Proskauer

Health Care Reform: Safe Harbor for Determining Full-Time Employee Status

October 10, 2012

New guidance has been issued on two requirements under the Patient Protection andAffordable Care Act (the "Act") that will become effective in 2014. Specifically, the Treasury Department and Internal Revenue Service recently released Notice 2012-58, which describes a safe harbor approach employers may use for purposes of determining whether an employee is "full-time" for purposes of the Act's "pay-or-play" mandate. In addition, the Departments of Treasury, Labor and Health and Human Services released guidance on the Act's rule that prohibits group health plans from imposing waiting periods in excess of 90 days.

The pay-or-play mandate is effective January 1, 2014 (regardless of plan year), and the 90-day limitation on waiting periods is effective for plan years beginning in 2014. Employers may, but are not required to, rely on the safe harbors described in the guidance at least through the end of 2014.

Pay-or-Play Mandate

Under the Act's pay-or-play mandate, an employer may be penalized if it offers no (or inadequate) coverage to its full-time employees and their families, and at least one full-time employee receives a federal premium subsidy to enroll in a state health insurance exchange. (Employers with less than 50 full-time equivalent employees are exempt.)

Given the complexity of identifying full-time employees, the IRS has provided safe harbor methods for determining whether an employee is full-time. The basic rule is that if an employee is not reasonably expected to work full-time when hired, the employee's status as a full-time employee will be determined by looking back at hours worked over a "measurement period." Based on whether the employee has worked full-time during the measurement period, the employee will be treated as either full-time or part-time for purposes of the subsequent "stability period," regardless of hours worked during the stability period, provided that the employee remains employed.

Although the safe harbors are complicated and technical, if followed correctly they will enable employers to determine, in advance, whether certain employees could potentially trigger a penalty under the pay-or-play mandate.

The safe harbor rules apply differently with respect to full-time employees and part-time employees. In addition, there are distinctions within the rules depending whether an employee is a new hire, or an "ongoing" (i.e., current) employee. Employers are also permitted to use an "administration period," which provides time to perform plan administrative functions such as distributing enrollment material to employees determined to be newly eligible based on the measurement period.

Ongoing Employees

The safe harbor method allows an employer to select a measurement period of between 3 and 12 months and then a stability period of between 6 and 12 months that is at least as long as the measurement period. If an employee is determined to average at least 30 hours of service per week during the measurement period, the employee will be treated as full-time during the subsequent "stability period" as long as the employee remains employed. On the other hand, if the employee did not do so, the employee will not be treated as full-time for the stability period.

For example, to determine which employees will be considered full-time for pay-or-play purposes as of January 1, 2014, an employer will need to use all or a portion of 2013 as a measurement period.

Employers taking advantage of the safe harbor must generally apply a consistent standard measurement period for all employees. However, the start date and duration may differ among certain designated categories of employees (e.g., collectively bargained and non-collectively bargained, salaried and hourly, employees of different entities, and employees located in different States).

New Employees

The safe harbor rules make a distinction between newly hired employees and "ongoing" employees. Newly hired employees are those who have not been employed for at least one standard measurement period.

Whether a new employee is full-time depends on expectations at the time of hire. If, based on the facts and circumstances at time of hire, the employee is reasonably expected to work full-time, then the employee must immediately be treated as a full-time employee. However, to coordinate with the Act's rule permitting waiting periods of up to 90 days, an employer will not be subject to a pay-or-play penalty for failing to offer coverage to a full-time employee during the initial three months of employment.

In contrast, if, based on the facts and circumstances at time of hire, it cannot be determined that the employee is reasonably expected to work on average at least 30 hours per week, then the employee is considered a variable hour employee. In such cases, the employer may use an "initial" measurement period of up to 12 months to determine whether the employee worked an average of 30 or more hours per week. As with an ongoing employee, if the new employee does work at that level, then the employee must be covered for the associated stability period (as long as he or she remains employed).

Generally, for these purposes, a part-time employee includes "seasonal" employees. Through at least 2014, employers may use any reasonable, good-faith definition of a "seasonal employee."

Administrative Period

The safe harbor rules also provide for an administrative period intended to accommodate employers who might need some time between the measurement period and the associated stability period in order to determine which employees are eligible for coverage and for other administrative purposes, such as distributing enrollment materials. The administrative period is a period of not more than 90 days between the end of the measurement period and the start of the associated stability period.

The pay-or-play mandate will not impose a penalty during the administrative period. However, to prevent an administrative period from creating a potential gap in coverage, it must overlap with the prior stability period, so that ongoing full-time employees will continue to be offered coverage during the administrative period.

With respect to new employees, there is a slight but important modification to the administrative period rules. Specifically, the initial measurement period and administrative period together cannot extend beyond the end of the thirteenth calendar month following the employee's date of hire. For example, if an employer uses a 12-month initial measurement period for a new part-time employee, the administration period cannot exceed one month. To accommodate employers that may wish to use a 12-month stability period for new part-time employees and an administrative period that exceeds one month, an employer is permitted to use an 11-month measurement period (in lieu of the 12-month measurement period that would ordinarily be required) and still comply with the general rule that the initial measurement period and administrative period combined may not extend beyond the thirteenth calendar month following the employee's date of hire.

90-Day Waiting Period

Starting with plan years beginning in 2014, group health plans and health insurance issuers offering group health insurance coverage will be prohibited from applying a waiting period exceeding 90 days. In Notice 2012-59, the Department of Treasury and Internal Revenue Service addressed how these rules will be interpreted. (Parallel guidance was issued by the Departments of Labor and Health and Human Services.)

In the guidance, the agencies made clear that the Act does not require an employer to offer coverage to any particular class of employee. Rather, it simply requires that a waiting period of more than 90 days not be imposed on an employee who meets a substantive eligibility condition (such as being in an eligible job classification).

Regarding what constitutes a substantive eligibility provision, the guidance states that eligibility conditions based solely on the lapse of time are permitted for no more than 90 days. However, other eligibility conditions are permissible unless they are designed to avoid compliance with the 90-day waiting period limitation. An example in the guidance suggests that if a plan that has a cumulative hours of service requirement of more than 1,200 hours, it may be designed to avoid compliance with the 90-day waiting period limitation.

There is also guidance explaining how these rules apply to a group health plan that conditions eligibility on an employee regularly working a specified number of hours per period (or full-time). Specifically, where it cannot be determined whether a newly-hired employee will do so, a plan can take a reasonable period to make the determination, which can include a measurement period similar to the one used for the pay-or-play mandate. However, coverage must be effective no later than 13 months from the start date (plus any time until the first day of the next calendar month).

Next Steps

Employers who are concerned that their employees might trigger a penalty under the pay-or-play mandate should start considering how to satisfy the safe harbors and establish appropriate procedures so that full-time employees can be identified in 2014. Also, employers with non-calendar year plans and waiting periods in excess of 90 days should carefully consider the application of these rules.

Employers should continue to monitor new guidance. The IRS guidance discussed in this alert is temporary, and the IRS may establish different final rules.

Proskauer is committed to working with its clients to monitor developments and to provide them with the latest, up-to-date information on new developments under the Act. Please contact your Proskauer lawyer or any member of our Health Care Reform Task Force should you have any questions regarding this or any other aspect of health care reform.

* * *

To ensure compliance with requirements imposed by U.S. Treasury Regulations, Proskauer Rose LLP informs you that any U.S. tax advice contained in this communication (including any attachments) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code, or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

This publication is a service to our clients and friends. It is designed only to give general information on the developments actually covered. It is not intended to be a comprehensive summary of recent developments in the law, treat exhaustively the subjects covered, provide legal advice, or render a legal opinion.

Related Professionals

- **Robert M. Projansky**
  Partner