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Shared Responsibility

More questions about guidelines in proposed health care regs

In May, we responded to questions regarding the proposed regulations from the Treasury and Internal Revenue Service (IRS)—78 Fed. Reg. 217—and new guidance about the employer "shared responsibility" requirements under Internal Revenue Code (IRC) Section 4980H. In this issue, we address additional questions we have received from employers about these new proposed requirements.

What look-back rules apply to rehired employees and employees who return to service after a leave of absence?

Under the safe harbor look-back rules in the proposed regulation, for purposes of determining whether the employer is required to consider an employee's previous service in determining full-time status, the following rules apply to employees who are rehired after a termination of employment or who resume service after other types of absences:

- **Treat as a new employee.** If the period of "no service" was at least 26 consecutive weeks, an employer may treat an employee who returns to work as a new employee for purposes of determining the employee's status as a full-time employee. For "no service" periods of less than 26 weeks, the employer may apply an optional rule of parity and treat the employee as a new employee if the "no service" period is at least four but less than 26 weeks long and is longer than the period of employment. For example, if an employee works for three weeks, terminates for 12 weeks and is rehired, the employee may be treated as new.
- **Treat as a continuing employee.** If neither of the above tests is satisfied, the employer must treat the employee who returns to work as a continuing employee who retains the same measurement and stability period that would have applied if the employee had not had a period of "no service." For example, if an employee who was being treated as full-time for a stability period returns during that stability period, he must be treated as full-time for the balance of the stability period.
- **Special unpaid leaves.** For a continuing employee who resumes after certain types of special unpaid leave—Family and Medical Leave Act (FMLA) leave, Uniformed Services Employment and Re-employment Rights Act (USERRA) leave, and jury duty—the employer must determine the average hours of service per week for the employee, excluding the special unpaid leave period, and use that average as the average for the entire measurement period. Alternatively, the employer may credit the employee with hours of service for the special unpaid leave period at a rate equal to the average weekly rate at which the employee was credited with hours of service during the weeks in the measurement period that are not special unpaid leave.

How does an employer determine whether the coverage it offers is affordable under the 9.5% of household income test?

Under IRC Section 4980H(b), an employer that offers full-time employees and their dependents the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan must ensure that a full-time employee's required contribution toward the cost of self-only coverage does not exceed 9.5% of the employee's household income in order for the coverage to be considered "affordable." Because employers generally will not know an employee's household income, the proposed regulations provide certain safe harbors that employers may use to measure affordability. In general, an employer using one of the safe harbors must offer minimum essential coverage to full-time employees—and their dependents—under an eligible employer-sponsored plan and satisfy one of the following tests:

- **Form W–2 safe harbor.** In general, the required employee contribution for self-only coverage for the lowest cost option that provides minimum value must not exceed 9.5% of the employee's Form W–2 wages for that calendar year. If an employee was not a full-time employee for the entire calendar year, the employee's Form W–2 wages are adjusted to reflect the period when the employee was offered coverage and the employee's share of premiums for that period. Note that the safe harbor will apply on an employee-by-employee basis and that the employer will not know for certain if it has satisfied the requirements of the safe harbor until the end of the calendar year, unless the contribution toward coverage is set as a percentage of wages.
- **Rate-of-pay safe harbor.** In general, the employer may take the hourly rate of pay for an hourly employee and multiply that rate by 130 to determine affordability for self-only coverage for the lowest cost option that provides minimum value based on this monthly wage. Affordable coverage must require a contribution of no more than 9.5% percent of the monthly wage. For salaried employees, monthly salary is used to make this determination. The employer may not reduce the hourly wage rate for hourly employees or the monthly wages of salaried employees during the year.
- **Federal poverty level (FPL) safe harbor.** The employee's required contribution for the lowest-cost self-only coverage providing minimum value must not exceed 9.5% of the most recently published federal poverty level for a single individual.

Do the proposed regulations include rules regarding how health coverage must be offered to meet the employer shared responsibility requirements?

The proposed regulations state that, if an employee does not have an effective opportunity to accept coverage at least once during the plan year, the employee will not be treated as having been offered coverage. Whether an employee has an effective opportunity is determined based on all relevant facts and circumstances, including adequacy of notice of the availability of the coverage offer, the period of time during which acceptance of the offer of coverage may be made, and any other conditions on the offer. If the coverage is not affordable or does not provide minimum value, the employee also must be permitted to decline coverage.

The proposed regulations also provide, generally, that in order for an employer to satisfy the requirement to "offer" coverage for a particular month, the employer must offer coverage that, if accepted, would be applicable for that month. If there is a day during a month in which the coverage would not be effective, the employee is treated as not having been offered coverage for the entire month, unless the employee is terminated.

Employers may offer coverage electronically and can follow the IRS safe harbor method for use of electronic media. See Treasury Regulations Section 1.401(a)–21; see also Notice 99–1. General recordkeeping requirements (under IRC Section 6001 and guidance thereunder) apply to demonstrate that an employer has "offered" coverage.

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Got a health care reform question? You can ask *your* health care reform legislation question online at http://surveymonkey.com/s/second_opinions.

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

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