Health Reform Advisory Practice

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FAQs Offer Peek Behind the Play-or Pay Curtain, 90-Day Waiting Period Rule

Executive Summary

- Federal officials have provided key details of impending regulations related to several important health reform requirements set to apply in 2014.
- Regulators have indefinitely postponed the automatic enrollment rule that would apply to employers with at least 200 full-time employees.
- The 90-day maximum waiting period rule will apply only to employees who are otherwise eligible for coverage under an employer plan.
- Regulators will allow an employer to use a "look-back" approach for determining whether an employee works at least 30 hours per week and therefore is an employee to whom the employer must offer coverage or risk penalties. The look-back period will be three months for new employees expected to be regular full-time, six months for other new employees, and 12 months for current employees.
- The play or pay mandate will never apply to a new employee prior to his or her fourth month of employment.

Formal guidance -- that is, federal *regulations* -- on key aspects of the federal health reform law are still weeks and perhaps months away, but late last week the Administration gave employers a peek behind the curtain at three important regulatory projects related to the law. The Departments of Labor, Treasury, and Health and Human Services released a series of frequently asked questions (FAQs) pertaining to 2014's automatic enrollment rule, 90-day maximum waiting period, and methods for determining who are "full-time employees" for purposes of the law's "play or pay" mandate on employers.

Background...and the FAQs

2010's federal health reform law, the Patient Protection and Affordable Care Act (PPACA), includes a number of provisions that take effect in 2014. Key among them are:

Automatic Enrollment.

The PPACA requires employers with at least 200 full-time employees to automatically enroll new full-time employees in a health plan (apparently, *any* health plan of the employer's choosing, if it offers one) and re-enroll those already enrolled in coverage. The automatically-enrolled and re-enrolled employees will be permitted to opt out of coverage. The PPACA calls for a January 1, 2014, effective date for this requirement.

The employer's "play or pay" mandate -- discussed below -- requires all but the smallest employers to offer health insurance at an affordable cost to full-time employees, or risk penalties. For purposes of the mandate, "full-time employee" means an employee who works an average of at least 30 hours per week. But for purposes of the automatic enrollment rule, earlier informal comments from federal officials suggested the employer may apply its *own* definition of full-time (e.g., 36 hours per week, 40 hours per week, etc.).

In last week's FAQs, the agencies noted that the Department of Labor (DOL) has responsibility for issuing regulatory guidance on the automatic enrollment requirement. The DOL earlier announced compliance would not be required until it issues regulations. According to the FAQs, the DOL will not have regulations ready for a 2014 implementation date. Thus, the automatic enrollment requirement will be deferred until sometime after 2014.

90-Day Maximum Waiting Period.

The PPACA prohibits a health plan from imposing a waiting period of more than 90 days, effective the first day of the plan year beginning in 2014. Under the statute, there is no accommodation for existing, "first day of the month *after* 90 days of employment" provisions.

The FAQs make clear that impending regulations will specify that the 90-day rule will apply only to employees who are *otherwise eligible* for coverage under the employer's plan design. That is, nothing about the 90-day rule *requires* an employer to treat any particular employee as eligible for or enrolled in coverage. The rule merely requires that, with respect to employees whom the employer considers to be in an eligible class, the plan cannot make them wait more than 90 days (after becoming eligible) for their coverage to begin.

Although the 90-day rule does not literally require coverage of any particular employee, the automatic enrollment rule appears to do so, at least for employers with 200 or more full-time employees. That is, the auto-enrollment rule appears to require enrollment and re-enrollment of employees deemed "full-time" by the employer. Precisely how the 90-day rule will coordinate with the automatic enrollment rule remains unclear. The FAQs say federal authorities are still considering potential approaches for coordinating the two concepts, and the implications of those potential approaches.

The 90-day rule also coordinates nicely with the employer's "play or pay" mandate. As noted below, the FAQs confirm our long standing hunch and provide that an employer will not be subject to the play or pay mandate, with respect to a new full-time employee, during the first three months of his or her employment; the employer has a free pass under play or pay for those first three months.

In the FAQs, federal authorities give no clue to their thinking about permitting a "first day of the month *after* 90 days" wrinkle on the 90-day rule. However, the 90-day period apparently does not begin until the employee is *eligible* for coverage, so a plan might simply provide that a person is not *eligible* until the first day of the month following date of hire. The 90-day waiting period would then expire 90 days after the beginning of that month.

Employer "Shared Responsibility" (i.e., "Play or Pay") Mandate.

The PPACA requires employers with 50 or more full-time equivalent employees to offer health coverage to their "full-time employees" (generally, those averaging at least 30 hours per week) and their dependents, beginning in 2014. If the coverage does not have a "minimum value," and if the employee-only premium is not considered "affordable," the employer will be subject to a penalty if the affected employee obtains federally subsidized health coverage in an insurance exchange.

There has been modest guidance to date on two pieces of this three-piece puzzle.

Federal authorities have not yet defined precisely how robust the coverage must be; that is, they have not defined "minimum value." But with regard to "affordability," earlier announcements said employee-only coverage will be considered "affordable" if the employee is not asked to pay more than 9.5 percent of his or her W-2 wages for the coverage. The FAQs confirm that federal officials intend to retain this "safe harbor" for employers. There remains no obligation to subsidize *dependent* coverage.

With respect to the third piece of the puzzle, that is, determining who the employer's "full-time employees" are for "play or pay" purposes, a 2011 request for information issued by the IRS to employers offered hope for a very reasonable approach. The request for information suggested that federal authorities would allow employers to average an employee's hours over a look-back or "measurement" period of up to 12 months, to determine if the employee averaged at least 30 hours per week over the measurement period. If the employee failed to do so he or she would not be considered full-time, *for play or pay purposes*, for an ensuing "stability" period that would run at least as long as the measurement period.

Last week's FAQs supply some interesting guidance with respect to the "full-time employee" determination.

<u>Look-Back Periods to Be Allowed.</u> First, the FAQs make clear that impending regulations will retain the concept of a look-back or "measurement" period, for determining whether an employee averages at least 30 hours per week and is therefore considered "full-time" for play or pay purposes.

<u>New Employees Who Are Expected to Be Full-Time.</u> The FAQs say that the regulations will address *new* employees and *current* employees differently. With regard to a *new* employee, if upon hire the employee is expected to work at least 30

hours per week annually, and averages at least 30 hours per week during his or her first thee months of employment, the employee will be considered "full-time" for a "stability" period (likely at least three months) beginning after the first three months of employment. Thus, beginning with the fourth month of employment, the employer will have to offer health insurance to such an employee and his or her dependents, and the employee-only rate will have to be "affordable," or the employer will risk penalties if the employee purchases federally subsidized insurance in an insurance exchange.

Note how nicely this initial three-month measurement period dovetails with the 90-day waiting period rule, discussed above. Under no circumstances will an employer be subject to the play or pay mandate with respect to a new full-time employee during the first three months of his or her employment.

<u>New Employees Not Necessarily Expected to Be Full-Time.</u> What about seasonal hires, or employees who -- when hired -- are not necessarily expected to work at least 30 hours per week?

The FAQs say that impending regulations will provide that if it's not entirely clear, upon hire, how many hours per week the employee is likely to average, the employer may bide its time until the employee has worked three months. If the employee averages at least 30 hours per week over those first three months, <u>*and*</u> if the employee's hours for those first three months are reasonably representative of the hours the employee is expected to average on an *annual* basis, then like the *regular* full-time employee, the employee is considered "full-time" for play or pay purposes for an ensuing stability period of at least three months. Of course, there is no obligation to offer coverage to the employee during his or her first three months of employment.

If such an employee does *not* average at least 30 hours per week over his or her first three months, the employee is considered part-time and the employer has no play or pay obligation with respect to the employee for those first three months (the employer would not anyway, because of how the 90-day waiting period rule coordinates with play or pay), *nor the ensuing three months*.

If the employee *does* average at least 30 hours per week over the first three months, but those hours are *not* representative of the hours the employee is expected to work on an annual basis, then the employer may wait through *a second three-month measurement period*. If the employee averages at least 30 hours per week over the second measurement period as well, the employee is considered "full-time" for play or pay purposes for an ensuing stability period of at least three months, but the employer has no play or pay obligation for the initial *six* months of employment.

However, if the employee does *not* average at least 30 hours per week over the *second* three-month period, the employee is considered "part-time," and the employer has no play or pay obligation with respect to the employee for those first six months, nor for the ensuing three-month stability period.

<u>Current Employees</u>*.* With respect to employees other than new hires, the FAQs say that impending regulations will permit employers to determine an employee's full-time status by applying look-back measurement periods of up to 12 months. Employees who average at least 30 hours per week over the measurement period will be

considered full-time, for play or pay purposes, for an ensuing stability period that we expect must be at least as long as the look-back measurement period.

How is All This Supposed to Work?

The 90-day waiting period rule, the play or pay mandate and (when implemented) the automatic enrollment rule will operate together like three pieces of a puzzle. The potential scenarios are legion: full-time employees hired into an eligible class; full-time employees hired into an *ineligible* class; employees deemed part-time by the employer, but full-time for play or pay purposes, who are hired into an ineligible class; seasonal employees hired into an ineligible class; employees hired into an ineligible class who later transfer to an eligible class, etc.

We'll explore these scenarios, and how they play out on the puzzle board, in our February 23 webcast and in later publications and illustrations. We would do it here, but it would double the size of this *Alert*, and as a result probably bore or annoy you, so we'll tee up the examples a little bit down the road.

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