

FREQUENTLY-ASKED-QUESTIONS FROM EMPLOYERS REGARDING AUTOMATIC ENROLLMENT, EMPLOYER SHARED RESPONSIBILITY, AND WAITING PERIODS

Notice 2012-17

INTRODUCTION

Many provisions of the Patient Protection and Affordable Care Act (Affordable Care Act) that become effective beginning in 2014 are designed to expand access to affordable health coverage. These include provisions for automatic enrollment of full-time employees in an employer's health plan, shared responsibility of employers regarding health coverage, coverage to be offered through State-based Affordable Insurance Exchanges (Exchanges), premium tax credits to assist individuals in purchasing coverage through Exchanges, and other related provisions. The Departments of Labor, Health and Human Services, and the Treasury (the Departments) are working together to develop regulations and other administrative guidance that will respond to questions and assist stakeholders with implementation.

This notice, which is being issued in substantially identical form by the other two Departments, provides information on questions from employers and other stakeholders regarding the provisions of the Affordable Care Act governing automatic enrollment, employer shared responsibility, and the 90-day limitation on waiting periods. Also outlined below are various approaches that the Departments are considering proposing in future regulations or other guidance. Comments and input are welcome on all intended proposals below.

BACKGROUND

Automatic Enrollment

Section 18A of the Fair Labor Standards Act (FLSA), as added by section 1511 of the Affordable Care Act, directs an employer to which the FLSA applies, and that has more than 200 full-time employees, to automatically enroll new full-time employees in one of the employer's health benefits plans (subject to any waiting period authorized by law), and to continue the enrollment of current employees in a health benefits plan offered through the employer. Section 18A further requires adequate notice and the opportunity for an employee to opt out of any coverage in which the employee was automatically enrolled.

On December 22, 2010, the Departments issued frequently asked questions (FAQ) on section 18A of the FLSA, which noted that the statute provides that employer compliance with the automatic enrollment provisions of section 18A shall be carried out "[i]n accordance with regulations promulgated by the Secretary [of Labor]." ¹ That FAQ also stated that it is the view of the Department of Labor that, until such regulations are issued, employers are not required to comply with section 18A. Finally, the FAQ indicated that the Department of Labor intends to complete this rulemaking by 2014.

¹ Available at: www.dol.gov/ebsa/faqs/faq-aca5.html.

Employer Shared Responsibility

The employer shared responsibility provisions, contained in section 4980H of the Internal Revenue Code (Code), provide that an applicable large employer (for this purpose, an employer with 50 or more full-time equivalent employees) could be subject to an assessable payment if any full-time employee is certified to receive an applicable premium tax credit or cost-sharing reduction payment. Generally, this may occur where either:

- (1) The employer does not offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan; or
- (2) The employer offers its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan that either is unaffordable relative to an employee's household income or does not provide minimum value.

For purposes of section 4980H, a "full-time employee" is an employee who is employed on average at least 30 hours per week.

The Treasury Department and the Internal Revenue Service (IRS) have requested and received comments on a number of issues and potential approaches to interpreting and applying the employer shared responsibility provisions. In particular, IRS Notice 2011-36 (2011-21 I.R.B. 792)² described and requested comments on a possible approach that would use a "look-back/stability period safe harbor" method that employers might use in determining whether current employees (those who are not newly-hired or transferred) are full-time employees for purposes of the employer shared responsibility provisions. Comments were also requested on potential rules for determining full-time status of new employees and employees who move into full-time status mid-year.

In addition, Treasury and the IRS have described (in IRS Notice 2011-73 (2011-40 I.R.B. 474))³ a safe harbor allowing employers, for purposes of determining whether they owe an assessable payment under section 4980H(b), to use an employee's Form W-2 wages (as reported in Box 1) instead of household income in determining whether coverage offered is affordable. Treasury and the IRS requested and received comments on the safe harbor.

² Available at: www.irs.gov/pub/irs-drop/n-11-36.pdf.

³ Available at: www.irs.gov/pub/irs-drop/n-11-73.pdf.

90-Day Limitation on Waiting Periods

Public Health Service (PHS) Act section 2708, as added by the Affordable Care Act, provides that, in plan years beginning on or after January 1, 2014, a group health plan or group health insurance issuer shall not apply any waiting period that exceeds 90 days.⁴ PHS Act section 2704(b)(4), ERISA section 701(b)(4), and Code section 9801(b)(4) define a waiting period to be the period that must pass with respect to the individual before the individual is eligible to be covered for benefits under the terms of the plan. In previous regulations, the Departments defined a waiting period to mean the period that must pass before coverage for an employee or dependent who is otherwise eligible to enroll under the terms of a group health plan can become effective.⁵ Unlike Code section 4980H, PHS Act section 2708 does not distinguish between full-time and part-time employees.

In addition to requesting comments on the employer shared responsibility provisions, IRS Notice 2011-36 requested comments on behalf of the Departments regarding the 90-day waiting period limitation under PHS Act section 2708, including how rules relating to the potential look-back/stability period safe harbor method for determining the number of full-time employees under Code section 4980H should be coordinated with the 90-day waiting period limitation.

DISCUSSION

The following questions and answers respond to inquiries the Departments are receiving regarding automatic enrollment, employer shared responsibility, and the 90-day limitation on waiting periods. As discussed above, the questions and answers below provide information and identify various approaches that the Departments are considering proposing in future regulations or other guidance. Guidance that employers may rely upon with respect to the issues addressed below will be provided with sufficient lead time for employers to comply. Comments are requested on these approaches.

Q1. What is the current timeline for issuing guidance on automatic enrollment under FLSA section 18A?

A1. The Department of Labor has been working with stakeholders to ensure that it has the necessary information and data to develop regulations relating to automatic enrollment, and is sensitive to stakeholder concerns regarding the need for adequate time to comply with any regulations that are ultimately issued. In addition, the Department of Labor is aware of the need to coordinate the work it will be undertaking to develop guidance relating to automatic enrollment with the guidance being developed regarding other related Affordable Care Act provisions, including the employer shared responsibility provision and the 90-day limitation on waiting periods, described above.

⁴ The Affordable Care Act also added section 715(a)(1) to the Employee Retirement Income Security Act (ERISA) and section 9815(a)(1) to the Code to incorporate various provisions of the PHS Act into the Code and ERISA, including the provisions of section 2708 of the PHS Act.

⁵ 26 CFR 54.9801-3(a)(3)(iii), 29 CFR 2590.701-3(a)(3)(iii), 45 CFR 146.111(a)(3)(iii).

In view of the need for coordinated guidance and a smooth implementation process, including an applicability date that gives employers sufficient time to comply, the Department of Labor has concluded that its automatic enrollment guidance will not be ready to take effect by 2014. It remains the Department of Labor's view that, until final regulations under FLSA section 18A are issued and become applicable, employers are not required to comply with FLSA section 18A.

Q2. Do Treasury and the IRS intend to issue proposed regulations or other guidance permitting employers to use an employee's W-2 wages as a safe harbor in determining the affordability of employer coverage, as outlined in IRS Notice 2011-73?

A2. Yes. As described in Notice 2011-73, Treasury and the IRS intend to issue proposed regulations or other guidance permitting employers to use an employee's Form W-2 wages (as reported in Box 1) as a safe harbor in determining the affordability of employer coverage.

Q3. Do Treasury and the IRS intend to issue proposed regulations or other guidance addressing how the employer shared responsibility provisions under Code section 4980H and the 90-day waiting period limitation under PHS Act section 2708 are coordinated?

A3. Yes. Treasury and the IRS intend to issue proposed regulations or other guidance under Code section 4980H (which imposes shared responsibility on large employers with respect to coverage of full-time employees). That guidance is expected to address the intersection of the Code section 4980H rules and the PHS Act section 2708 rules applicable to the 90-day waiting period limitation and will be coordinated with upcoming tri-Department proposed rules under PHS Act section 2708 (discussed below). Treasury and the IRS are mindful of employers' requests for safe harbors and simplicity and will seek to accommodate those requests to the extent feasible and consistent with the terms of the statute.

The upcoming guidance is expected to provide that, at least for the first three months following an employee's date of hire, an employer that sponsors a group health plan will not, by reason of failing to offer coverage to the employee under its plan during that three-month period, be subject to the employer responsibility payment under Code section 4980H.

Q4. For purposes of determining whether an employee (other than a newly-hired employee) is a full-time employee for purposes of Code section 4980H, do Treasury and the IRS intend to issue proposed regulations or other guidance allowing employers to use a look-back/stability period safe harbor, based on the approach outlined in IRS Notice 2011-36?

A4. Yes. Having reviewed the comments in response to IRS Notice 2011-36, Treasury and the IRS intend to issue proposed regulations or other guidance that would allow employers to use a "look-back/stability period safe harbor" method based on the approach outlined in the Notice for purposes of determining whether an employee (other than a newly-hired employee) is a full-time employee. Accordingly, it is anticipated that the guidance will allow look-back and stability periods not exceeding 12 months.

For a description of anticipated guidance regarding newly-hired employees, see Q&A-5.

Q5. For purposes of determining whether a newly-hired employee is a full-time employee, do Treasury and the IRS intend to issue proposed regulations or other guidance under Code section 4980H?

A5. Yes. Treasury and the IRS also intend to issue proposed regulations or other guidance that will address how to determine whether a newly-hired employee is a full-time employee for purposes of Code section 4980H.

As stated in Q&A-3, the upcoming guidance is expected to provide that, at least for the first three months following an employee's date of hire, an employer that sponsors a group health plan will not, by reason of failing to offer coverage to the employee under its plan during that three-month period, be subject to the employer responsibility payment under Code section 4980H. The guidance is also expected to provide that, in certain circumstances, employers have six months to determine whether a newly-hired employee is a full-time employee for purposes of section 4980H and will not be subject to a section 4980H payment during that six-month period with respect to that employee. Treasury and the IRS intend to propose an approach under which the period of time that an employer will have to determine whether a newly-hired employee is a full-time employee (within the meaning of section 4980H) will depend upon whether, based on the facts and circumstances, (a) the employee is reasonably expected as of the time of hire to work an average of 30 or more hours per week on an annual basis and (b) the employee's first three months of employment are reasonably viewed, as of the end of that period, as representative of the average hours the employee is expected to work on an annual basis.

Specifically, it is intended that the upcoming proposed regulations or other guidance would provide, for purposes of section 4980H, that:

- If a newly-hired employee is reasonably expected to work full-time on an annual basis and does work full-time during the first three months of employment, the employee must be offered coverage under the employer's group health plan as of the end of that period in order to avoid the possibility that the employer would be subject to a section 4980H payment after the end of that three-month period.
- If, based on the facts and circumstances as of the time of hire, it cannot reasonably be determined that a newly-hired employee is expected to work full-time, the following rules will apply for purposes of determining whether the newly-hired employee is considered a full-time employee in applying section 4980H with respect to the employer's group health plan:
 - If the employee works full-time during the first three months of employment, and the employee's hours during that period are reasonably viewed, as of the end of that period, as representative of the average hours the employee is expected to work on an annual basis, the employee will first be considered a full-time employee for purposes of section 4980H as of the end of that three-month period. (If the employee works part-time during the first three months of employment, then no section 4980H penalty applies during the first or second three-month period.)

- If the employee works full-time during the first three months of employment, but the employee's hours during that period are reasonably viewed, as of the end of that period, as not representative of the average hours the employee is expected to work on an annual basis, the plan is permitted an additional three-month period to determine the employee's status, and no section 4980H payment would be required with respect to that employee during the first or second three-month periods. (If the employee works part-time during the second three months of employment, then no section 4980H penalty applies during the first, second, or third three-month period.)

This policy describes the applicability of a potential section 4980H payment with respect to newly-hired employees. Forthcoming guidance is expected also to coordinate the rules for newly-hired employees with those applicable to other employees (including employees who are transferred from one employment classification or status to another).

The following examples illustrate the intended approach described above:

Example 1: Newly-hired employee expected to work full time.

Facts: Employer D, an applicable large employer (i.e., an employer with at least 50 full-time equivalent employees), hires Employee X as a computer programmer on December 1. Employee X is expected to work full-time on an annual basis and does work full-time for the months of December, January, and February. Employer D offers health coverage to its full-time workers (and their dependents).

Conclusion: Employee X must be able to enroll in coverage beginning in March or the employer potentially would be subject to a section 4980H payment. However, failure to offer coverage to Employee X during the first three months (December-February) would not subject Employer D to a potential section 4980H payment.

Example 2: Newly-hired employee who seasonally works full-time

Facts: Same as Example 1 except that Employer D hires Employee Y as a salesperson who is expected to work full-time during the holiday season and part-time the rest of the year. Employee Y works an average of 35 hours per week in December, January, and February and 20 hours per week in March, April, and May.

Conclusion: If, based on the facts and circumstances at the end of the period, the three-month period of December through February is reasonably viewed as not representative of the average hours Employee Y is reasonably expected to work on an annual basis, Employer D may use a second three-month period (March-May) as a look-back period. Failure to offer coverage under Employer D's group health plan to Employee Y during the first (December-February) and the second (March-May) three-month periods would not subject Employer D to a potential section 4980H payment. (Failure to offer coverage to Employee Y for June also

would not subject Employer D to a potential section 4980H payment because Employee Y was determined to be part-time during the March-May look-back period.)

Q6. When PHS Act section 2708 (which imposes a 90-day limitation on waiting periods) becomes effective in 2014, will it require an employer to offer coverage to part-time employees or to any other particular category of employees?

A6. No. Many employers make distinctions in eligibility for coverage based on full-time or part-time status, as defined by the employer's group health plan (which may differ from the standard under Code section 4980H). PHS Act section 2708 does not require the employer to offer coverage to any particular employee or class of employees, including part-time employees. PHS Act section 2708 merely prohibits requiring an otherwise eligible employee to wait more than 90 days before coverage is effective. Furthermore, nothing in the Affordable Care Act penalizes small employers for choosing not to offer coverage to any employee, or large employers for choosing to limit their offer of coverage to full-time employees, as defined in the employer shared responsibility provisions.

Q7. How do the Departments intend to address the application of the 90-day waiting period limitation in PHS Act section 2708 to an offer of coverage by an employer?

A7. Having reviewed the comments in response to IRS Notice 2011-36, the Departments intend to retain, for purposes of PHS Act section 2708, the definition in existing regulations that the 90-day waiting period begins when an employee is otherwise eligible for coverage under the terms of the group health plan. This is the definition of waiting period used for purposes of Title XXVII of the PHS Act, Part 7 of ERISA, and chapter 100 of the Code.⁶ Under this approach, if a plan were to provide that full-time employees are eligible for coverage without satisfying any other condition, and an employee were hired as a full-time employee, the waiting period (if the employer were to choose to impose one) for that employee would begin on the date of hire and could not exceed 90 days. Consistent with PHS Act section 2708, eligibility conditions that are based solely on the lapse of a time period would be permissible for no more than 90 days.

Other conditions for eligibility under the terms of a group health plan would generally be permissible under PHS Act section 2708, unless the condition is designed to avoid compliance with the 90-day waiting period limitation. For example, eligibility conditions such as full-time status, a bona fide job category, or receipt of a license would be permissible.

The upcoming guidance under section 2708 is also expected to address situations in which, under the terms of an employer's plan, employees (or certain classes of employees) are eligible for coverage once they complete a specified cumulative number of hours of service within a specified period (such as 12 months). It is anticipated that, under the upcoming guidance, such eligibility conditions will not be treated as designed to avoid compliance with the 90-day waiting period limitation so long as the required cumulative hours of service do not exceed a number of hours to be specified in that guidance.

⁶ 26 CFR 54.9801-3(a)(3)(iii), 29 CFR 2590.701-3(a)(3)(iii), 45 CFR 146.111(a)(3)(iii).

Comments are requested on how this possible approach would apply to plans that credit hours of service from multiple different employers and plans that use hours banks.

Example 3: Employee ineligible under terms of plan by reason of job classification

Facts: Same as Example 1 except that Employer D’s plan does not cover computer programmers.

Conclusion: Unlike Code section 4980H, in which the determination of full-time status is governed by a statutory standard (working an average of 30 hours per week), the waiting period limitation under PHS Act 2708 applies only to employees who are otherwise eligible under the terms of the plan. Because Employee X is excluded under the plan’s eligibility criteria, and the plan’s terms are not designed to avoid compliance with PHS Act section 2708, the plan’s eligibility provision does not violate PHS Act section 2708.

Example 4: Part-time employee, hours of service requirement

Facts: Employer E hires Employee Z to work 20 hours per week. Employer E’s plan requires part-time employees to complete 750 hours of service in order to participate. Solely for purposes of illustration in this example, it is assumed that upcoming guidance under PHS Act section 2708 permits plans to require part-time employees to complete up to, but no more than, 750 hours of service in order to participate.

Conclusion: Part-time employees who work 20 hours per week will complete 750 hours of service in 37 ½ weeks or just under 9 months. The waiting period under PHS Act section 2708 begins when Employee Z satisfies the cumulative service requirement, thereby becoming eligible (but for the waiting period) for coverage under the plan. Employer E must provide coverage to Employee Z no later than 90 days after Employee Z completes 750 hours of service, which is about one year after Employee Z is hired and begins working part-time. (No Code section 4980H payment applies because Employee Z is part-time.)

REQUEST FOR COMMENTS

Comments are requested by April 9, 2012. **WARNING:** Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments are posted on the Internet as received, and can be retrieved by most Internet search engines. Comments may be submitted anonymously. Comments will be shared by the Departments.

Comments may be sent electronically to: e-ohpsca-er.ebsa@dol.gov. Alternatively, comments may be sent via mail or hand delivery to: Office of Health Plan Standards and Compliance Assistance, Employee Benefits Security Administration, Room N-5653, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210.

FOR FURTHER INFORMATION

The Departments have coordinated on the information contained in this Notice and are publishing substantively identical issuances. Questions concerning the information contained herein may be directed to the Department of Labor's Office of Health Plan Standards and Compliance Assistance at 202-693-8335; the Internal Revenue Service at 202-927-9639; or the Department of Health and Human Services at 410-786-1565 or phig@cms.hhs.gov. Additional information for employers regarding the Affordable Care Act is available at www.healthcare.gov and www.dol.gov/ebsa/healthreform.