

Employee Benefits Update

February 2014

Final Regulations Implementing Pay or Play Provisions Issued

Thompson Hine's employee benefits lawyers understand the rising costs, increasing scrutiny and changing legal landscape facing employers who provide group health plan benefits to employees. We are working closely with our clients to help design, implement and administer health plans in this challenging environment. The breadth and depth of our experience allows us to identify best practices as they emerge and provide responsive, legally compliant and cost-effective solutions. For more information on ensuring that the design of your group health plan, employee communications and plan documentation comply with PPACA, please contact any member of our [Employee Benefits & Executive Compensation](#) practice group.

Background

On February 10, 2014, the Treasury Department and IRS released [final regulations](#), a [fact sheet](#) and a number of [questions and answers](#) regarding the employer shared responsibility (also known as pay or play) requirements under Section 4980H of the Internal Revenue Code. Section 4980H imposes penalties on certain employers who fail to provide affordable, minimum-value medical coverage to substantially all full-time employees and their children. While the final regulations do not alter the basic structure established by the proposed regulations and other previous guidance, they do provide some additional clarity and transition relief to certain employers.

The final regulations are effective for periods beginning after December 31, 2014. Employers should become familiar with the guidance, many significant aspects of which are summarized below.

A Brief Refresher

In order to avoid a penalty, an employer subject to the employer shared responsibility provisions must offer 95 percent or more of its full-time employees (and their children) minimum essential coverage that is both affordable and provides minimum value.

If an employer does not meet these requirements for a given month, it will be subject to a penalty if any of its full-time employees obtains an insurance policy through an exchange (also known as a health insurance marketplace) and is certified as eligible for a premium tax credit for that month.

Employers Subject to the Requirements

An employer is subject to the pay or play requirements for a calendar year if it is an applicable large employer. An applicable large employer is one who (together with certain related companies) employed at least 50 full-time equivalent employees during the prior calendar year.

Special rules apply to new employers and those who employ seasonal workers.

The Penalties

If an applicable large employer does not offer minimum essential coverage to 95 percent or more of its full-time employees and their children for a month, the penalty is equal to:

$$\frac{1}{12} \times \$2,000 \times (\text{the number of the employer's full-time employees} - 30)$$

If a covered employer does offer minimum essential coverage to 95 percent or more of its full-time employees and their children for a month, the penalty is equal to:

$$\frac{1}{12} \times \$3,000 \times (\text{the number of full-time employees certified eligible for a premium tax credit})$$

This second penalty is capped so it will never be greater than the first.

The Final Regulations

As noted above, the final regulations do not alter the basic structure of the employer shared responsibility requirements as described in the proposed regulations. They do, however, provide some important transition relief, changes and clarification.

Transition Relief

The final regulations provide the following transition relief:

- *Mid-sized employers.* For the 2015 plan year, employers with fewer than 100 full-time equivalent employees for 2014 are not subject to the employer shared responsibility provisions if the employer does not reduce its workforce (or overall hours of service) to qualify for the relief, does not eliminate or materially reduce its health coverage in effect on February 9, 2014, and certifies that it meets the foregoing requirements.
- *Coverage threshold lowered to 70 percent.* For the 2015 plan year, an employer with 100 or more full-time equivalent employees will not be subject to the offer of coverage penalty (the first penalty outlined above) if it offers coverage to at least 70 percent (rather than 95 percent) of its full-time employees and their children.
- *Dependent coverage.* For employers who do not currently offer coverage to dependents (or some subset of dependents to whom coverage must be offered under the final regulations), the penalty will not apply for the 2015 plan year solely by reason of the failure to offer coverage to those dependents if the employer takes steps during the 2015 plan year to offer dependent coverage for the 2016 plan year.
- *Applicable large employer determinations.* For purposes of determining status as an applicable large employer for the 2015 calendar year (triggering application of the employer shared responsibility provisions), employers may use a period of at least six consecutive months (rather than a full year).
- *Measurement periods.* To determine which full-time employees must be offered coverage for the 2015 plan year, an employer may use a measurement period of at least six months followed by a 12-month stability period. This transitional measurement period must start 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.
- *Non-calendar-year plans.* An employer with a non-calendar-year plan will not be required to satisfy the employer shared responsibility requirements until the beginning of the 2015 plan year if it satisfies certain conditions as of February 9, 2014, and offers affordable, minimum-value coverage to its full-time employees on the first day of the 2015 plan year.

Other Significant Changes

In addition to the transition relief described above, the final regulations make other significant changes and clarifications:

- *Dependent definition.* The definition of dependent was modified to exclude stepchildren and foster children. Additionally, the definition confirms that spouses are excluded. The final regulations also clarify that a child is a dependent for purposes of the employer shared responsibility requirements through the end of the calendar month in which he or she attains age 26.
- *Seasonal employee definition.* A seasonal employee is defined as one in a position for which the customary annual employment is six months or less.
- *New employees "reasonably expected" to be full-time employees.* The final regulations provide a non-exhaustive list of factors to determine when a new employee is reasonably expected to be a full-time employee. Factors include whether hours of service during recent measurement periods for ongoing employees in the same or comparable positions have been above or below 30 hours per week and whether the job was advertised or otherwise communicated as requiring hours of service of 30 or more hours per week.
- *Expansion of prohibited uses of hours equivalencies.* The final regulations expand the circumstances under which hours equivalencies for non-hourly employees cannot be used. Specifically, the final regulations add that an employer may not use the daily or weekly equivalencies if the result would be to understate the hours of service of a substantial number of employees (rather than substantially understate a single employee's hours of service).

- *Certain hours excluded from hours of service.* Hours of bona fide volunteers, hours worked in a federal work study program (or similar state program) and hours for services outside of the United States generally are excluded.
- *Monthly measurement method to identify full-time employees.* For the first time, the final regulations introduce and provide detail regarding how to identify full-time employees when an employer does not use the safe harbor lookback measurement method. As a general matter, this monthly measurement method identifies full-time employees by reference to average hours worked on a month-by-month basis. The final regulations also retain the lookback measurement method described in the proposed regulations.
- *Special rules for employees who transition between groups using the monthly measurement method and lookback measurement method.* The final regulations provide detail regarding identifying full-time employees in circumstances where employees transition from a group measured using the monthly measurement method to a group measured using the lookback measurement method, and vice versa.
- *Special rules for employees to whom minimum value coverage has been continuously offered.* The final regulations provide an exception to the general rule that employees must be offered coverage for the entire stability period following a measurement period during which they averaged 30 or more hours of service per week. If the employer offered coverage to the employee by the first day of the calendar month following the employee's initial three calendar months of employment and through the calendar month in which a change in employment status occurred (for which the employer would reasonably expect the employee not to average at least 30 hours of service per week), the employer may apply the monthly measurement period to determine full-time status beginning on the first day of the fourth full calendar month following the calendar month in which the status change occurred.
- *Rules on rehired employees.* The final regulations modify the rules regarding when a rehired employee is treated as a new or continuing employee. Under the final regulations, if a period of absence for which no hours of service are credited is at least 13 consecutive weeks (reduced from 26 weeks in the proposed regulations), the employee may be treated as a new hire upon return to employment. The final regulations continue to permit employers to apply a rule of parity for absences of at least four weeks in length. Special rules apply to employees of educational organizations.
- *Offers of coverage.* The final regulations provide that an offer of coverage from one applicable large employer member is treated as an offer of coverage from all members of the controlled group. Additionally, the final regulations provide guidance on how to identify the employer when an employee shifts employers within a controlled group. The final regulations also provide guidance on determining whether an offer of coverage by a staffing firm is considered an offer of coverage by the service recipient employer.
- *Rate of pay safe harbor for determining affordability.* The final regulations permit employers to use the rate of pay safe harbor for determining affordability even when an employee's rate of pay is reduced during the year. Affordability will be measured based on the lesser of the hourly rate of pay as of the first day of the coverage period (typically the first day of the plan year) or the lowest hourly rate paid to the employee for the relevant month.
- *Adjunct faculty.* Pending further guidance, employers are to use a reasonable method for crediting hours of service for adjunct faculty. An acceptable method would credit an adjunct faculty member with 2 ½ hours of service per week per hour of teaching, and an hour of service per week for each additional hour the faculty member spends on required duties.

FOR MORE INFORMATION

For more information, please contact any member of our [Employee Benefits & Executive Compensation](#) group.

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