Managing Your Risks

Health Care Reform: The Employer Shared Responsibility and “Full-Time Employees”

Must workers employed for the holiday season be offered health care coverage? Are part-time sales associates really “part time?” What if there is no way of knowing in advance how many hours an employee will work each week? For many retailers, such questions have gone unanswered as they prepare to comply with the health care coverage mandate under the Patient Protection and Affordable Care Act of 2010 (the ACA). Fortunately, some of the questions are finally being resolved by recently issued IRS guidance.

Why is Identifying Full-Time Employees Important?

Identifying an employer’s full-time employees is necessary to comply with and assess the potential liability under the ACA’s “employer shared responsibility” requirement.

Beginning in 2014, an employer with at least 50 “full-time employees” will be subject to an “assessable payment” (or penalty) if it fails to offer “minimum essential coverage” to full-time employees. To avoid the assessable payment, the coverage must provide “minimum value” and be “affordable.”

The term “minimum essential coverage” is yet to be defined by regulations, but will likely be based on benchmark plans offered in each state. An employer’s plan will provide “minimum value” if it pays at least 60 percent of the actuarial costs of health benefits. A plan will be “affordable” with respect to an employee if the premium required to be paid by the employee does not exceed 9.5 percent of the employee’s household income. Under a safe harbor method proposed by the IRS, an employer may determine whether coverage is affordable based on the employee’s income reported in Box 1 of his or her Form W-2.

Beginning in 2014, an employer with at least 50 “full-time employees” will be subject to an assessable payment” (or penalty) if it fails to offer “minimum essential coverage” to full-time employees.

If an employer with at least 50 full-time employees (a “large employer”) fails to offer minimum essential coverage and at least one employee receives a premium tax credit or a cost-sharing subsidy through a health insurance exchange, the employer will owe a monthly penalty equal to $166.67 times the number of the employer’s full-time employees minus thirty. For example, an employer with 60 full-time employees that fails to offer minimum essential coverage would owe a monthly penalty of $5,000 ($166.67 x (60 full-time employees – 30)).

If a large employer offers minimum essential coverage, but the coverage is unaffordable or fails to provide minimum value, the employer will owe a monthly penalty of $250 multiplied by the number of full-time employees who receive a premium tax credit or a cost-sharing subsidy through a health insurance exchange. The assessable payment for an employer that offers coverage, however, may not be greater than the assessable payment that would be owed if the employer offered no coverage at all.

Accordingly, an employer must know how many “full-time employees” it employs in order to know whether it is subject to the employer shared responsibility requirement and, if it is, to measure the potential assessable payment liability.

Who are Full-Time Employees?

For ACA purposes, a “full-time employee” is any employee who works on average at least 30 hours per week. Under IRS guidance, an employee who works at least 130 hours per month is deemed to work on average 30 hours per week in that month. Recognizing the administrative burden of determining which employees are full-time employees from month to month, the IRS provided a safe harbor approach that uses a look-back “measurement period” and a “stability period.”

Under the safe harbor, an employer may determine the full-time status of an “ongoing employee” (an employee who has been employed at least three months) by looking back at a “standard measurement period.” The “standard measurement period” is a period of three to 12 months. An employer may determine when its “standard measurement period” begins and ends, provided that the determination must be made on a consistent basis for all employees in the same category of employment. The permitted categories of employment are the following: collectively bargained and non-collectively bargained, salaried and hourly, employees of different entities and employees located in different states.

If an employee worked on average 30 hours per week during the standard measurement period, then the employee must be treated as a “full-time employee” during the subsequent “stability peri-

Continued on Page 4

Health Care Reform

Continued from Page 3

od." The duration of the "stability period" is determined by the employer, but must be at least six months and may not be shorter than the measurement period.

To facilitate plan administration, the IRS safe harbor permits an "administrative period" of up to 90 days following a measurement period to allow employers to notify and enroll affected employees in minimum essential health coverage.

How do the Rules Apply to New Hires?

Newly Hired Full-Time Employees. If an employee is hired as a "full-time employee," coverage should be offered within 90 days of employment to avoid the assessable payment requirement. For newly hired seasonal employees and employees whose hours of service cannot be reasonably predicted, the IRS has provided special safe harbor rules.

Newly Hired Variable Hour and Seasonal Employees. For variable hour and seasonal employees, an employer may use an "initial measurement period" of three to 12 months following the employee's date of hire. If the employer determines that the employee did not work an average of 30 hours of service per week during the initial measurement period, the employer may treat the employee as not a full-time employee during the subsequent stability period. Such stability period may not be more than one month longer than the initial measurement period and may not exceed the remainder of the standard measurement period (plus any associated administrative period) in which the initial measurement period ends. If the employer determines that the variable hour or seasonal employee is a full-time employee, the stability period must be at least six months long and may not be shorter than the initial measurement period. Such stability period would begin after the initial measurement period and any associated administrative period.

Example: A department store offers health plan coverage only to full-time employees. The store uses a 12-month initial measurement period for new seasonal employees. The initial measurement period begins on the employee's first day of employment. The department store hires Jan as a sales associate on November 1, 2014. Jan is expected to work through the holiday season and terminate employment on January 30, 2015. Jan works 40 hours per week and terminates on January 30, 2015. Jan's initial measurement period would be from November 1, 2014 through November 1, 2015. Although Jan works 40 hours per week while employed, she does not average 30 hours per week during the 12-month stability period. The department store would not be required to offer health plan coverage to Jan and would not be subject to the assessable payment requirement with respect to Jan.

The new safe harbor rules give some certainty to employers, such as retailers, who may have high turn-over and variable hour and seasonal employees. Retailers need to keep in mind that, although the employer shared responsibility requirement does not apply until 2014, the measurement periods under the safe harbor will begin in 2013. The length of the measurement period and the method for capturing the hours of service for purposes of applying the safe harbor need to be determined soon. ❑

Source: Guest column written by Brydon M. DeWitt, Partner, Employee Benefits Team, Williams Mullen

Durbin Amendment Anniversary One Year Later

One year after the implementation of the Federal Reserve's regulations to reform debit card interchange swipe fees, the messaging wars continue as retailers continue to seek transparency and competition in how swipe fees are set. In late September, the banking lobby was taken to task by Senator Richard Durbin (D-IL), the lead author of the Durbin Amendment to the Dodd-Frank Act, who wrote to the American Bankers Association saying that "Congress made no mistake in passing debit interchange reform" and that "while the banking industry may resent that its enormous lobbying effort did not produce a different outcome, a defeat is not the same as a mistake."

Separately, the Electronic Payments Coalition, which is comprised of banks and credit card companies, re-circulated a non-scientific report around the same time period claiming that merchants are pocketing the savings from the Durbin Amendment. The two previous releases of this report gained little traction with the press because they were done unscientifically and cherry-picked data for their own exploitation. This is despite the fact that merchants operate under incredible pricing pressures, and Moody's Investor Service has concluded that merchants may have partially used the savings to offset escalating costs for gasoline, food prices, and other expenses.

While the messaging wars continue, RILA continues to stay engaged on the interchange class action litigation proposed settlement announced earlier this summer, bringing other trade groups including NCRMA into the fold to advocate to the courts, Congress and the public that the proposed settlement is a bad deal for retailers and consumers. ❑