Sharing the Burden

Employer guidelines on proposed regulations have been released

Earlier this year, the Treasury and the Internal Revenue Service (IRS) published proposed regulations—78 Fed. Reg. 217 (January 2, 2013)—and new guidance about the employer "shared responsibility" requirements under Internal Revenue Code (IRC) Section 4980H. Below, we respond to questions from employers on these new requirements.

What employers are subject to the employer mandate rules?

The employer shared responsibility requirements apply to "large" employers—those with an average of at least 50 full-time employees for the prior year. All employees for all entities in a "controlled group" and full-time equivalent employees, as determined under rules in the proposed regulation, are taken into account for this purpose. Under the proposed regulations, an employer must count the actual hours of service of employees in the prior year. The proposed regulations also include special rules for counting seasonal workers and how the rule applies to new employees.

What employees are treated as full-time employees for purposes of the employer mandate requirements?

A full-time employee is defined as an employee who was employed at least 30 hours of service per week, on average, or 130 hours per month. The terms "employer" and "employee" are defined under the common law standard.

The proposed regulations include much guidance on calculating hours of service for purposes of the full-time employee determination, including: 1) all hours of service an employee performs for members of the controlled group are counted; 2) each hour for which an employee is paid, or entitled to payment, for performance of duties for the employer is counted; 3) each hour for which an employee is paid, or entitled to payment, on account of a period of time during which no duties are performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence is counted; 4) for hourly employees, employers must use actual hours of service from records of hours worked and hours for which payment is made or due; 5) for non-hourly employees, employers may calculate hours by counting actual hours of service from records of hours worked and hours for which payment is made or due, using a days-worked equivalency method or using a weeks-worked equivalency method.

May employers use look-back periods to determine whether an employee is full-time—instead of the month-to-month approach described in the statute?

Yes, consistent with prior IRS guidance (IRS notices 2012-58 and 2011-36), the proposed regulations provide an optional look-back method for determining full-time employee status. Under this "safe harbor" approach, an employer may use a look-back "measurement period" for counting hours of service; a "stability period" during which coverage may have to be provided (depending on whether the employee worked on a full-time basis during the measurement period); and an "administrative period" for enrollment activities. The employer may choose the length of time for such periods within certain limits and may generally change the length of the periods from year to year.

What look-back period rules may be used for ongoing employees?

An employer may look back over a standard measurement period of three to 12 months to determine whether an ongoing employee—one who has been employed for at least one standard measurement period—was employed at least 30 hours of service per week, on average. Employers may make certain adjustments at the beginning and end of the standard measurement period to accommodate weekly, biweekly or semimonthly payroll periods. If an ongoing employee works on a full-time basis during the measurement period, then the employer must treat the employee as full-time for a subsequent standard stability period of at least six consecutive calendar months or, if longer, the length of the standard measurement period. If an ongoing employee did not work on a full-time basis during the measurement period, the employer may treat the employee as not full-time for a subsequent stability period, the maximum length of which may not exceed the length of the standard measurement period.

What look-back period rules may be used for new employees?

The proposed regulations define a "new employee" as an employee who has been employed for less than one complete standard measurement period. In the case of a new employee who, at his start date, is reasonably expected to be employed 30 hours of service or more per week, on average (and is not a seasonal employee), an employer must offer minimum essential coverage that provides minimum value and satisfies the affordability requirements at or before the end of the employee's first three months of employment, in order to avoid penalties.

In the case of a new variable-hour or seasonal employee, an employer generally may look back over an initial measurement period of three to 12 months that begins on any date between the employee's start date and the first day of the first calendar month following the employee's start date to determine whether the employee was employed at least 30 hours of service per week, on average. A variable-hour employee is defined as an employee for whom the employer is unable to determine, at his start date, whether he is reasonably expected to be employed on average at least 30 hours per week. The term "seasonal employee" is not defined in the proposed regulations, and employers may use a reasonable, good-faith interpretation of the term until further guidance is provided.

If a new variable-hour or seasonal employee worked on a full-time basis during the initial measurement period, the employer must treat the employee as full-time for a subsequent stability period that must be at least six months and is no shorter than the initial measurement period. If such an employee did not work on a full-time basis during the initial measurement period, the employer may treat the employee as not full-time during a subsequent stability period that must be no more than one month longer than the initial measurement period and must not exceed the remainder of the standard measurement period (plus any administrative period) in which the initial measurement period ends.

An optional administrative period may be used before or after the initial measurement period. The administrative period cannot exceed 90 days and cannot reduce or lengthen the measurement or stability period. The administrative period must overlap with the prior stability period—an ongoing employee enrolled in coverage because of his full-time status in a prior measurement period must continue to receive coverage. The initial measurement period and administrative period combined may not extend beyond 13 months and a fraction of a month.

CONTRIBUTORS

Christy Tinnes is a principal in the Health and Welfare group of Groom Law Group in Washington, D.C. She is involved in all aspects of health and welfare plans, including ERISA, HIPAA portability, HIPAA privacy, COBRA and Medicare. She represents employers designing health plans, as well as insurers designing new products. Most recently, she has been extensively involved in the insurance market reform and employer mandate provisions of the health care reform legislation.

Brigen Winters is a principal at Groom Law Group, Chartered, where he co-chairs the firm's Policy and Legislation group. He counsels plan sponsors, insurers and other financial institutions regarding health and welfare, executive compensation and tax-qualified arrangements, and advises clients on legislative and regulatory matters, with a particular focus on the recently enacted health care reform legislation.

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These Q-and-As first appeared on plansponsor.com in January. As health care law is evolving rapidly, there may have been further developments since the initial publication.

