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IRS Request for Comments on Employer Mandate, Full-Time Employee Definition, and Waiting Period Issues

The IRS and Treasury recently released Notice 2011-36 (the "Notice") (it was released on May 3 and will be published in IRB 2011-21 on May 23), which requests comments on issues related to the employer "shared responsibility" mandate and other related requirements in the Patient Protection and Affordable Care Act ("PPACA"). In particular, the Notice requests comments on possible approaches that employers could take to determine which employees are full-time employees for purposes of the shared responsibility mandate and other provisions. Notably, the Notice also requests comments on how the Departments of Treasury, Labor, and Health and Human Services (the "Agencies") should interpret and apply the 90-day limitation on waiting periods under PPACA and the interaction between the shared responsibility mandate provisions and the determination of the maximum permissible waiting period. **Comments are due by June 17.**

The Notice provides that "[t]his notice does not constitute guidance" and instead describes "potential approaches" on certain discrete issues that could be incorporated into future proposed regulations. Nevertheless, the Notice provides helpful insights into the Agencies' current thinking on several key issues relating to the shared responsibility mandate and 90-day waiting period limitation.

Below is a summary of key issues addressed in the Notice.

I. Background

Effective beginning in 2014, Code section 4980H (as added by PPACA section 1513) generally requires employers with an average of at least 50 full-time employees that do not offer full-time employees (and dependents) the opportunity to enroll in "minimum essential coverage" under an "eligible employer-sponsored plan" and have at least one full-time employee receive a federal tax credit for coverage through an exchange, to pay a \$2,000 annual excise tax penalty for each full-time employee (calculated on a monthly basis). The penalty is calculated based on the number of full-time employees after subtracting the first 30.

In addition, employers with an average of at least 50 full-time employees that offer full-time employees (and dependents) the opportunity to enroll in "minimum essential coverage" under an "eligible employer-sponsored plan," but have at least one full-time employee receive a federal tax credit for exchange coverage (because the employer coverage does not provide minimum value or is unaffordable as provided in PPACA), are required to pay the lesser of a \$3,000 annual excise tax penalty for each full-time employee receiving the credit (calculated on a monthly basis) or \$2,000 per employee for each full-time employee, after subtracting the first 30.

PPACA generally defines full-time employee for these purposes as an employee who works an average of 30 hours of service or more per week with respect to any month. The statutory language suggests that the determination of full-time employee status – and application of the employer mandate penalties – could be required on a month-to-month basis. Commentators have noted that applying these rules on a monthly basis would cause practical difficulties for employers and that in many cases it would be difficult to predict which employees would meet the full-time employee threshold for a particular month.

Section 2708 of the Public Health Service Act (also incorporated into the Code and ERISA), as added by PPACA, generally prohibits group health plans and health insurance issuers offering group health insurance coverage from applying any waiting period that exceeds 90 days. This restriction also is generally effective beginning in 2014.

II. Determination of Full-Time Status

The Notice outlines possible approaches to determine full-time employee status under the employer shared responsibility mandate in PPACA. In outlining the possible approaches, the Notice indicates that determining full-time employee status on a monthly basis "may cause practical difficulties" including "uncertainty and inability to predictably identify" which employees are considered full-time. The Notice notes that such issues are particularly problematic in cases of employees with varying hours or employment schedules, and could result in employees moving in and out of employer coverage on a monthly basis.

Notably, the Notice provides that Treasury and IRS are considering alternatives to a rigid "month-to-month" calculation of full-time employee status. Specifically, the Notice requests comments on a possible "look-back/stability period safe harbor" that would provide certainty as to which employees are full-time for a particular coverage period. Under such an approach, employers would have the option of looking back a defined period of 3 to 12 months, as chosen by the employer (the "measurement period"), to determine full-time employee status for a subsequent "stability period," regardless of the employee's actual hours of service during the stability period. The stability period would be a period of from 6 to 12 months that follows the measurement period. For new employees and employees moving to full-time status, the Notice indicates that the safe harbor may apply only in limited form and requests comments on determining full-time employee status for such employees. The Notice also requests comments on possible provisions related to the administration of the look-back/stability period (e.g., whether there should be an interval between the periods; whether different periods could be permitted for different groups of employees) and other possible alternative methods for determining full-time status.

The Notice also indicates that the proposed regulations will provide that "130 hours of service in a calendar month" is the functional equivalent of 30 hours of service per week, and that "hours of service" generally will be calculated based on existing Department of Labor regulations. Further, it indicates that employers may be able to apply different methods for counting hours of service for different classifications of non-hourly employees, so long as the classifications are "reasonable and consistently applied."

III. Applicability of Employer Shared Responsibility Penalties

The Notice suggests that the definitions of employer, employee and hours of service for purposes of the shared responsibility mandate will generally conform to "well-established regulatory definitions and rules" in the benefits area. For example, the Notice indicates that employers and employees generally would be determined under the common-law tests, and that the controlled group rules in Code section 414(b), (c), (m), and (o) will apply.

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The Notice also describes the process for determining whether an employer employs an average of at least 50 full-time employees (including full-time equivalents) on business days during the preceding calendar year and thus would be subject to the shared responsibility mandate. In general, all employees (including seasonal employees) who were not full-time employees under the 30 hours per week/130 hours per month thresholds would be included in calculating full-time equivalents (but seasonal employees employed for 120 days or fewer could not put the employer over the 50 full-time employee threshold).

As noted above, different shared responsibility mandate penalties apply depending upon whether an employer "offers" its full-time employees (and dependents) the opportunity to enroll in "minimum essential coverage" under an "eligible employer-sponsored plan." Employers that do not offer full-time employees the opportunity to enroll in such coverage generally are subject to a \$2,000 annual penalty (calculated on a monthly basis) for each full-time employee if one full-time employee receives a federal tax credit for exchange coverage, while employers that do offer such coverage generally are subject to a \$3,000 annual penalty (calculated on a monthly basis) for each full-time employee that receives a federal tax credit for exchange coverage.

The Notice indicates that the proposed regulations will provide that an employer offering coverage to "all, or substantially all, of its full-time employees" generally would not be subject to the \$2,000 annual penalty for each full-time employee (minus 30). It requests comments on the challenges employers may face in offering coverage to certain categories of employees and whether there are appropriate exceptions that should be provided under the shared responsibility provisions (e.g., for seasonal employees).

IV. Waiting Period Issues

Also effective in 2014, group health plans and group health insurance may not impose a waiting period that exceeds 90 days. The Notice asks for comments on the PPACA 90-day waiting period limitation, including which employees are subject to the limitation, when a waiting period may apply consistent with the PPACA limitation, and how the 90-day limit should be calculated. In addition, it requests comments on the application of the 90-day waiting period limit to common employer eligibility and enrollment practices, and the interaction between the waiting period limitation and shared responsibility requirements.

Among other things, the Notice requests comments on the following scenarios:

- Employees becoming eligible to enroll in the employer's plan when they are determined to have worked an average of a certain number of hours during a look-back period (and therefore satisfy the plan's eligibility requirements), with a 90-day waiting period being applied beginning once the employee is determined to be eligible to enroll.
- Employees who are newly hired to work a full-time schedule becoming eligible to enroll in the employer's plan subject to a 90-day service requirement that is calculated from the date of hire, with enrollment permitted beginning on the first day of the month (or quarter) after completion of the 90-day service period.

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- Employees covered by a collective bargaining agreement becoming eligible for coverage under a multiemployer plan for a period (such as a calendar quarter) after they complete a specified number of hours during an earlier period (such as the previous calendar quarter), with the possibility that hours could be "banked" and available to maintain coverage for future quarters in which an employee does not meet the hours threshold.
- Employees becoming eligible to enroll in the employer's plan after completing a service-based "probationary" period of from 3 to 6 months.
- Employees hired as seasonal workers (or into other temporary, variable-hours categories of employment) who are not eligible to enroll in the employer's plan, even if the employee works a sufficient number of hours to satisfy the plan's eligibility requirement for non-seasonal employees.
- Part-time employees who are offered coverage, but only after having worked for longer than a 90-day period.

In general, these scenarios suggest that the Agencies are open to comments requesting that the proposed regulations provide somewhat flexible rules regarding the interaction of the waiting period limitation and common employer and plan eligibility and enrollment practices.

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Since the enactment of PPACA, we have been working closely with employers and service providers on plan design and implementation issues related to the shared responsibility mandate and waiting period limitations. The Notice is an important first step to receiving guidance in this area, and it is notable that the Agencies are seeking input from the public before issuing proposed regulations. As noted above, comments are due by June 17. If you have questions or concerns regarding the issues addressed in the Notice, please contact your regular Groom attorney or any of the Health and Welfare team attorneys.

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