordability Safe Harbors"*

- Coverage is affordable if required employee contribution for self-only coverage for the lowest cost option that provides minimum value does not exceed 9.5% of:
  - W-2 Wages for that calendar year
  - Hourly rate of pay x 130 (does not apply if wages reduced during year)
  - The most recently published federal poverty level for a single individual

Proposed Regulations *Transition Rules*

- All Plans
  - Reduced measurement period (6 months) beginning before 7/1/13 for 2014 stability period
  - Large employer determination (6 or more consecutive months in 2013)
  - No dependent coverage required for 2014 if don't offer currently
  - Status of variable hour employee in 2014 based on facts and circumstances

Proposed Regulations *Transition Rules*

- Fiscal Plans
  - Delayed effective date (i.e., first day of 2014 plan year) if fiscal year plan in existence on December 27, 2012
  - Salary reduction mid-year election changes permitted if incorporated into plan
- Multiemployer Plans
  - Participating employer deemed to satisfy employer responsibility requirements through 2014 (if affordability, minimum value, etc. satisfied)