PUBLICATION

IRS Issues Proposed Regulations for Employer-Shared Responsibility under ACA

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On December 28, 2012, the IRS issued proposed regulations with respect to employer-shared responsibility regarding health coverage under the Affordable Care Act of 2010 (ACA). Employers are permitted to rely on these proposed regulations pending the issuance of final regulations or other further guidance.

Under the ACA, starting in 2014, an employer with at least 50 full-time employees (including full-time equivalents) is subject to assessment under Internal Revenue Code Section 4980H (Section 4980H). If the employer does not offer substantially all of its full-time employees and their dependents the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan and at least one such full-time employee receives an applicable premium tax credit or cost-sharing reduction for purchasing individual coverage through an affordable insurance exchange, the employer will be assessed $2,000 for each full-time employee (whether or not offered coverage) in excess of 30. If the employer does offer such coverage, but the coverage is either not affordable or does not provide minimum value, and at least one such full-time employee receives an applicable premium tax credit or cost-sharing reduction, the employer will be assessed $3,000 for each full-time employee who is not offered affordable coverage providing minimum value and who receives an applicable premium tax credit or cost-sharing reduction (in total not to exceed $2,000 for each full-time employee in excess of 30).

The proposed regulations provide guidance on various aspects of these requirements. The proposed regulations adopt and expand upon proposals made in a series of IRS notices issued in 2011 and 2012, and include by reference regulations and proposed regulations published by the Department of Labor (DOL) and the Department of Health and Human Services (HHS). Employer reporting requirements will be addressed in future regulations under Code Section 6056.

Affected Employers

Shared responsibility applies to all large employers of common law employees, including governmental entities and nonprofit organizations. For purposes of determining whether an employer is a large employer subject to Section 4980H for a given year, the employer must calculate the number of full-time and full-time equivalent common law employees it had in each month of the prior year (based on 30 hours of service per week being full time), and then determine the average of such monthly numbers. If the average is 50 or more, the employer is subject to a possible assessment under Section 4980H. Service is generally based on the number of hours for which the employee is paid (including vacation, sick pay and other paid time off), and service equivalencies may be used for employees who are not paid on an hourly basis. Only service performed in the U.S. is counted in determining an employee's full-time status or equivalence. Special rules apply to educational organizations and businesses with seasonal workers. Businesses treated as a single employer under qualified retirement plan provisions of the Code are combined for purposes of determining large employer status, but leased employees are not included in the determination. For 2014, the determination is based on number of employees during 2013. Transition relief in the proposed regulations allows employers to determine large employer status for 2014 using any six-consecutive-month period in 2013, rather than the full 12 months.

Full-Time Employees

If an employer does not offer minimum essential coverage to its full-time employees, it is subject to an assessment under Section 4980H based on the number of such full-time employees. Full-time equivalents are not included in the assessment calculation, and the number of full-time employees is calculated differently for purposes of assessment than it is for purposes of determining large employer status. Under the statute, full-time employees are to be determined each month as those who average at least 30 hours of service per week during the month.

The proposed regulations provide an optional look-back measurement method to allow employers to determine in advance who is a full-time employee for a particular month. For ongoing employees, an employer may use a look-back measurement period that is between 3 and 12 consecutive months. Ongoing employees averaging at least 30 hours of service per week during the measurement period are considered full-time during the subsequent stability period that is the longer of six months or the length of the measurement period. Employees averaging less than 30 hours of service per week during the measurement period can be treated as not being full-time during the subsequent stability period that can be no longer than the measurement period.

New employees expected at the time of hire to average 30 or more hours of service per week must be treated as full-time and offered coverage within three months of employment. Seasonal and variable hour employees for whom it cannot be determined whether they will average 30 hours of service per week can be tested prospectively using measurement and stability periods similar to those for ongoing employees. Special rules apply to employees who have employment status changes (e.g., from seasonal to full-time), who are terminated and rehired, or who take certain types of unpaid leave.

Minimum Essential Coverage

Minimum essential coverage through an eligible employer-sponsored plan is coverage provided by an employer through a group health plan or group health insurance that is a governmental plan or a plan offered in a small or large group market within a state. This requirement will be clarified in future regulations under Code Section 5000A.

To avoid the assessment of $2,000 per year per full-time employee in excess of 30, coverage must be offered to at least 95 percent of all full-time employees (or all but five employees, if greater than five percent) and their dependents. The proposed regulations define "dependents" as only the employee's children under age 26. Spouses and others who may qualify as dependents for other purposes are not required to be offered coverage. An employer will not be assessed for failing to offer dependents coverage in its plan year beginning in 2014 if it is taking steps during that year toward satisfying the dependent coverage requirement.

Coverage must be for every day of a month to be counted for that month, other than the portion of any month after termination of employment.

Assessment When Coverage Offered

An employer offering minimum essential coverage to its full-time employees and dependents may still be assessed $3,000 per year for each full-time employee who receives a premium tax credit or cost sharing reduction if: (a) the coverage is not affordable to the employee, (b) the coverage does not provide minimum value, or (c) the employee is among the five percent or five employees not offered coverage.

Affordability

Coverage is not affordable for an employee if the employee's required contribution to the cost of employee-only coverage exceeds 9.5 percent of the employee's household income for the year. The proposed regulations provide three safe harbors that employers may use as a substitute for household income for purposes of determining affordability. These are the employee's W-2 wages (after reduction for any 401K or cafeteria plan contributions), the employee's rate of pay (hourly rate multiplied by 130 hours per month), or the federal poverty line (below which the employee would qualify for Medicaid). Employer-offered coverage is affordable if the employee's cost share for employee-only coverage does not exceed 9.5 percent of any of these calculations.

Minimum Value

Coverage provides minimum value if the plan pays at least 60 percent of the total allowed costs of benefits. Minimum value is determined actuarially under proposed regulations issued by HHS on November 26, 2012. IRS and HHS will be providing an online minimum value calculator to assist employers in satisfying this requirement.

Fiscal Year Plans

The proposed regulations provide transition relief for employers with health care plans that were on a fiscal year immediately prior to the publication of the proposed regulations. Such an employer is not subject to assessment in 2014 prior to the first day of the plan year beginning in 2014 with respect to any employer-offered affordable minimum value coverage on or before the first day of such plan year.

Cafeteria Plan Elections

For plan years beginning in 2013, employers may amend their cafeteria plans to allow employees to change cafeteria plan elections relating to premiums for employer-provided health coverage. This is to allow employees to switch from employer-provided coverage to coverage purchased through an exchange or to enroll in employer-provided coverage to avoid individual responsibility assessments.

If you have questions about how these proposed regulations may affect your company, please contact any of our more than 70 Labor & Employment attorneys located in Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville and New Orleans, Louisiana; Jackson, Mississippi; Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee; and Houston, Texas.