Health Reform

Additional Guidance Issued on Full-Time Employees

Ross Rubin | Norman Rubin Agency Inc | (610) 525-3830 | ross@normanrubininc.com

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New guidance has been issued to assist employers in determining who is a full-time employee for purposes of the employer mandate. Beginning in 2014, employers with 50 or more full-time employees may face a penalty if they do not offer coverage to all or substantially all full-time employees, or if they offer coverage, but the coverage is unaffordable or does not provide minimum value and a full-time employee qualifies for and receives a premium tax credit or cost-sharing subsidy to enroll in the Exchange.

With regard to the employer mandate, a full-time employee is an employee who is employed for an average of at least 30 hours of service per week. Employers have been anxious for further details to help them determine who is considered a full-time employee for purposes of this penalty. IRS Notice 2012-58 provides safe harbor methods that employers may use (but are not required to use) to determine which employees constitute full-time employees for these purposes. This guidance will be effective at least through the end of 2014 and employers will not be required to comply with any subsequent guidance that is issued on these topics that is more restrictive until, at the earliest, January 1, 2015.

The guidance in Notice 2012-58 is extremely complex and creates a significant amount of administrative burden on employers to track and monitor the full-time status of variable hour and seasonal employees. The guidance does not answer a number of outstanding issues including a clear understanding of how to determine full-time employee status for employees in short-term assignments, temporary staffing agencies and high turnover positions; how a plan will determine whether it provides a minimum value; and what constitutes providing coverage to "substantially all" full-time employees in order to avoid the application of the penalty. We assume further guidance will be issued.

In brief, the guidance provides the following:

- Relief to employers with seasonal populations that do not work for an average of 30 hours per week in a defined measurement period (e.g., holiday retail workers and ski instructors for ski season);
- New terminology including "standard measurement periods," "stability periods," "administrative periods," and "initial measurement periods;"
- Specific measurement and stability periods of up to 12 months to determine full-time employee status without being subject to a penalty for this period; and
- Employers will not face a penalty for failing to offer coverage to new employees who are reasonably expected to work full-time for the initial 3 months of employment.

Ongoing Employees

An ongoing employee is one who has been employed by the employer for at least one complete "standard measurement period" (SMP). The SMP is a defined period of time chosen by the employer (not less than 3 and no more than 12 consecutive calendar months). Employers have flexibility in choosing the SMP, but it must be applied on a uniform and consistent basis for all employees in the same category. For example, employers could choose a 12-month SMP and base it on the calendar year, plan year, or a different 12-month period, such as one that ends shortly before the start of the plan's open enrollment season. Categories include:

- Collectively bargained employees and non-collectively bargained employees;
- Salaried employees and hourly employees;
- Employees of different entities; and
- Employees located in different states.

The safe harbor provides that an employer may determine an employee's full-time status by looking back at the SMP. If the employer determines an employee averaged at least 30 hours per week during the SMP, the employee is treated as a full-time employee during the subsequent "stability period" regardless of the number of hours actually worked during the stability period, as long as the employee remains an employee. If the employee did not work full-time during the SMP, the employer could treat that employee as not full-time during the stability period.

The "stability period" is a period of at least 6 months and no shorter than the SMP. It begins after the SMP (or any "administrative period") ends. Since employers may need time between the SMP and the associated stability period to determine which ongoing employees are eligible for coverage, and to notify and enroll employees, employers may make time for these administrative steps by having their SMP end before the stability period begins. This "administrative period" may last up to 90 days and cannot reduce nor lengthen the SMP or stability period. Generally it will overlap with the prior stability period.

New Employees

If a new employee is reasonably expected at his or her start date to work full-time, an employer will not be subject to a penalty for failing to offer coverage to such employee during the first 3 calendar months of employment (a 90-day waiting period).

A safe harbor is also available to employers with new variable hour employees or new seasonal employees. A new employee is a variable hour employee if, based on the facts and circumstances at the start date, it cannot be determined that the employee is reasonably expected to work on average at least 30 hours per week. A new employee who is expected to work initially at least 30 hours per week may also be a variable hour employee if, based on the facts and circumstances at the start date, the period of employment at more than 30 hours per week is reasonably expected to be of limited duration and it cannot be determined that the employee is reasonably expected to work on average at least 30 hours per week during the "initial measurement period" (defined below). For example, a retail worker is hired to work more than 30 hours per week during the holiday season and is reasonably expected to work after the holiday season, but not expected to work at least 30 hours per week for the portion of the initial measurement period remaining after the holiday season. It cannot be determined at this worker's start date that s/he is reasonably expected to average at least 30 hours per week during the initial measurement period.

A seasonal employee has not been fully defined by the guidance. The guidance acknowledges that the term "seasonal worker" has only been defined as it applies with respect to determining whether an employer is an applicable large employer. Thus, through at least 2014, employers are permitted to use a reasonable, good faith interpretation of the term "seasonal employee" for purposes of this guidance.

To determine whether a new variable employee or new seasonal employee is a full-time employee, an employer may use an "initial measurement period" (IMP), as selected by the employer, of between 3 and 12 consecutive calendar months. The IMP may begin on the employee's start date, or the first day of the calendar month following the start date. The IMP works just like the SMP. If the new variable hour or seasonal employee is determined to be a full-time employee during the IMP, then the employee is determined to be a full-time employee during the stability period. The length of the stability period for new variable hour and seasonal employees must be the same as the stability period that applies for ongoing employees. If the employee is not determined to be a full-time employee during the IMP, the employer can treat the employee as a non-full-time employee for the stability period that follows the IMP.

Employers may also apply an administrative period before the start of the stability period. Similar to ongoing employees, the administrative period cannot exceed 90 days in total. For this purpose, the administrative period includes all periods between the start date of the new variable hour or seasonal employee and the date the employee is first offered coverage under the employer's group health plan (other than the IMP). In other words, if there is a period between the end of the IMP and the date the employee is first offered coverage, that period must be counted against the 90-day limit.

There is also an overall limit on the combined length of the IMP and the administrative period applicable to new variable hour and seasonal employees. Together, the IMP and administrative period cannot extend beyond the last day of the first calendar month beginning on or after the first anniversary of the employee's start date.

During the IMP or any administrative period, an employee is not treated as being eligible for health coverage, and may still qualify for assistance to buy coverage in the Exchange. An employer will not be penalized on employees who are in their IMP and receive government assistance to buy coverage in the Exchange.

Transition from New Employee Rules to Ongoing Employee Rules

Once an employee, employed for the IMP, has been employed for the entire SMP, the employee must be tested for full-time status, beginning with that SMP at the same time and according to the same conditions as an ongoing employee. If the employee is determined to be a full-time employee during an IMP or SMP, the employee must be treated as a full-time employee for the entire associated stability period. This is the case even if the employee is found to be a full-time employee during the IMP, but not determined to be a full-time employee in the overlapping SMP. In that case, the employer may treat the employee as a non-full-time employee only after the end of the corresponding stability period associated with the IMP. In contrast, if the employee is determined to be a non-full-time employee during his or her IMP, but is determined to be a full-time employee during the overlapping or immediately following SMP, the employee must be treated as a full-time employee for the entire stability period that corresponds to the SMP.

The following example will help you understand how an employer with a calendar year plan can set its measurement, stability and administrative periods to comply with the standards of the guidance:

Employer has:

- An SMP for ongoing employees from October 15, 2012 through October 14, 2013
- An administrative period for ongoing employees from October 15, 2013 through December 31, 2013
- A stability period from January 1, 2014 through December 31, 2014
- A 12-month IMP for new variable hour employees that begins on the employee's start date
- An administrative period for new employees that applies from the end of the IMP through the end of the first calendar month beginning on or after the end of the IMP