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1-2-3, Let's Count Employees!

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- Over 800 attorneys in 56 locations nationwide
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Topics for Discussion

- Determine applicable large employer status
- How to count the worker for large employer status
- Full-time vs. part-time for penalty purposes
- Leased/staffing agency employees
- What happens with hour and/or employee status changes

Topics for Discussion

- Measurement and stability periods
- Calculating penalties
- Minimum value and affordability
- Transition rules
- Documentation of status and hours

Play or Pay/Employer Shared Responsibility

- Applicable Large Employers (ALEs) that fail to **offer** their full-time employees and their dependents group health plan coverage that is **affordable** and provides **minimum value** are subject to penalties if a full-time employee enrolls in Marketplace coverage and receives a premium tax credit or cost-sharing reduction
- Penalties are:
 - Effective 1/1/2015 (1/1/2016 for ALE's with under 100 FTE's)
 - Assessed annually/calculated monthly
 - Nondeductible excise taxes
 - Indexed to inflation, with increases effective in 2015

Play or Pay/Employer Shared Responsibility

● NO OFFER PENALTY

- ALE fails to offer minimum essential coverage to substantially all full-time employees and dependents
 - Minimum essential coverage = coverage under an employer-sponsored plan
 - Substantially all = 70% full-time employees in 2015; 95% thereafter

● AND

- One full-time employee enrolls in Marketplace coverage and receives a premium tax credit or cost sharing reduction

● THEN

- Penalty = \$2,000 per year for each full-time employee in excess of 30 (80 in 2015) – **Monthly Penalty**

Play or Pay/Employer Shared Responsibility

● INADEQUATE COVERAGE PENALTY

- ALE fails to offer minimum essential coverage that is affordable and provides minimum value to full-time employees and dependents

● AND

- One or more full-time employee enrolls in Marketplace coverage and receives a premium tax credit or cost-sharing reduction

● THEN

- Penalty = \$3,000 per year for each full-time employee who enrolls in Marketplace coverage and receives a tax premium credit or cost-sharing reduction – **Monthly Penalty**
 - Capped by amount that would apply if the ALE were subject to No Offer Penalty

Who is an Applicable Large Employer?

- “ALE” means the employer had an average of 50 or more full-time and **full-time equivalent** employees on business days in prior calendar year
- Employer status is determined on controlled group basis; different EIN does not mean different employer for determining ALE status

ALE Determination

- First – Determine number of full-time employees
 - A full-time employee is an individual who is expected to work at least 30 hours per week or 130 hours per month
- Second – Hours of all other employees must be counted to determine how many “Full-Time Equivalent” employees exist
 - Part-time employees are considered to determine whether an employer is “Large,” part-time employees do not need to be offered coverage to avoid the penalty

ALE Determination

- Fractional employees are counted for determining how many full-time equivalent employees exist
- Calculation of “Full-Time Equivalent” = The aggregate hours of service in a month of all employees who work an average of less than 30 hours per week (up to 120), divided by 120 hours. The result is the number of Full-Time Equivalent employees for that month
- Example
 - 6 workers each work 100 hours per month
 - $600 \div 120 = 5$ Full-Time Equivalent employees

What is a “Full-Time Employee” for Penalty Purpose?

- Common law employee definition
- Full-time = employed on average 30 or more hours per week (130 hours per month)
- For salaried employees, can count hours or use equivalencies (8 hours/day; 40 hours/week)
- Can use month-by-month or look back measurement period
- Look-back measurement period can be used for variable, seasonal and part-time employees

“Common Law” Employee

- Must count and offer coverage to “full-time” employees, using the common law definition (does not include sole proprietors, partners, 2% S Corporation Shareholders)
 - Generally, the common law employer is the entity with the right to control the individual’s performance
 - Potential penalties for employers who use contingent workforces and are at risk for a misclassification claim
 - Draconian downside – fail to offer to substantially all full-time employees

“Common Law” Employee

- Do I have Leased Employees/Agency Employees/Staffing Employees?
 - Determine who is properly considered the common law employer
 - Examine leasing contracts for language regarding provision of health plan by leasing organization
 - In the event the recipient employer is the common law employer, coverage offered by the leasing organization can satisfy the recipient employer’s obligation to offer coverage if part of the fee the recipient employer pays to the leasing organization takes into account the provision of coverage
 - Consider requiring indemnification for any ACA penalty in the event the recipient employer is determined to be a common law employer
 - Draconian downside – fail to offer to substantially all full-time employees

Variable and Seasonal Employees

- Variable Hour Employees = impossible to determine whether they will average at least 30 hours a week/good faith determination
- Seasonal Employees = hired into a position for which the customary annual employment is 6 months or less
- If a Variable, Seasonal or Part-Time Employee averages at least 30 hours a week over a “Measurement Period,” he or she is treated as a full-time employee for the following “Stability Period”

Determining **Full-Time** for Penalty Purposes

- The IRS has issued safe harbor rules to assist with determining who is considered a full-time employee – “measurement periods” and “stability periods”
- Variable hour employees are employees for whom it cannot be determined whether they will average 30 hours a week – good faith determination
- If a variable hour employee averages 30 hours a week over a “measurement period,” he is treated as a full-time employee for the following “stability period”

Determining **Full-Time** for Penalty Purposes

- Final regulations set forth two basic methods to determine employees' "full-time" status
 - Monthly measurement method – in essence, the default rule
 - Look-back measurement method – used to determine status of new variable hour, seasonal and part-time employees, and ongoing employees

Look-Back Measurement Method

- The employer can select the length of the measurement period, between 3-12 consecutive calendar months
 - For 2015 plan year, 6 month measurement period can be used even with 12 month stability period
- Measurement and stability periods must be applied in a uniform and consistent basis, but may use different periods for:
 - Collectively bargained and non-collectively bargained employees
 - Each group of collectively bargained employees covered by a separate collective bargaining agreement
 - Salaried and hourly employees
 - Employees whose primary hours of employment are in different states

Look-Back Measurement Method

- Look-back 12 months or other chosen period for “standard measurement period”
- Make determination whether employee is full-time or not full-time
- If the employee is full-time, the employee must be treated as such for the “stability period” and administration period
- “Stability period” may not be less than 6 months and may not be less than the “standard measurement period”
 - Except for 2015 transitional relief allows 6 month measurement period with longer stability period

Look-Back Measurement Method

- Administrative period – the employer can set a period of up to 90 days between the end of the measurement period and the beginning of the stability period to determine who is eligible and notify eligible employees

Look-Back Measurement Method

- New Employees

- The “initial measurement period” must begin on a date between the employee’s start date and the first day of the month following the start date
- If an employee averages 30 hours/week during the initial measurement period, he must be offered coverage for the entire stability period that follows

Special Classes of Employment

- Final regulations addressed certain unique situations:
 - Hours of Service as a “bona fide volunteer” are excluded
 - Special rules for educational organizations
 - No exception for short-term, temporary and high-turnover employees
 - Rehires

Leaves and Rehires

- If there is a Break in Service of less than 13 weeks, the employee:
 - Is treated as an ongoing employee upon return
 - Retains the status he or she had prior to the break
 - Must be offered coverage as soon as administratively practicable after return (by first of month following resumption of service) if he or she was considered full-time prior to the break

Leaves and Rehires

- If an employee has a break of at least 13 weeks or more, the employee:
 - May be treated as a new hire upon return
 - May be subjected to an initial measurement period if part-time, seasonal or variable
 - Employer is entitled to another 3 month limited non-assessment period, provided minimum value coverage is offered after 3 months, i.e., can hold out of plan for 3 months upon rehire

Special Rules for Educational Organizations

- Break in service use either:
 - 26 weeks in lieu of 13 weeks, or
 - Rule of parity –
 - Employer can elect if wants to use a shorter period than 26 weeks
 - An employee can be treated as a new employee if the period (measured in weeks) during which no services are performed is at least four weeks long (and not longer than 26 weeks) and exceeds the number of weeks of employment immediately preceding the period during which no services are performed

Changes in Status

● Full-time to Part-time

- If in the Initial Measurement Period, employee is evaluated monthly and coverage can be dropped when average monthly hours drop below 30
- If an Ongoing Employee, coverage generally must be retained for the remainder of the stability period unless a “change in status” occurs (in which case, coverage can be dropped after 3 consecutive months of averaging less than 30 hours/week)

● Part-time to Full-time

- Coverage must be offered by the first day of the fourth month following the change in status, or the beginning of the following stability period if earlier.

● COBRA obligations still apply

Look-Back Measurement Method

- A new variable employee that did not work 30 hours per week during the initial measurement period, but did work 30 hours per week, on average, during the subsequent or overlapping standard measurement period of the employer must be treated as “full-time” for purposes of the stability period that follows that standard measurement period
- Thereafter the new employee joins all other variable, on-going employees, in the standard measurement period/stability period schedule

Look-Back Measurement Method

- Any administrative period applicable to the new employee may not extend past the last day of the first calendar month after the initial measurement period (i.e., if the IMP is 12 months – the last day of the month commencing after the employee's first anniversary)

Look-Back Measurement Period – Terminated and Rehired Employees

- For special unpaid leave, the employer must treat the employee as a continuing employee and deem average hours during a look-back measurement period in which special unpaid leave occurs
 - FMLA/Military Leave/Jury Duty
- Final regulations do not permit employers to treat short-term employees as variable hour employees. Thus, short-term employees (other than seasonal employees) hired to work an average of 30 hours or more are treated as full-time

Staffing/Temporary Employees

- A staffing business may be treated as a common law employer
- The specific facts and circumstances determine whether workers are staffing company's employees and/or recipient company's employees
- Staffing company's offer of coverage is treated as offer by recipient company if the staffing fees are higher when coverage is provided

What is Required to Avoid Penalties?

- Coverage must be offered to “substantially all” full-time employees and their dependents;
 - 95% of full-time employees
 - 2015 only – 70% of full-time employees
- Coverage must be “Affordable” for the employee; and
 - 9.5% household income
- Must provide “Minimum Value”
 - Plan’s share of total costs of benefits must be a least 60% of covered costs (HHS-IRS calculator)
 - Not 60% of premium – do not base on premium

Transition Relief for Fiscal Year Plans

- Non-calendar year plans are subject to the penalty tax based on the start of the 2015 plan year if certain conditions are met:
 - Affordable, minimum value coverage must be offered to full-time employees on the first day of the 2015 plan year who were eligible for coverage under the terms of the plan in effect on December 27, 2012
 - Plan was not modified after December 27, 2012 to begin at a later calendar date
- Midsize employers get this break for 2016

Documentation

- No government guidance
- Document methodology and elections
 - Standard measurement period
 - Stability period
- Sufficient records to substantiate results



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ANY QUESTIONS?



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