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Employment and Labor Law

ALERT

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Employer Shared Responsibility Proposed Regulations

Although employers are not required to provide health care benefits for their employees, beginning in 2014, under the Patient Protection and Affordable Care Act, certain large employers (including both for-profit and not-for-profit employers) that do not offer "substantially all" their full-time employees (and their "dependents") the opportunity to receive "affordable," "minimum value" health care coverage under an employer-sponsored plan will be subject to penalties under the provisions of new Internal Revenue Code Section 4980H. Two types of penalties potentially will apply. For employers that do not offer health coverage to their full-time employees and their dependents and where at least one full-time employee receives a federal premium tax credit to help pay for coverage through an Exchange, the "play or pay" penalty will be $2,000 for each of the employer's full-time employees in excess of the first 30. For employers that offer health care coverage to their full-time employees and their dependents but the coverage is deemed unaffordable or fails to provide minimum value so that at least one full-time employee obtains subsidized coverage through an Exchange, the "play and pay" penalty will be $3,000 for each of the employer's full-time employees who enroll for coverage through an Exchange and receive a federal premium tax credit. These annual penalties will be assessed on a monthly basis (*i.e.*, $2,000 or $3,000 divided by 12).

The newly-issued proposed regulations, along with Questions-and-Answers posted on the Internal Revenue Service web site, provide details as to these employer "shared responsibility" requirements and penalties, the highlights of which are as follows:

"Large Employer" Status - An employer (determined on the basis of 80 percent or greater-owned controlled group) will be "large" for these purposes if, in the immediately preceding calendar year (*i.e.*, for 2014, the first year for which these rules will be effective, on the basis of 2013), it employed on average at least 50 full-time and/or full-time-equivalent employees. (For a new employer with no immediately preceding calendar year, the test is whether or not it is reasonably expected to meet the threshold for the current calendar year). A full-time employee is one employed by the employer for an average of 30 hours per week (for employees paid on a monthly rather than an hourly basis, for an average of 130 hours per month). The number of full-time-equivalent employees is calculated on a monthly basis by determining the number of hours worked or for which payment is made or due (*i.e.*, for vacation, illness, holiday, leave, etc.) per month by all non-"full-time" employees (but not in excess of 120 hours per employee) and dividing that number by 120. The monthly totals for all months are combined and divided by 12. If the aggregate number of full-time employees and full-time equivalent employees equals or exceeds 50, the employer is "large" for the purposes of the Affordable Care Act. Special transition relief applies to the 2014 year only and permits the 2013 look-back year to be the entire 2013 year or any six-consecutive-month period during 2013. A special rule is provided for employers of seasonal employees, which precludes "large employer" status if the 50 full-time and/or full-time-equivalent threshold is met for 120 days or less during the applicable look-back year on account of seasonal workers. Special anti-abuse provisions are included to prevent employers from avoiding these rules through the use of temporary staffing agencies. The IRS also clarified that workers employed outside of the United States need not be counted for this purpose. Finally, special effective-date relief is provided for plans operating on the basis of a non-calendar fiscal year provided that they were in effect on December 27, 2012.

"Substantially All" Threshold - The "substantially all" threshold is the greater of five full-time employees or 95 percent of all of the employer's (again, determined on the basis of 80 percent or greater-owned controlled group) full-time employees.

"Dependent" Definition - "Dependent" is defined as a child who is younger than age 26 - a spouse is not a "dependent" for this purpose. (Transitional relief is provided to permit an employer to first provide dependent coverage in 2014 without its failure to do so in prior years to cause the penalty to apply.)

"Minimum Value" and "Affordable" Standards - No penalty will apply unless a full-time employee of the employer obtains subsidized Exchange coverage, which requires that the employee's household income be between 100 and 400 percent of the federal poverty line, the employee's enrollment for Exchange coverage is at a time when the employee is not eligible for Medicaid (or other governmental coverage), and either the employer provides no coverage or the employer-provided coverage fails to meet either a "minimum value" or "affordability" test. Employer-provided coverage will satisfy the "minimum value" requirement if it covers at least 60 percent of the total allowed cost of the benefits expected to be incurred under the plan and the "affordability" requirement if the employee is required to pay no more than 9.5 percent of the employee's household income for employee-only coverage. Three safe harbors are provided to assist employers to satisfy the "affordability" requirement – 9.5 percent of the employee's W-2 reported wages for annual coverage, 9.5 percent of monthly wages for monthly coverage (for hourly employees, the hourly rate of pay multiplied by 130 hours per month would be the monthly wage) or if the employee's cost for employee-only coverage does not exceed 9.5 percent of the federal poverty line for an unmarried individual.

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