

Final Rules on Employer Coverage Mandate and 90-Day Waiting Period Requirements

On February 12, 2014, the IRS issued [final regulations](#) on the “employer shared responsibility” provisions under the Affordable Care Act (ACA). These regulations will be effective in 2015 for employers with 100 or more full-time equivalent employees, and in 2016 for employers with between 50 and 100 full-time equivalent employees. In addition, on February 24, 2014, the government issued [final](#) and [proposed](#) regulations regarding the 90-day waiting period rules under the ACA, which will take effect in 2015.

While both sets of final rules largely follow the previously issued proposed rules, there are some key changes which are described below.

Employer Shared Responsibility

The employer shared responsibility requirement, also referred to as the “employer coverage mandate,” imposes an excise tax on employers that do not provide coverage to all full-time employees, or provide coverage that does not meet certain specified affordability and minimum value requirements. The proposed rules, issued in January 2013, included rules for determining when an employee should be considered “full time,” and the final rules provide further clarification on determining full-time status, as well as treatment of certain employee groups.

Determining Full-Time Status

Both the proposed and final rules provide that in general, a “full-time” employee includes any employee who works on average at least 30 hours per week. The final rules provide two possible methods for determining full-time status.

- Under the “monthly measurement method,” the employer determines status by counting actual hours of service for each month or successive one-week periods. In the latter case, either a four- or five-week period is used for each month; the measurement period must generally include either the last day or the first day of the month, but not both.
- Under the “look-back” method, employers may determine full-time status based on hours worked during a defined prior “measurement” period of no less than three and no more than 12 months. If the employee averaged 30 or more hours per week during the measurement period, the employer must treat the employee as full time during the “stability” period that follows the measurement period (which must be six to 12 months long and generally no less than the measurement period), regardless of actual hours worked during the stability period.

Under the look-back method, all hours are to be counted, including vacation, sick leave, holidays and other leaves of absence (similar to what is required under ERISA). While actual hours must be counted for hourly employees, employers may choose to credit

nonhourly employees with eight hours per day or 40 hours per week in which they work at least one hour, as long as this would not substantially understate hours actually worked by the employee. Hours performed outside of the U.S., however, need not be counted.

The same measurement method must be used for ongoing and new employees in the same employee category (e.g., union or non-union employees, salaried or hourly employees, employees located in different states).

The final rules also provided additional guidance concerning the following employee groups:

- *Part-time employees.* The final rules clarify that the same analysis used for full-time employees should be used to determine part-time employees, which will include any employee who is reasonably expected, as of his or her date of hire, to be employed on average less than 30 hours per week.
- *Seasonal employees.* The final rules define the term “seasonal employee” as including any employee who is hired in a position for which the period of employment is customarily no more than six months per year. Seasonal employees are not required to be treated as full-time employees even if they work more than 30 hours per week while employed.
- *Employees in short-term or high turnover positions.* Notwithstanding the special provisions for seasonal employees, the final rules make clear that new employees who are employed in short-term or high turnover positions must still be treated as full-time, to the extent they are otherwise reasonably expected at the time of hire to work on average 30 or more hours per week.
- *Adjunct faculty.* Until further guidance is issued, educational institutions are permitted to use any reasonable method for counting hours of employment of adjunct faculty. The final rules provide a safe harbor method of assigning 2 ¼ hours of service per teaching credit and one hour of service for each additional hour spent on other work obligations, such as faculty meetings.
- *Student interns.* The final rules provide a general exemption for students in a federal work study program or those who are not entitled to compensation. Otherwise, a full-time paid student intern will have to be treated in the same manner as any other full-time employee.
- *Bona fide volunteers.* The final rules exclude hours worked by bona fide volunteers of government entities or tax-exempt entities (such as 501(c)(3) organizations) whose only compensation from that entity is in the form of reimbursement for (1) reasonable expenses and (2) reasonable benefits and nominal fees customarily paid by similar entities in connection with performance of volunteer services.

- *International employees.* Employees on long-term international assignment can be treated as having terminated employment while on assignment and their hours worked overseas need not be counted.

Employers may use an administrative period of up to 90 days between the measurement period and stability period to determine coverage eligibility, provide notice, and enroll newly eligible employees. However, the administrative period may not reduce or lengthen either the measurement period or stability period, and employees who were covered by the employer's health care plan because they were full-time employees during the prior measurement period must remain covered during the administrative period (if it otherwise extends beyond the employee's current stability period).

New and Returning Employees

The final rules also clarified treatment of new employees and changes in employees' status, as described below:

- *New variable hour employees.* For *new* variable hour (as defined below) and seasonal employees, employers using the "look-back" method must use a separate initial measurement period and administrative period which may not extend beyond the end of the first full month following the first anniversary of the employee's hire date. The measurement period may be three to 12 months, but the stability period must be the same length as the measurement period for on-going employees, and no less than six months. The rules define "variable hour" employees as those for whom it cannot reasonably be determined, as of their hire date, whether they will average 30 hours per week over the initial measurement period.
- *New full-time employees.* Newly-hired "full-time" employees (unless they are employed seasonally) must be treated as "full-time" from the date of hire for purposes of these rules; as a result, the initial measurement period rules cannot be applied to them. The employer will not be subject to a tax for failure to provide coverage to a new full-time employee during the first three months of employment, as long as the employee is offered coverage by the first day of the fourth full calendar month after employment. The 90-day waiting period rules (described below) will also play a role here.
- *Change from variable to full-time status.* The final rules provide that if a variable hour or seasonal employee experiences a material change in status and as a result of such change would, had he or she started employment in that capacity, have reasonably been expected to work 30 hours per week, the employer must treat the employee as full-time no later than the first day of the fourth month following the change (or the end of the initial administrative period, if earlier).

- *Returning employees.* The final rules provide that in general, a rehired employee can be treated as “new” employee only if the period of non-employment has been at least 13 consecutive weeks (26 consecutive weeks for educational institutions), as compared to 26 weeks for all employers in the proposed rules. The same is also the case where the period of non-employment is at least 4 weeks but less than 13 (26 for educational institutions) and it exceeds the employee’s period of employment.

Staffing Agency Workers

The rules generally recognize that for purposes of applying the employer coverage mandate, temporary staffing agency workers are the “employees” of the staffing agency, and not the client to which the workers have been assigned. However, the final rules also indicate that where such assignments are long-term, the staffing agency workers may be treated as the “employees” of the client in applying the coverage mandate. In addition, the rules provide that any coverage offered to staffing agency workers by the staffing agency will not be treated as offered by the client unless the client pays more for those employees who elect coverage than those who do not.

While it appears that the focal point here is on staffing arrangements of a year or more, it is not entirely clear where the IRS may draw the line in this regard. Therefore, employers may want to consider the coverage mandate in deciding when and for how long to use staffing agency workers and other contractors in an employee-type capacity.

Penalty for Failure to Offer Coverage

The final rules provide that in general, applicable large employers that do not offer coverage to substantially all of their “full time” employees (and their spouses and dependents) during any month of the year must pay an annual excise tax equal to the employer’s total number of full-time employees over 30 (for 2015, 80), multiplied by 1/12 of \$2,000 for each month that at least one full time employee obtains subsidized exchange coverage. In general, this requirement is met if the employer offers coverage to 95% of its full-time employees (70% for 2015)

An “applicable large employer” includes any employer that has at least 50 full-time equivalent employees, although certain exceptions also apply for employers with seasonal employees who employ fewer than 50 employees no more than 120 days during the calendar year.

The final rules provide that in determining whether an employer is an “applicable large employer” subject to these provisions, the IRS “controlled group” rules are applied, meaning that all affiliated employers for which there is 80% or greater common ownership will be treated as a single employer. However, compliance with the coverage mandate requirements – and any associated penalties – will generally be assessed on an employer-by-employer (and not on a controlled group) basis.

Penalty for Coverage that Does Not Provide “Minimum Value”

If an applicable large employer meets the offer of coverage mandate, but the offered coverage is either “unaffordable” or does not provide “minimum value,” the employer must pay an annual excise tax equal to the number of full-time employees who obtain subsidized exchange coverage, multiplied by 1/12 of \$3,000 (subject to a penalty cap) for each month that the employees have such coverage. The final rules provide that this penalty also applies to any full-time employee who is not offered coverage where the employer otherwise meets the coverage requirement.

- *Affordability.* In general, coverage is “unaffordable” if the premium cost for individual coverage exceeds 9.5% of the employee’s household income. The final rules provide several alternative safe harbors for calculating whether health coverage is “unaffordable,” and also establish that where a plan offers more than one option, the lowest cost option is to be used. The safe harbors for calculating household income are (1) W-2 (Box 1) compensation; (2) monthly rate of pay; or (3) the federal poverty level for single individuals.
- *Minimum value.* Coverage does not provide “minimum value” if the plan pays less than 60% of the covered costs (determined on an actuarial basis). In general, minimum value can be determined by – (1) using the [HHS MV Calculator](#); (2) meeting IRS and HHS established “safe harbors” (which have not yet been finalized); or (3) actuarial certification from an AAA member actuary. The HHS calculator must be used unless a safe harbor is met or the plan contains nonstandard plan features that are outside the parameters of the HHS calculator, in which case, actuarial adjustments are permitted.
- *Health reimbursement arrangements.* Health reimbursement arrangement/account (HRA) contribution credits can only be taken into account in determining affordability if the credits can be used to pay premiums. While health savings account (HSA) contributions are automatically taken into account in determining minimum value, annual HRA credits cannot be counted unless the HRA is “integrated” with the plan and the HRA amounts can only be used for cost sharing. Generally, an HRA will be considered to be “integrated” with the plan only if the HRA is offered to individuals who are covered by the plan and the individuals are offered the opportunity to opt out of the HRA on an annual basis and at termination of employment.
- *Wellness program premium reductions.* Both affordability and minimum value are to be determined without taking into account any wellness program premium reductions, with the exception of cost-sharing reductions related to the prevention or reduction of tobacco usage, which can be counted.

Offering Coverage to Dependents

In order to comply with the mandate, employers must offer coverage to “dependents,” which includes children under the age of 26 (through the end of the month in which the child turns 26). The final rules provide that this excludes not only the employee’s spouse (as set out in the proposed rules), but also stepchildren and foster children. In addition, under the final rules, coverage is not required to be provided to dependents in 2015 if the employer is taking steps to arrange for dependent coverage in 2016.

Transition Relief

As noted above, employers with between 50 and 100 employees will not be subject to the employer shared responsibility rules until 2016. In order to be eligible for this relief, an employer must not reduce the size of its workforce or overall hours of service of employees, other than for bona fide business reasons, and may not eliminate or materially reduce health coverage offered as of February 9, 2014.

In addition, the final rules provided additional transitional relief for large employers that will be subject to the rules in 2015:

- *Substantial compliance.* As noted above, an employer will be deemed to be in “substantial compliance” and will not be subject to the “failure to offer coverage” penalty if it offers coverage to at least 70% of its full-time employees during the 2015 plan year (decreased from 95% in the proposed rules) and at least 95% of its full-time employees in the 2016 plan year and beyond. Notably, an employer could still be liable for the \$3,000 per-participant “insufficient coverage” penalty for any excluded full-time employees who receive subsidized exchange coverage, so employers may still be subject to some potential exposure in using the substantial compliance rule to avoid penalties.
- *Non-calendar year plans.* For non-calendar year plans in place as of December 27, 2012, no payment will be required until the first day of the plan year that begins in 2015, provided that the employer offers affordable and minimum value coverage as of the first day of the 2015 plan year to any employee (and dependent) who is eligible (or would have been eligible if employed) as of the first day of the plan year.
- *Shorter measurement period.* For stability periods beginning in 2015, employers may use a transitional measurement period that is less than 12 months (but at least six consecutive months), as long as it (a) is at least six months, (b) starts before July 1, 2014 and (c) ends not earlier than 90 days before the first plan year beginning on or after January 1, 2015.

In addition to the final rules, the IRS has also published a series of [questions and answers](#) further explaining certain aspects of the rules.

90-Day Waiting Period Rules

As with the proposed rules, the final rules provide that the maximum period that an otherwise eligible employee can be required to wait to commence health plan coverage cannot exceed 90 days. However, the final rules provide that a bona fide orientation period (described further below), a cumulative-hours of service requirement (up to 1,200 hours) and certain other limitations not based solely on the passage of time will generally qualify as a bona fide eligibility requirement that will not be treated as a waiting period.

The final rules also clarify that a former employee who is rehired can be treated as “new” employee and be subject again to a waiting period (as long as the termination was not intended to avoid compliance). The same is also true for employees transferring to and from eligible positions or categories, as they can be treated as newly eligible for purposes of the waiting periods upon transfer to an eligible position or category.

The government also issued a proposed rule regarding the maximum permitted length of any “reasonable and bona fide employment-based orientation period.” For 2014, an orientation period of up to 1 month will be considered bona fide. To the extent future rules require a shorter time period, they will apply to plan years beginning on or after January 1, 2015 at the earliest.

For further information, see our prior summary of the proposed waiting period regulations issued in 2012: [New 90-Day Waiting Period Rule For Group Health Plans Under Health Care Reform.](#)