GROOM LAW GROUP CHARTERED

BENEFITS BRIEF

October 10, 2012 www.groom.com

Authors: Ada B. Esedebe, Christine L. Keller, Tamara S. Killion and Brigen L. Winters

If you have questions, please contact your regular Groom attorney or any of the Health and Welfare attorneys listed below:

Jon W. Breyfogle
jbreyfogle@groom.com
(202) 861-6641

Elizabeth T. Dold
edold@groom.com
(202) 861-5406

Ada B. Esedebe
aesedebe@groom.com
(202) 861-6654

Thomas F. Fitzgerald
tfitzgerald@groom.com
(202) 861-6617

Cheryl Risley Hughes
chughes@groom.com
(202) 861-0167

Christine L. Keller
ckeller@groom.com
(202) 861-9371

Tamara S. Killion
tkillion@groom.com
(202) 861-6328

Mark C. Nielsen
mnielsen@groom.com
(202) 861-5429

William F. Sweetnam, Jr.
bsweetnam@groom.com
(202) 861-5427

Christy A. Tinnes
ctinnes@groom.com
(202) 861-6603

Vivian Hunter Turner
vturner@groom.com
(202) 861-6324

Brigen L. Winters
bwinters@groom.com
(202) 861-6618

IRS Affordable Care Act Guidance on Full-Time Employee Definition and 90-Day Waiting Period

On August 31, 2012, the IRS issued two notices (Notice 2012-58 and Notice 2012-59) related to the employer "shared responsibility" requirements (also known as the "employer mandate" or the "play or pay" provision) and waiting period limitation added by the Patient Protection and Affordable Care Act ("ACA") and effective beginning in 2014. Notice 2012-58 describes certain safe harbor methods employers may use to determine which employees are "full-time employees" who must be offered health coverage in order for the employer to avoid certain penalties under new Internal Revenue Code section 4980H. Notice 2012-59, which was also issued in substantially identical form by the Department of Health and Human Services (HHS) and the Department of Labor (DOL), contains important clarifications regarding section 2708 of the Public Health Service Act, which prohibits group health plan waiting periods of longer than 90 days. Importantly, the notices may be relied upon at least through the end of 2014.

This guidance builds upon Notice 2011-36, in which IRS requested comments on a proposed optional look-back/stability period safe harbor for determining whether ongoing (but not newly-hired) employees are full-time employees, and further requested comments on how Code section 4980H and the 90-day waiting period requirement should coordinate. Earlier this year, the IRS issued Notice 2012-17 (and HHS and DOL issued substantially identical guidance), which discussed a possible approach for newly-hired employees whereby employers would be given three, or in certain cases six, months to determine whether a new employee is a full-time employee.

Below is a summary, in Q&A format, of key issues addressed in the new guidance.

I. Employer Shared Responsibility Requirements Generally

Generally, what are the employer shared responsibility requirements?

"Applicable large employers" are required to offer their full-time employees (and their dependents) health coverage that is "affordable" and provides "minimum value." An applicable large employer that fails to do so will be subject to penalties if at least one of its full-time employees receives federal tax subsidies to purchase coverage through an exchange beginning in 2014.

Who is an "applicable large employer" that must offer coverage to full-time employees?

"Applicable large employers" are employers that employ at least 50 full-time employees, including full-time equivalent employees, on business days during the preceding calendar year.

Who is a "full-time employee" for these purposes?

A "full-time employee" is generally defined as any employee who works on average at least 30 hours of service per week. The methods described in Notice 2012-58 as summarized in Section II, below, provide a safe harbor for determining whether an employee should be treated as working on average at least 30 hours of service per week.

II. Notice 2012-58: Determining Full-Time Employee Status

Under the new guidance, what methods can an employer use to determine the full-time status of employees?

The notice generally permits different look-back methods and requirements depending on whether the employee is --

- "an ongoing employee;"
- a newly-hired employee who is reasonably expected to work full-time;
- a newly-hired variable hour or seasonal employee; or
- transitioning from newly-hired to ongoing status.

Different rules may also apply to employees who move into full-time status during the year due to a change in job classification

A. Ongoing Employees

What is the safe harbor method that may be used to determine the full-time status of ongoing employees?

For ongoing employees, an employer may generally determine full-time status by looking back over a "standard measurement period" of between 3 to 12 consecutive months.

What happens if an ongoing employee is determined to be a full-time employee during the standard measurement period?

The employer must treat such an employee as a full-time employee during a "stability period" of 6 to 12 consecutive months (but which cannot be shorter than the standard measurement period), regardless of the employee's actual hours during the stability period, so long as he or she remains an employee.

What happens if an ongoing employee is determined not to be a full-time employee during the standard measurement period?

An employer may treat such an employee as not a full-time employee during a stability period that is not longer than the standard measurement period.

What happens if an ongoing employee moves into full-time status during the year?

Notice 2012-58 states that different rules may apply to employees who "move into" full-time status during the year, and that upcoming regulations will likely provide additional rules regarding employees who experience a change in employment status.

May employers take time between the standard measurement period and the associated stability period to determine eligibility and notify and enroll eligible employees?

Yes, the new guidance permits employers to use an "administrative period" of up to 90 days between the standard measurement period and the associated stability period to identify full-time employees, notify them of their eligibility for coverage, and enroll those who elect coverage. This administrative period must overlap with the prior stability period (to prevent gaps in coverage).

For example, an employer could choose--

- a 12-month stability period (beginning January 1 and ending December 31),
- a 12-month standard measurement period (beginning October 15 and ending October 14), and
- an administrative period between October 14 and January 1.

B. New and Seasonal Employees

By when must an employer offer health coverage to newly-hired employees who are reasonably expected to work full-time?

Within three calendar months of employment. An employer that offers coverage that is affordable and provides minimum value to a new employee who is reasonably expected at his or her start date to work full-time before the end of the employee's first three calendar months of employment will not be subject to the employer shared responsibility tax penalties.

What is the safe harbor method that employers may use to determine the full-time status of newly-hired, variable hour and seasonal employees?

An employer may use an "initial measurement period" of between 3 and 12 months to determine if a variable hour or seasonal employee averaged 30 or more hours of service per week during that period. The employer may use the safe harbor if the employer limits eligibility for health coverage to employees who are full-time (e.g., who work an average of 30 or more hours per week).

What are the definitions of "variable hour" and "seasonal" employees for purposes of these rules?

An employee is a "variable hour employee" if, based on the facts and circumstances at the employee's start date, it cannot be determined that the employee is reasonably expected to work an average of 30 hours or more per week. Through at least 2014, employers may use a reasonable, good faith interpretation of the term "seasonal employee" for purposes of these look-back rules.

What must an employer do if a newly-hired variable hour or seasonal employee is determined to be a full-time employee during the initial measurement period?

If an employer determines that a new variable hour or seasonal employee is a full-time employee during the initial measurement period, then "the employer must treat that employee as full-time during a subsequent stability period that is the same length as the stability period for ongoing employees and that is at least 6 consecutive calendar months (but no shorter than the initial measurement period)."

What can an employer do if a newly-hired variable hour or seasonal employee is determined not to be a full-time employee during the initial measurement period?

For a new variable hour or seasonal employee who is determined not to be a full-time employee during the initial measurement period, the employer may classify the employee as not a full-time employee during a stability period that is not more than one month longer than the initial measurement period and that does not exceed the remainder of the standard measurement period (plus any associated administrative period) in which the initial measurement period ends.

May employers use an administrative period between the initial measurement period and associated stability period to determine eligibility and notify and enroll eligible newly-hired variable hour and seasonal employees?

Yes, an employer may use an administrative period of up to 90 days before the start of the stability period for such new employees. An administrative period for this purpose includes all periods between the start date of the new employee and the date the employee is first offered coverage, other than the initial measurement period. In addition, the combined length of the initial measurement period and administrative period cannot extend beyond the last day of the first calendar month beginning on or after the one-year anniversary of the employee's start date.

C. Transition from New to Ongoing Employee Status

Are there any special rules for new employees who transition to ongoing employee status?

Yes, once a new employee who has been employed for an initial measurement period also has been employed for an entire standard measurement period, the employer must test the employee for full-time status under its ongoing employee look-back method beginning with that standard measurement period to comply with the safe harbor.

III. Notice 2012-59: 90-Day Waiting Period Limit

What is the ACA 90-day waiting period limitation?

Generally, the ACA prohibits group health plans and health insurance issuers offering group health insurance coverage from imposing a waiting period that exceeds 90 days.

How is "waiting period" defined for purposes of the 90-day limitation?

A "waiting period" is defined as the period of time that must pass before coverage for an employee or dependent who is *otherwise eligible* to enroll under the terms of the plan can become effective. Being "otherwise eligible" for coverage generally means having met the plan's substantive eligibility conditions (e.g., being in an eligible job classification). However, eligibility conditions that are based solely on the lapse of a time period are permissible for no more than 90 days, and any other eligibility conditions that are designed to avoid compliance with the 90-day limitation are not permissible.

If an employer's plan conditions eligibility on an employee working a specified number of hours of service or working full-time, how does the 90-day waiting period limitation apply in the case of a newly-hired variable hour employee being tested under the new employee look-back rules?

Such an employer is permitted to take a "reasonable period of time" to determine whether the employee meets the plan's eligibility condition, including through use of a measurement period of up to 12 months that is consistent with

the look-back period guidance in Notice 2012-58. In general, the employer may use a look-back period method to determine whether the employee is eligible so long as coverage is made effective no later than 13 months from the employee's start date (plus, if the employee's start date is not the first day of a calendar month, the period until the first day of the next calendar month).

IV. Conclusion

The release of Notices 2012-58 and 2012-59 marks an important step in the interpretation and application of the ACA employer shared responsibility and waiting period limitation requirements. The notices provide substantial modifications to previous approaches as well as helpful clarifications for employers, plans, and insurers. Moreover, these notices can be relied on at least through the end of 2014.

If you have questions, please contact your regular Groom attorney or any of the attorneys listed above.