P4P: Recent Guidance on Automatic Enrollment, 90-Day Waiting Periods, & Shared Responsibility

American Benefits Council
P4P Session 10

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Health Reform

Let’s Review. . .
Health Reform – The Key Pieces of the Puzzle

- **Individual Mandate (2014)**
  - Everyone must have “minimum essential coverage,” or potentially pay a modest penalty

- **Employer “Play or Pay” Mandate (2014)**
  - Offer FTEs “qualifying” and “affordable” coverage, or risk nondeductible penalties

- **Health Insurance Exchanges (2014)**
  - Subsidized and unsubsidized coverage

- **Benefit and Administrative Mandates (2011 – 2014)**
  - Employer-based coverage must meet certain rules

- **Cadillac Tax (2018)**
  - Employer-based coverage should not exceed certain premium values
Focus Today...

- Three connected puzzle pieces...
  - Automatic enrollment rule
  - 90-day maximum waiting period
  - Employer’s “play or pay” mandate (shared responsibility rules)
Automatic Enrollment
Automatic Enrollment

- Applies to Employers with +200 FTEs (2014)
  - A new requirement not under PHSA or ERISA, but FLSA
  - What’s the definition of “full-time”? Whom do we count?
    - “Full-time employee” does not appear to be same as for “play or pay” (i.e., 30+ hours per week)
    - Will employer be permitted to define its “full-time” class, for counting the +200?
Automatic Enrollment

**Requirement:**
- Enroll *new full-time employees* in a benefit offered by the employer
  - Again, does employer define “full-time”?
  - *Any* plan? Must it be minimum essential coverage? Must it be “qualifying coverage” for “play or pay” purposes (i.e., minimum essential coverage with minimum value)?
  - What about dependents?
  - Any requirement to subsidize the coverage to same extent as for other employees who have affirmatively enrolled?
Automatic Enrollment

 Requirement: (cont.)

- Which employees are auto-enrolled? Is it all new FTEs or just those new FTEs the employer deems eligible for coverage?
  - Does the law unilaterally place all FTEs in an eligible class under the employer’s plan?
  - Arguably, no...
    - A waiting period (presumably, of up to 90 days) is permitted...
    - And recent guidance on the 90-day waiting period requirement says the 90-day waiting period “clock” begins to tick only after the employee is considered eligible by the employer...
    - So, if the auto-enrollment and the 90-day waiting period rules will be coordinated, it appears the answer should be “no”...so that you’re auto-enrolling only new FTEs who are in an eligible class as defined by the employer
Automatic Enrollment

- **Requirement:** (cont.)
  - **Re-enroll** employees already enrolled
    - In what? The plan they’re currently enrolled in?
    - What about dependents?
  - What about potential *late* enrollees
    - Those who are existing—not new—FTEs who declined to enroll earlier...or opted out earlier *(see below)*
  - Notice of auto-enrollment/re-enrollment, and opt-out right
    - When?
    - How much time to opt-out?
    - Can opt-outs be retroactive?
    - Cafeteria plan implications
Automatic Enrollment

- December, 2010 - FAQs:
  - DOL has regulatory jurisdiction over the auto-enrollment rule
  - No compliance required until regulations issued

  - Auto-enroll rule deferred until guidance issued
  - Guidance not expected in time for 2014

- SBC Issues:
  - Recall from P4P Session #9:
    - Different timing rules for SBC distribution depending on whether re-enrollment is affirmative or automatic
90-Day Maximum Waiting Period
90-Day Maximum Waiting Period

- Most Employers Don’t Have Waiting Periods > 90 Days
- For Those Who *Do*, the Plan May Not Have a Waiting Period Longer than 90 Days
  - This is a benefit mandate; it applies to *the plan*
  - It doesn’t matter whether the plan covers full-timers, part-timers or both... 90 days is the maximum waiting period.
  - Period.
90-Day Maximum Waiting Period

- Good News:
  - Recent FAQs say the 90-day waiting period will apply only to employees whom the employer treats as “eligible” for coverage under the employer’s plan
  - So...the 90-day clock begins when employee become *eligible*
  - No mention of “first of the month after 90 days” provisions
    - Will regulations accommodate these common plan provisions?
90-Day Maximum Waiting Period

FAQs:

- E.g., may plan provide that the employee does not become *eligible* until the first of the month following employment in an eligible class......and then apply a 90-day waiting period from the date of eligibility?
  - “*Eligibility* conditions that are based solely on the lapse of time would be permissible for no more than 90 days.”
  - “[T]he 90-day waiting period begins when an employee is otherwise *eligible* for coverage under the terms of the group health plan.”
  - EXAMPLE: Employee hired January 1; may plan say *eligibility* begins April 1 (after up to 90-day passage of time), eligibility sets the 90-day waiting period clock ticking, and coverage begins, say, July 1?
FAQs:

- Other eligibility conditions are generally permissible unless designed to circumvent the 90-day waiting period limitation:
  - Full-time status
  - Bond fide job categories
  - Receipt of a license
  - Geographic location?
  - Exempt versus non-exempt?

- What about facially bona fide “hours of service” prerequisites to eligibility?
  - They’ll be allowed, within limits to be described later
  - 90-day waiting period will begin after satisfying required hours of service for eligibility
  - Authorities are mulling hour bank issues, challenges created by plans crediting hours from multiple employers, etc.
90-Day Maximum Waiting Period

- **Puzzle Pieces**
  - We’ve discussed the relationship between the *automatic enrollment* rule...
  - ...and the *90-day waiting period*...
  - The 90-day waiting period also dovetails nicely with the employer "*play or pay*” *mandate*....
    - FAQs: Employer will have no “play or pay” responsibility with respect to a full-time employee during his or her first 90 days (more on this in a moment)
Employer Shared Responsibility ("Play or Pay")
Employer Play or Pay

The Employer’s “Play or Pay” Puzzle

Offer...

- Full-Time Employees (and their dependents?)...
  - FTE = 30+ hours per week
- Qualifying Coverage...
  - “Minimal essential coverage” that satisfies a “minimum value” requirement
- At an Affordable Cost
  - Not more than 9.5% of W-2 pay for employee-only coverage

...or risk penalties...
“Who Are My Full-Time Employees?”

Who are the “full-time employees” who must receive the offer of “qualifying” and “affordable” coverage, in order for the employer to avoid the risk of penalties?

Statute:

An employee working at least 30 hours per week...

FAQs:

...But only after the first 90 days of employment!
Many Employers Have Only Regular, Full-Time Employees Working 40+ Hours Per Week

- The issue of determining “full-time employees” for “play or pay” mandate purposes is straightforward
- Generally, these employees are all considered “full-time” for “play or pay” mandate purposes, *but only after 90 days of employment*
But Other Employers Face a More Difficult Challenge

- Seasonal employers
  - Retail, agricultural, amusement parks, golf course management companies, staffing companies, etc.

- Employers with high turnover rates
  - Restaurants and other hospitality employers, retail employers, etc.

- Employers with regular employees with fluctuating hours
  - Hospitals and other “on call” employers
Employer “Play or Pay”

- Request for Information (May, 2011)
  - Regulators considering allowing employers to determine “full-time employees” by averaging hours over a look-back “measurement” period of up to 12 months
    - Only if employee averaged at least 30 hours per week over the entire look-back period would he or she be considered full-time, for play or pay purposes
    - He or she would not be considered “full-time” retroactively, but for an ensuing, prospective “stability” period at least as long as the look-back period
Recent FAQs:

- Federal authorities will permit use of the “look back” concept
- Rules will treat *new* employees differently than *current* employees
Employer “Play or Pay”

- **New** Employee Hired as Full-Time, Expected to Work Full-Time Annually
  - Employer gets free pass under “play or pay” for the employee’s first 90 days *(recall how “play or pay” coordinates with the 90-day waiting period rule)*
  - If the employee, as expected, averages at least 30 hours per week during first 3 months, he or she is considered “full-time” (for play or pay purposes) for an ensuing stability period (likely, at least 3 months)
  - Thus, through months 4-6 (and perhaps longer), employee is considered “full-time,” and the employer must either offer him/her qualifying and affordable coverage, or risk penalties
    - *What if employee doesn’t average 30+ hours per week?*

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**Date of Hire**

**3-Month Anniv.**

**3-Month “Measurement” Period – No Play or Pay Obligation**

**Stability Period – Play or Pay Obligation**
Employer “Play or Pay”

- *New* Employee *Not Necessarily* Hired to Work 30+ Hours Per Week Annually
  - Employer gets free pass under “play or pay” for first 90 days
  - If employee:
    - Does *not* average at least 30 hours per week during first 3 months, then...
    - Employee is considered “part-time” (for play or pay purposes) for the ensuing (3-month?) stability period...
Employer “Play or Pay”

- **New** Employee *Not Necessarily* Hired to Work 30+ Hours Per Week Annually
  - Employer gets free pass under “play or pay” for first 90 days
  - If employee:
    - Averages at least 30 hours per week during first 3 months, *and* ... 
    - His/her first 3 months are *reasonably representative* of the hours he/she is expected to average annually (i.e., it turns out the employee really is “full-time”), then...
    - Employee is considered “full-time” (for play or pay purposes) for an ensuing 3-month (or perhaps longer) stability period...
Employer “Play or Pay”

- **New Employee Not Necessarily** Hired to Work 30+ Hours Per Week
  - Same facts, except:
    - Employee’s first 3 months are *not* reasonably representative of the hours he/she is expected to average annually, then...
    - The employer gets a *second* 3-month measurement period during which “play or pay” does not apply...
    - If employee does *not* average at least 30 hours per month over the second look-back measurement period (i.e., it turns out the employee really is *part-time*)...then the employee is considered part-time for the ensuing stability period

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**Date of Hire**

1st 3-Month “Measurement” Pd – No Play or Pay Obligation

**3-Month Anniv.**

2nd 3-Month “Measurement” Pd – No Play or Pay Obligation

**6-Month Anniv.**

Stability Period – No Play or Pay Obligation

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Date of Hire

3-Month Anniv.

6-Month Anniv.
Employer “Play or Pay”

- **New Employee Not Necessarily Hired to Work 30+ Hours Per Week**
  - Same facts, except:
    - Employee averages at least 30 hours per month over the *second* look-back measurement period (i.e., it turns out the employee really is *full-time*)...then
    - The employee is considered full-time for the ensuing stability period, and there *is* a “play or pay” obligation
Upon Hire, Expected to Average 30+ Hours/Week Annually?

- **Yes**
  - Actually Average 30+ Hours/Week During First 3 Months?
    - **Yes**
      - Hours Over 1st 3 Months Representative of Expected Annual Hours?
        - **Yes**
          - Full-Time = Play or Pay for Ensuing Stability Period
        - **No**
    - **No**
- **No**
  - Actually Average 30+ Hours/Week During First 3 Months?
    - **Yes**
      - Hours Over 1st 3 Months Representative of Expected Annual Hours?
        - **Yes**
          - Full-Time = Play or Pay for Ensuing Stability Period
        - **No**
    - **No**
  - Actually Average 30+ Hours/Week During Second 3 Months?
    - **Yes**
      - Hours Over 1st 3 Months Representative of Expected Annual Hours?
        - **Yes**
          - Full-Time = Play or Pay for Ensuing Stability Period
        - **No**
    - **No**
  - Part-Time = No Play or Pay for Ensuing Stability Period
Employer “Play or Pay”

- **Current Employees**
  - Up to 12-month look-back measurement period
  - Prospective stability period will likely have to be at least as long as the look-back measurement period
  - Important details still to be ironed out:
    - E.g., What’s the beginning of the 12-month look-back measurement period? Or what’s the determination date – the date on which the plan sponsor looks back over the measurement period?
    - What to do with employees who leave/are laid off and then return?
    - What about current employees who transfer to new employment classification?