LEGAL UPDATES

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Recent Healthcare Reform Regulations Provide Delay of Key Employer Penalties

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On February 10, 2014, the Department of Treasury and Internal Revenue Service issued final regulations implementing the employer shared responsibility penalties under the Affordable Care Act (ACA) along with Q&A guidance. The ACA gives employers with at least 50 full-time equivalent employees an ultimatum: offer healthcare coverage to full-time employees and their dependents that is affordable and meets certain minimum standards, or pay a shared responsibility penalty. The recently issued final regulations provide welcome transition relief for some employers and additional guidance for who is treated as a "full-time employee" or "dependent."

Some highlights of the final regulations include:

Enforcement Delays and Transition Rules

Employers with 50 to 99 full-time equivalent employees are exempt from the shared responsibility penalties until 2016.

Employers with 100 or more full-time equivalent employees that sponsor non-calendar year health plans are not subject to shared responsibility penalties until the first day of the plan year beginning in 2015, provided that certain requirements are met.

Whether the delay applies is more complicated than simply having a non-calendar year plan. The plan must have been a fiscal year plan as of December 27, 2012, so plans which recently changed plan years cannot take advantage of

this rule. Sponsors of non-calendar year plans will need to carefully review certain plan metrics as of February 9, 2014, to determine when the shared responsibility penalty scheme applies to them.

An employer with 100 or more full-time equivalent employees will not be subject to the penalty for failure to offer coverage for the plan year beginning in 2015 if the employer provides coverage to at least 70 percent of its full-time employees. Beginning with the first plan year beginning in 2016, employers will need to provide coverage to at least 95 percent of full-time employees to avoid this penalty.

Full-Time Employees and Dependents

The final regulation largely adopted the rules in the proposed regulation that allow employers to use lookback measurement periods to determine full-time status of seasonal employees and variable hour employees, and adds an optional monthly measurement period.

The final regulation refines the rules with respect to who qualifies as a variable hour employee or seasonal employee and can therefore be held out of the plan while it is determined whether they are a full-time employee that must be offered coverage.

An employee is a variable hour employee if, based on the facts and circumstances on the employee's start date, it cannot be determined whether the employee is reasonably expected to be employed on average at least 30 hours of service per week during the initial measurement period, because the employee's hours are variable or otherwise uncertain. The final regulation provides a list of factors to be used to help determine whether an employee meets the definition of a variable hour employee, including:

- Whether the employee is replacing an employee who was a full-time employee or variable hour employee;
- The extent to which hours of service of employees in the same or a comparable position have varied above or below 30 hours per week; and
- Whether the job was advertised or otherwise communicated as requiring 30 hours or more per week.

Seasonal employees are those employees whose customary annual employment is six months or less.

Additional guidance is provided for certain types of employees for whom it is difficult to measure hours including adjunct faculty (see our article titled New Affordable Care Act Regs and Higher Education: Delays, Clarifications and Adjunct Hours Calculation), pilots, and on-call employees.

Hours worked by volunteers, certain students working pursuant to a federal or state work study program, unpaid interns, and members of a religious order who have taken a vow of poverty are generally excluded when determining full-time status.

The ACA mandates that coverage be offered to both full-time employees and "dependents." The proposed regulations stated that the class of "dependents" who must be offered coverage included biological children, adopted children, stepchildren and foster children of the employee. The final regulations eliminate the requirement to offer coverage to stepchildren and foster children. The final regulations adopted the rule in the proposed regulation stating that coverage need not be offered to spouses.

What This Means to You

It is important that all employers reevaluate their unique ACA compliance plans, including evaluating health plan eligibility rules and employment practices. This should be completed relatively soon, as the final regulations look at hours worked in 2014 to calculate penalties for 2015. Employers who might fall in the 50 to 99 full-time equivalent employee range will especially want to consider their employment practices during 2014 to avoid potential penalties until 2016.

Also, health plan sponsors must remember that not all healthcare reforms have been delayed. Several reforms remain in force, including the restriction on waiting periods in excess of 90 days; the requirement to provide coverage for contraceptives and other preventive care services without cost sharing; coverage for clinical trials; limits on out-of-pocket maximums; and the prohibition on preexisting conditions limits. Generally, failing to comply with these rules can result in a penalty of

$100.00 per affected individual per day. These penalties can add up quickly, and we recommend reviewing your plan document for compliance with these reforms.

Contact Us

For more information on the Affordable Care Act or other issues affecting employee benefits, please contact your Husch Blackwell attorney or any attorney in our Employee Benefits & Executive Compensation group.