HEALTH CARE REFORM NEWS

...From the Employer Perspective

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Employer Mandate Final Regulations Issued

A recent Trion *HCRAlert!* notified you of the release of employer shared responsibility ("employer mandate") final regulations in the Patient Protection and Affordable Care Act (PPACA). This edition of *HCRNews* provides a detailed analysis of notable provisions within the final regulations that differ from the proposed guidance previously issued.

EMPLOYER MANDATE TRANSITION RELIEF

Are there employers for which the employer mandate will be further delayed?

Yes. Employers with 50 – 99 full-time and full-time equivalent employees will not be subject to the mandate until 2016. To assist these "small" employers in complying with the employer mandate rules, no penalty under the employer mandate will apply during the 2015 plan year, provided:

- Between February 9, 2014 and December 31, 2014, the employer does not reduce the size of its workforce or the overall hours of service of its employees in order to satisfy the workforce size condition of the relief;
- During this coverage maintenance period the employer does not eliminate or materially reduce the health coverage, if any, it offered as of February 9, 2014; and
- The employer certifies on a prescribed form (expected to be part of employer annual IRS reporting) that it meets the transition eligibility requirements

Will there be changes in the requirements for "large" employers with 100 or more full-time and full-time equivalent employees who still are subject to the employer mandate in 2015?

Yes, there are several areas of transition relief provided to large employers for 2015:

- *The % threshold for full-time employees that must be offered coverage in order to avoid the 4980H(a) penalty is reduced to 70%* – In general, the employer mandate requirements provide that an employer is treated as offering coverage to its full-time employees if it offers coverage to all but 5% (or all but 5, if greater) of its full-time employees (and their dependents). For 2015 only, the threshold for determining whether an employer will be treated as offering coverage to its full-time employees will be 70% of full-time employees rather than 95%.
- *The requirement to offer coverage to dependents (children) of full-time employees is delayed until 2016* – The regulations provide that any employer that takes steps during the plan year that begins in 2015 toward offering coverage to full-time employees' dependents (children) will not be liable for a penalty under the employer mandate rules due to a failure to offer dependent coverage for 2015. This 2015 plan year relief applies to plans under which:
  - Dependent coverage is not offered,
  - Dependent coverage that does not constitute minimum essential coverage is offered, or

- Dependent coverage is offered for some, but not all, dependents.

The relief is not available to the extent the employer offered dependent coverage during either the 2013 or 2014 plan year and subsequently dropped that offer of coverage.

- *Transition relief for non-calendar year plans has been extended to 2015 (with additional opportunity to qualify)* – If an employer maintained a non-calendar year plan as of December 27, 2012 (and the plan year was not modified since then to start at a later date), the employer mandate rules apply on the first day of the 2015 plan year for employees who, under the eligibility terms of the plan on February 9, 2014, are eligible for affordable coverage that provides minimum value on the first day of the 2015 plan year. With regard to all other employees, this same transition relief is offered if:
  - On any date during the 12 months ending February 9, 2014 at least 1/4 of all employees or 1/3 of full-time employees were covered under the plan, or
  - During the open enrollment ending most recently before February 9, 2014, coverage under the plan was offered to at least 1/2 of all employees or at least 1/3 of full-time employees.
- *A shorter period is permitted for determining applicable large employer status for 2015* – Generally, determination of whether an employer is an applicable large employer subject to the employer mandate for any given year will be based on average employee counts in the preceding calendar year. For 2015 only, an employer may determine its status as an applicable large employer, i.e., employed an average of at least 100 full-time equivalent employees, using a period of at least six consecutive calendar months during the 2014 calendar year (rather than the entire 2014 calendar year).
- *A shorter measurement period is permitted for the stability period starting during 2015* – For purposes of stability periods beginning in 2015, even if the 2015 stability period will be 12 months, employers may adopt a transition look-back measurement period that is shorter than 12 consecutive months, but the look-back period must be at least 6 consecutive months. In addition, the look-back measurement period must begin no later than July 1, 2014, and end no earlier than 90 days before the first day of the plan year beginning on or after January 1, 2015. For example, an employer with a calendar year plan may use a measurement period from April 15, 2014, through October 14, 2014 (six months), followed by an administrative period ending on December 31, 2014 and a stability period from January 1, 2015 through December 31, 2015.
- *The 30 FT employee reduction for the purposes of calculating 4908H(a) penalty liabilities is increased for 2015 to 80 FTEs* **–** In general, the employer mandate regulations provide that an employer that is subject to the $2,000 per full-time employee employer mandate penalty for failing to offer coverage to 95% (70% in 2015) of its full-time employees may exclude the first 30 full-time employees from the calculation of that penalty. For 2015, the number of full-time employees that may be excluded from this penalty calculation will be 80 rather than 30.

DETERMINATION OF STATUS AS AN APPLICABLE LARGE EMPLOYER

When an employer near the large employer threshold crosses that threshold and becomes subject to the employer mandate for the first time, is there any grace period for the employer to respond to becoming a large employer?

Yes, there's a 3-month grace period in the initial year of coverage. Specifically, the final regulations provide, with respect to employees who were not offered coverage at any point in the prior calendar year, that if the employer offers coverage on or before April 1 of the first year in which the employer is an applicable large employer, the employer will not be subject to a penalty for January through March of that first year under section 4980H(a) for failure to offer coverage to the employees for January through March

of that year, and the employer will not be subject to a penalty for January through March of that first year under section 4980H(b) if the coverage offered provides minimum value.

HOURS OF SERVICE

Are there any new rules or clarifications around hours of service for the purpose of identifying an employer's full-time employees and full-time equivalent employees?

Yes, there are several clarifications in the final rules. The basic rules continue to be:

- Hourly employees: the employer is required to directly track the hours each employee is paid or entitled to be paid.
- Salaried (non-hourly) employees: the employer can track the actual hours for each employee or use one of two equivalency methods – the "days worked" or "weeks worked" methods described in the proposed regulations.

The clarifications include:

- *Use of equivalency methods for non-hourly employees* – The anti-abuse rules around the use of an equivalency method are expanded to also prohibit the use of an equivalency method if the result is to understate hours of service for a substantial number of employees and it could affect the calculation of FTEs as part of the applicable large employer determination.
- *Bona fide volunteers* – Hours of service do not include hours worked as a "bona fide volunteer." For this purpose, bona fide volunteers include any volunteer who is an employee of a government entity or an organization described in section 501(c) that is exempt from taxation under section 501(a) whose only compensation from that entity or organization is in the form of (i) reimbursement for (or reasonable allowance for) reasonable expenses incurred in the performance of services by volunteers, or (ii) reasonable benefits (including length of service awards), and nominal fees, customarily paid by similar entities in connection with the performance of services by volunteers.
- *Student employees* – Hours of service do not include hours of service performed by students in positions subsidized through the federal work study program or a substantially similar program of a State or political subdivision thereof. However, the final regulations do not include a general exception for student employees. All hours of service for which a student employee of an educational organization (or of an outside employer) is paid or entitled to payment in a capacity other than through the federal work study program (or a State or local government's equivalent) are required to be counted as hours of service.
- *Religious orders* – A religious order is permitted, for purposes of determining whether an employee is a full-time employee, to not count as an hour of service any work performed by an individual who is subject to a vow of poverty as a member of that order when the work is in the performance of tasks usually required (and to the extent usually required) of an active member of the order.
- *Certain other employees* – Until further guidance is issued, employers of adjunct faculty, employees with layover hours, employees with on-call hours, commissioned salespeople and any other employees whose hours of service are particularly challenging to identify or track are required to use a reasonable method of crediting hours of service that is consistent with the employer mandate.
- *Adjunct faculty* – One (but not the only) method that is reasonable for this purpose would credit an adjunct faculty member of an institution of higher education with (a) 2 1/4 hours of service (representing a combination of teaching or classroom time and time performing related tasks such as class preparation and grading of examinations or papers) per week for each hour of teaching or classroom time (in other words, in addition to crediting an hour of service for each hour teaching in

the classroom, this method would credit an additional 1 1/4 hours for activities such as class preparation and grading) and, separately, (b) an hour of service per week for each additional hour outside of the classroom the faculty member spends performing duties he or she is required to perform (such as required office hours or required attendance at faculty meetings).

- *On-call hours* – It is not reasonable for an employer to fail to credit an employee with an hour of service for any on-call hour for which payment is made or due by the employer, for which the employee is required to remain on-call on the employer's premises, or for which the employee's activities while remaining on-call are subject to substantial restrictions that prevent the employee from using the time effectively for the employee's own purposes.

IDENTIFICATION OF FULL-TIME and VARIABLE HOURS EMPLOYEES

Are there any changes to guidelines for the look-back measurement process for determining the full-time status of variable hour and seasonal employees?

Yes. The final regulations include a number of changes and clarifications to the process for measuring whether a variable hour or seasonal employee must be considered full-time after a specified time period, including:

- *Reasonable expectations with respect to a new employee* – The final regulations provide that whether an employer's determination that a new hire is/is not a full-time employee is reasonable is based on the facts and circumstances at the hire date. Factors to consider include, but are not limited to:
  - whether the employee is replacing an employee who was or was not a full-time employee,
  - the extent to which employees in the same or comparable positions are or are not full-time employees, and
  - whether the job was advertised, or otherwise communicated to the new hire or otherwise documented (for example, through a contract or job description), as requiring hours of service that would average 30 (or more) hours of service per week or less than 30 hours of service per week.

  The employer may not take into account the likelihood that the employee may terminate employment before the end of the initial measurement period.
- *Temporary staffing firms* – The final regulations set forth additional factors relevant to the determination of whether a new temporary staffing firm employee who is intended to be placed on temporary assignments at client organizations is a variable hour employee. These factors generally relate to the typical experience of an employee in this position with the temporary staffing firm and include whether:
  - employees in the same position with the temporary staffing firm retain as part of their continuing employment the right to reject temporary placements that the employer temporary staffing firm offers the employee,
  - employees in the same position with the temporary staffing firm typically have periods during which no offer of temporary placement is made,
  - employees in the same position with the temporary staffing firm typically are offered temporary placements for differing periods of time, and
  - employees in the same position with the temporary staffing firm typically are offered temporary placements that do not extend beyond 13 weeks.

No one factor is determinative and the determination is made on the basis of the temporary staffing firm's reasonable expectations at the start date, even if the employee in fact averages 30 or more hours of service per week over the initial measurement period.

- *Seasonal employees* – The final regulations give a clearer definition of seasonal employee by providing that a seasonal employee means an employee in a position for which the customary annual employment is six months or less. The reference to customary means that by the nature of the position an employee in this position typically works for a period of six months or less, and that period should begin each calendar year in approximately the same part of the year, such as summer or winter. In certain unusual instances, the employee can still be considered a seasonal employee even if the seasonal employment is extended in a particular year beyond its customary duration (regardless of whether the customary duration is six months or is less than six months).
- *Initial measurement period* – The proposed regulations provided that the initial measurement period for a new variable hour or seasonal employee could begin any time from the date of hire to the first day of the month following date of hire. The final regulations provide that the initial measurement period may begin on the employee's start date or any date after that up to and including the first day of the first calendar month following the employee's start date (or, if later, as of the first day of the first payroll period beginning on or after the employee's start date). The final regulations also clarify that the initial measurement period need not be based on calendar months but instead may be based on months, defined as either a calendar month or as the period that begins on any date following the first day of the calendar month and that ends on the immediately preceding date in the immediately following calendar month (for example, from March 15 to April 14). In contrast, a stability period must be based on calendar months. The final regulations, consistent with the proposed regulations, also allow an employer to base measurement periods on one week, two week, or semi-monthly payroll periods.

Are there any changes or clarifications to the rules regarding rehire and breaks in service?

Yes. The final regulations retain the rehire rules contained in the proposed regulations but reduce the length of the break-in-service required before a returning employee may be treated as a new employee from 26 weeks to 13 weeks (except for educational organization employers, to which the 26-week break in service rules still applies).

What do the final regulations say regarding employees who are hired into full-time positions that are expected to last less than 12 months (but not including seasonal employees, who are employees in positions that also last a certain limited period but are expected to recur on an annual basis)?

The Treasury Department and the IRS continue to be concerned about the potential for abuse of any exception for short-term employees through the use of initial training period positions or other methods intended to artificially divide the tenure of an employee into one or more short-term employment positions in order to avoid application of the employer mandate. For these reasons, the final regulations do not adopt any special provisions applicable to short-term employees.

AFFORDABILITY & AFFORDABILITY SAFE HARBORS

Are there any changes or clarifications to the three safe harbors provided employers for determining whether coverage is affordable for a given employee or potentially subject to an employer mandate penalty?

Yes, the final rules include adjustments to the safe harbor calculation methods other than the Form W-2 wages safe harbor, which remains unchanged from the proposed regulations

- *Rate of pay safe harbor* – Under this safe harbor, for an hourly employee, coverage is affordable if the employee's contribution for the lowest self-only coverage is less than 9.5% of an amount equal to 130 hours multiplied by the lower of the employee's hourly rate of pay as of the first day of the coverage period (generally the first day of the plan year) or the employee's lowest hourly rate of pay during the calendar month. In the proposed regulations an employer could not use this safe harbor if an employee's rate of pay was reduced during the year. The final regulations permit an employer to apply the rate of pay safe harbor to an hourly employee even if the employee's rate of pay is reduced during the year. In this situation, the rate of pay is applied separately to each calendar month, rather than to the entire year and the employee's required contribution may be treated as affordable if it is affordable based on the lowest rate of pay for the calendar month multiplied by 130 hours.
- *Federal poverty line safe harbor* – Under this safe harbor, coverage is affordable if an employee's contribution is less than 9.5% of the federal poverty line for a single individual. The final regulations permit employers to use the federal poverty line guidelines in effect six months prior to the beginning of the plan year, so as to provide employers with adequate time to establish premium amounts in advance of the plan's open enrollment period.

OFFERS OF COVERAGE

Do the final regulations say anything new about the offering of coverage to eligible employees, specifically whether employers can make any coverage mandatory for employees?

Yes. The final regulations provide that an employer may not render an employee ineligible for a premium tax credit by providing an employee with mandatory coverage, i.e., coverage which the employee is not offered an effective opportunity to decline, that does not meet minimum value or that may not be affordable. However, an employer does not have to provide an effective opportunity to decline coverage that provides minimum value and is offered either at no cost to the employee or at a cost of no more than 9.5% of the federal poverty line.

DEFINITION OF DEPENDENT

Are there any changes to the definition of a dependent to which employers must offer coverage in order to avoid an employer mandate penalty?

Yes. The proposed regulations defined a dependent as a child of an employee who has not attained age 26. The final regulations exclude both foster children and stepchildren from the definition, as well as a child who is not a U.S. citizen or national, unless that child is a resident of a country contiguous to the United States or is within the exception for adopted children.

WORKER CLASSIFICATION

Are there any changes to the worker classifications that are not included in the definition of employee for the purpose of the employer mandate?

Yes, The final regulations define an employee for purposes of the employer mandate as an individual who is an employee under the common law standard, and as not including a leased employee, a sole proprietor, a partner in a partnership, a 2-percent S corporation shareholder, or a worker described in section 3508 (this last category, which includes real estate agents and direct sellers, is added to the list of exclusions in the final regulations).

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