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Final Employer Shared Responsibility Guidance

On February 10th, the IRS published the highly anticipated final Employer Shared Responsibility provisions. This guidance is extensive, touching on all aspects of the Employer Mandate, and incorporating public feedback on all manner of subjects.

Employers with between 50 and 99 full-time employees will not be required to comply with Shared Responsibility in 2015, while employers with 100 or more full-time employees will be required to offer affordable coverage to 70% of their full-time employees in 2015, and 95% in 2016. Also, the IRS has generally extended all of the fiscal year transitional relief, meaning employers with non-calendar year plans will be subject to Shared Responsibility as they renew if they meet certain criteria.

Transition Relief

Transition relief is provided for four different components of the Employer Mandate: employers who are first subject to shared responsibility, non-calendar year plans, dependent coverage and measurement and stability periods. Employers who are first becoming responsible for shared responsibility can determine whether they had at least 100 full-time or full-time equivalent employees in the previous year by looking at a period of at least six consecutive months, instead of a full year. Non-calendar year plans will have to begin their compliance with the Employer Mandate for the plan year starting in 2015 rather than on 1/1/2015. Also, employers that must offer coverage to their full-time employee's dependents must do so beginning in 2016. Lastly, for 2014 preparing for 2015 only, employers using the look-back measurement method to determine full-time status may use a measurement period of six months, even with respect to the stability period of up to 12 months.

Rules for New Employers

The final regulations outline some guidelines that are directed specifically at new employers. First, it defines a new employer as an employer that was not in existence on any business day in the prior calendar year. A new employer must then determine whether or not it is an applicable large employer. The determination as to whether or not a new employer is a large employer during its first calendar year is based on the employer's reasonable expectations at the time the business first opens, even if subsequently, events cause the actual number of full time employees (including full time equivalents or FTEs) to exceed that expectation.

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- Also, for purposes of the liability calculation under section 4980H(a)[1], with respect to a calendar month, the number of full-time employees of an applicable large employer member is reduced by that member's allocable share of 30.

Clarifications and Definitions

The IRS clarified a variety of questions and provided more distinct definitions of the meaning of key items that are part of the Employer Shared Responsibility Regulations.

Treatment for Dependents Age 26: A child is a dependent for the entire calendar month during which he/she attains age 26.

Full Time Employees: Many groups have requested that the hours of service to determine full time status be raised from 30 hours to 40 hours, however, the final regulations solidify that the 30 hour a week threshold for determining full time status remains in place. In addition, 130 hours of service per calendar month can be used to determine a full-time employee under both the look-back and monthly measurement periods. This is equal to 30 hours of service a week multiplied by 52 weeks and divided by 12 months.

Hours of Service: The IRS clarified certain items relating to calculating an employee's hours of service. The service crediting method states that an hourly employee must be credited with hours of service for 24 hours in which no services were performed, but for which they are owed payment (such as certain hours of paid sick leave). The equivalency methods[2] do not require that an employee have actually worked an hour of service in a day or week to be credited with eight or 40 hours of service with respect to that day or week.

The regulations also ensure that strict anti-abuse rules are in place. This prohibits the use of the equivalency method if the result is to intentionally understand an employee's hours of service, thus causing an employee to not be treated as a full-time employee. It has also been expanded to prohibit the use of an equivalency method if the result is to understate hours of service for a substantial number of employees. For example, if an employer had 100 non-hourly employees who each worked two days

[1] 4980H(a) references the $2,000 penalty
[2] Methods used to credit a fixed number of hours per day / per week to an employee

per week for 10 hours each day, the employer could not use the days-worked equivalency because that would result in 400 fewer hours of service being included in the FTE calculation for each week.

Aggregation of Hours of Service Across Applicable Large Employer Members: If an employee works for multiple companies that are all owned by another single entity or individual, all of the hours worked by an employee at all companies will be counted together to determine full time status.

Rehires and Continuing Employee Break in Service Rules, Including Monthly Measurement Period Rules: A rehired employee must be treated as an ongoing employee unless the employee has had a period of at least 13 weeks[3] during which no hours of service were credited at which point they can again be treated as a new hire. The period remains at 26 weeks for employees of educational organizations, and this same timeframe is to be used for continuing employees. Family Medical Leave Act (FMLA) breaks are included as part of the 13 week break in service. In addition, the averaging method can still be used for special unpaid leave and employment breaks. The Rule of Parity, stating that an employee may be treated as new hire if employee is not credited with any hours of service during a period that is at least 4 consecutive weeks' duration and longer than the employee's immediately preceding period of employment, can still be used.

The final regulations allow an employer to determine an employee's full-time employee status for a calendar month under the monthly measurement method based on the hours of service over successive one-week periods. For calendar months calculated using four week periods, an employee with at least 120 hours of service is a full-time employee, and for calendar months calculated using five week periods, an employee with at least 150 hours of service is a full-time employee. The Look-Back measurement rules remain unchanged.

Reasonable Expectations with Respect to a New Employee: If a new employee is reasonably expected to be a full-time employee at his or her start date and is offered coverage by the first day of the month immediately following the conclusion of the employee's initial three full calendar months of employment, the employer is not subject to the penalty for the initial 3 calendar months (as long as the offered coverage provides minimum value). It is important to note that this requirement of the Employer Mandate does NOT supersede the ACA's prohibition of excessive waiting periods of no longer than 90 days.

[3] Change from the 26 weeks for all employers stated in the previous proposed regulations

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The final regulations also lay out three factors for non-staffing employers to consider in determining whether an employee is a variable hour employee:

- 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
- Whether the job was advertised, or otherwise communicated to the new hire or other 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

Administrative Period: In regards to variable hour and seasonal employees, the combined length of the period before the start of the initial measurement period and the period beginning immediately after the end of the initial measurement period and ending immediately before the beginning of the associated stability period is subject to an overall limit of 90 days.

Measurement Periods/ Stability Periods to Consolidate Coverage Entry Dates: Remaining constant with the proposed regulations and to help ease the administration of initial measurement periods, the final regulations adapt the ability for employers to consolidate coverage entry dates. The initial measurement period for a new variable hour employee or new seasonal employee 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). Effectively, this allows employers to group new hires into 12 groups throughout the year for purposes of determining the initial measurement period.

Change in Employment Status: Many questions were asked revolving around what would happen if an employee has a change in employment status. The final regulations set out to answer those questions. If an employee goes from part time to full time during initial measurement period, the look-back rule for seasonal and variable hour employees will apply (employer will not be assessed penalty until first day of fourth calendar month following the change in status). If an employee goes from full time to part time, the employer is allowed to apply the monthly measurement period to such an employee within three months of the change, if the employee averages less than 30 hours of service per week following the change in status. If an employee goes from a position that uses the look-back method to a position using the monthly measurement method (or vice versa) and if they are in a stability period, they will continue to be treated as having the status they had under their stability period.

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Periods during which the Employer Mandate Penalty does not apply: Employers asked for clarification as to when Employer Mandate does not apply. There are three specific times that the final regulations clarify an employer would not be subject to the mandate:

- During initial measurement period
- During the period of time after an employee changes to full time status while in their initial measurement period
- With respect to a new employee who is reasonably expected to work full-time and to whom coverage is offered on the first of the month following the employee's initial three full calendar months of employment. It is important to note that this will go beyond the 90 day limit on waiting periods. While employers won't be assessed the penalty during the interim between 90 days and the first of the month following three full calendar months, they will still be considered as not complying with section 2708 of the PHS Act during that period.

Temporary Staffing Firms: Temporary staffing firms have been faced with the task of identifying whether or not their workers are full time employees, part time employees, or variable hour employees. The IRS has provided some additional factors for staffing firms to consider when determining if a staffing employee is, in fact, a variable hour employee or not. They encourage employers to look at the typical experience of an employee in the position within the staffing firm and question:

- Do employees in the same position retain, as part of their continuing employment the right to reject temporary placements offered to them
- Do employees in the same position typically have periods during which no offer of placement is made
- Do employees in the same position get offered temporary placements for differing periods of time
- Are employees in the same position typically offered placements that don't extend beyond 14 weeks

These questions should all be asked upon hire and the classification of the employee should be determined using the reasonable expectations at the time of hire.

Staffing firms have also asked when an employee is considered having separated from the company if they are not currently working on an assignment. Like all employers, staffing employers may determine when an employee has separated from service by considering all available facts and circumstances and

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by using a reasonable method that is consistent with the employer's general practices for other purposes, such as the qualified plan rules, COBRA, and applicable State law.

Professional Employer Organizations
The final regulations clarify that in certain circumstances, a coverage offering made by a PEO on behalf of its client to its employees will satisfy the client's Shared Responsibility requirements as long as the client is, in essence, paying for at least part of that coverage via an increased fee from the PEO. It is important to note that PEOs may still be responsible for providing coverage to employees if they determine that they are the common law employer.

Offers of Coverage: Under Shared Responsibility, employers do not have to provide their employees the option to decline coverage if it provides **minimum value** and is offered at no cost to the employee, or at a cost of no more than **9.5 percent of the federal poverty line** for a single individual for the applicable calendar year. However, state laws may still require that employees have the right to opt out of the coverage if the employees have to contribute to the coverage. Also, employers have asked if they still have to offer coverage to full time employees who have coverage through Medicare, Medicaid, or their spouse's employer. The final rules state that yes, employers must still offer all eligible full time employees coverage, despite any other coverage they may have or have available to them.
For employers that have collective bargaining agreements with unions, if during the collective bargaining process between an employer and the union, the employer offers coverage to the union which is not accepted, the employer is NOT considered to have offered coverage to all the employees covered by the collective bargaining agreement. The final regulations verify that an offer of coverage includes offers made by a Taft-Hartley plan or MEWA to an employee on behalf of a contributing employer of that employee.

Assessment and Payment of Section 4980H Liability: The IRS set out to clarify who would be responsible for the Employer Mandate if a full time employee works for two or more applicable large employers. If a full time employee works for two or more applicable large employers within a month, the employer for whom the employee worked the greatest number of hours in that calendar month is the one that will be held liable for the Employer Mandate Penalty. If a full time employee works the same number of hours for two or more applicable large employers' members, then the members can choose who is treated as the employer of the employee for the assessable payment. However, if neither is chosen, the IRS will choose for them.

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Clarifications for Specific Classes of Employees

Seasonal Employees: Employees who typically work six months or less can be considered seasonal employees. In addition, their employment should begin the same time of year each year (i.e. summer or winter). The employee can still be considered a seasonal worker, even if the seasonal employment is extended, in a particular year, beyond its typical duration. A seasonal employee would then receive the same treatment as a variable hour employee in terms of measuring their hours. This does not affect the rules for determining whether or not an employer is considered a large employer, but rather is relevant to the determination of a worker's status as a full-time employee.

Seasonal Worker: The final regulations make a clear distinction between seasonal *employees* and seasonal *workers*. A seasonal worker is a worker who performs labor and services on a seasonal basis as defined by the Secretary of Labor and retail workers employed exclusively during the holiday season. Seasonal workers are utilized to help determine large employer status, wherein if an employer's workforce exceeds 50 full-time employees for 120 days or fewer during the calendar year and the employees in excess of 50 employed during those 120 days are seasonal workers, then the employer is not considered to employ more than 50 employees.

Volunteers: Hours of service do not include those provided by bona fide volunteers who are employees of a government entity or tax-exempt organization will not be considered full time employees, subject to certain compensation limits.

Student Employees: Many institutions questioned whether or not student employees' hours of service needed to be counted. The final regulations confirm that hours of service worked by student employees of an educational organization or outside employer that they are paid for must be counted. However, student employees that have positions that are subsidized by the federal work study program or a state sponsored work study program do not need to be counted to determine whether or not they are full time employees.

Members of Religious Orders: The guidance provides some relief for religious orders. Individuals that are subject to a vow of poverty to be part of that order does not need to be counted as a full time employee, so long as the work that they perform are those that are usually required of active members of the order.

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Adjunct Faculty (may be relied upon at least through the end of 2015): Employers that have adjunct faculty are expected to use a "reasonable method" for calculating whether or not an adjunct facility member is a full time employee. For ease of administration and predictability, the IRS has provided a "bright line" approach that can be used when calculating the hours of service. Under this calculation, 2 ¼ hours of service would be credited for each hour of classroom time. This rate would take into account other activities, such as class preparation and the grading of exams or papers. An additional 1 hour of service would be added for each additional hour outside of the classroom that the adjunct faculty member spends performing required duties, such as office hours or faculty meetings.

Airline Industry Employees: The airline industry expressed concerns about how to appropriately calculate hours worked by airline employees, as pilots and flight attendants often have to stay overnight between flights at locations away from their home. The IRS has clarified that layover hours do not need to be counted if the employee receives compensation beyond their regular compensation. If the layover hour is counted towards the required hours of service that the employee has to do in order to earn their full pay, then those hours would be counted. However, if no additional compensation is received, employers should credit an employee in the airline industry with 8 hours of service for each day which the employee is required to stay away from home overnight for business purposes.

On-Call Hours: Many industries have workers that are required to be on call during certain periods of time. Employers requested clarification on if and how those hours should be counted. An hour of service must be counted for any hour of service for which the individual is paid, any on call hour for which the employee is required to remain on the employer's premises, or for which the employee's activities while on-call restrict the employee from using the time for his/her own purpose.

Conclusion

The final Shared Responsibility regulations for employers successfully answered many questions that commentators had in regards to the Employer Mandate. However, there are still a number of items that leave room for interpretation and further guidance is welcomed. The many details and nuances of these regulations are necessary in order to encompass the vast array of differences in how employers operate and offer benefits to employees. In the weeks and months to come, there will be inevitable tweaks and modifications to these rules.

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The final Shared Responsibility regulations filled many of the remaining gaps in the ACA that affect employers. We are still waiting for the final non-discrimination rules, however with the transitional phase-in of the Employer Mandate, the timeline for these rules may get extended yet again. Assurance will continue to evaluate the regulations as they are modified and will update our clients as needed.