Mandate Clarity

Employer mandate, waiting period and auto-enrollment issues

The Internal Revenue Service (IRS), the Department of Labor (DOL) and the Department of Health and Human Services (HHS) recently issued guidance (IRS Notice 2012-17; DOL Technical Release 2012-1) in the form of frequently asked questions (FAQ) about various issues related to the Patient Protection and Affordable Care Act (PPACA) employer mandate, waiting period limitation and auto-enrollment requirement. Below, we discuss several questions we have received about these PPACA provisions.

When will employers be required to implement the PPACA auto-enrollment requirements?

PPACA added section 18A to the Fair Labor Standards Act (FLSA), which requires employers with 200 or more full-time employees to automatically enroll new full-time employees in one of the employer's health plans and to continue the enrollment of current employees. Agency FAQ guidance issued in 2010 stated that employers would not be required to comply with the requirement before DOL regulations became applicable. The recent FAQ guidance states that the DOL has concluded that its regulations will not be ready to take effect by 2014, as previously projected, and until regulations are issued, employers will not be required to comply with the auto-enrollment requirement. Furthermore, it states that the DOL is working to coordinate the guidance with the employer mandate and waiting period guidance.

Could an employer be subject to an employer mandate penalty for not offering health coverage to an employee during a 90-day waiting period?

The new FAQ guidance indicates that future U.S. Treasury Department- and IRS-proposed regulations will address coordination of the employer mandate and waiting period limitation rules; it is expected to provide that an employer will not be subject to an employer mandate penalty for failing to offer coverage to an employee during the first three months after his date of hire.

Are the agencies planning to permit employers to use lookback and stability periods to identify full-time employees for purposes of the employer mandate?

The recent FAQ states that the Treasury and IRS intend to issue proposed regulations or other guidance that would allow employers to use "lookback periods" and "stability periods" of up to 12 months, for purposes of determining full-time status of current employees, as previously described in Notice 2011-36.

Will the PPACA 90-day limitation on waiting periods effectively require employers to offer coverage to part-time employees after they have worked 90 days?

The recent FAQ states that the waiting period limitation does not require employers to offer coverage to part-time or any other classification of employees (indeed, employers may exclude part-timers or other classifications of employees from coverage entirely). Instead, the PPACA waiting period limitation merely prohibits requiring "otherwise eligible" employees to wait more than 90 days before coverage is effective.

How will the 90-day waiting period limitation apply if an employer offers coverage only to employees who satisfy certain eligibility conditions?

The recent FAQ provides some guidance on how the agencies intend to apply the 90-day waiting period limit to an employer's offer of coverage, including the following key points: The 90-day waiting period begins when an employee is otherwise eligible for coverage under the terms of the health plan; a full-time employee's waiting period generally begins on the date of hire (and cannot exceed 90 days), if the plan provides that full-time employees are eligible for coverage without satisfying any other condition for coverage; eligibility conditions that are based solely on the lapse of a time period are permissible for no more than 90 days; it will be permissible for a group health plan to impose other conditions for eligibility for coverage, so long as the conditions are not designed to avoid compliance with the 90-day limit on waiting periods. The FAQ guidance provides that, besides full-time-employee status, "employees in a bona fide job category" and "receipt of a license" are permissible eligibility conditions; and upcoming guidance is expected to address eligibility conditions under which employees or classes of employees are eligible for coverage after they complete a specified cumulative number of hours of service within a specified time period (i.e., 12 months). It is expected that the guidance will permit this type of cumulative hours condition so long as the required hours do not exceed the number specified. An example in the current guidance describes an eligibility condition under which part-time employees are required to work 750 hours in order to participate and states that, "solely for purposes of illustration," it is anticipated that the upcoming guidance would permit such a threshold.

If the lookback and stability period rules will not apply to new employees, how and when will the full-time status of new employees be determined?

The FAQ includes a preview of detailed rules that the Treasury and IRS intend to propose with respect to the determination of whether a newly hired employee is a full-time or part-time employee—under the 30-hour-per-week full-time employee threshold—for purposes of the employer mandate penalty. Generally, the guidance provides that: An employer will not be subject to the employer mandate penalty for failing to offer a newly hired employee coverage during the first three months of employment (and, in certain circumstances, employers will have six months to determine whether a newly hired employee is full time); the period of time in which the employer will have to make the determination will depend on whether the employee is reasonably expected, as of the date of hire, to work an average of 30 or more hours per week on an annual basis, and whether the employee's first three months of employment are reasonably viewed, at the end of that period, as representative of the average hours he is expected to work per year; if a new hire is expected to work full time on an annual basis and does meet the average-30-hour-per-week requirement during his first three months, he must be offered coverage at the end of that period; and if it cannot reasonably be determined whether a new hire will be working full time, certain new rules will be put in place to help. Generally, under these expected rules, whether an employee who works full time during his first three months is considered full time at their close will depend on whether his hours worked can be viewed, looking back, as reasonably representative of the average hours he is expected to work per year. If so, the employee will be considered full time; if not, the plan will be permitted an additional three-month period to determine his full-time status.

These Q&As first appeared on www.plansponsor.com in March 2012. As health care law is evolving rapidly, there may be further developments since the initial publication.

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