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Benefit Trends

HEALTH CARE REFORM – SPECIAL EDITION

Guidance on Automatic Enrollment, Employer Shared Responsibility, and Waiting Periods

LEGISLATIVE BRIEF

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DOL, HHS and IRS released non-binding FAQs on February 9, 2012 addressing Employers' Questions Regarding Automatic Enrollment (FLSA section 18A), Employer Shared Responsibility (Code section 4980H), and Waiting Periods (PHSA section 2708). (DOL Technical Release 2012-01, IRS Notice 2012-17) The Departments also outlined various approaches they are considering proposing in future regulations or other guidance implementing the Affordable Care Act (ACA). The main points are summarized below.

Main Points of the Guidance#

1. **Automatic Enrollment Delayed until at Least 2015.**
   The Department of Labor has concluded that its automatic enrollment guidance will not be ready to take effect by 2014. Employers will not be required to comply with the automatic enrollment provision until final regulations are issued and become applicable. So, it appears that will not be until at least 2015. The automatic enrollment rule (FLSA section 18A) requires that employers with more than 200 full-time employees must automatically enroll new full-time employees in one of the employer's health benefits plans (subject to any allowable waiting period).

2. **Employer Shared Responsibility ("Pay-or-Play"):**
   Under the "employer shared responsibility" provision, large employers (those with 50 or more full-time equivalent employees) could be subject to an assessable payment (penalty) if any full-time employee is certified by an insurance Exchange as eligible to receive an applicable premium tax credit or cost-sharing reduction for purchasing health insurance through the Exchange, and the employer either does not offer employer-sponsored group health coverage to all its full-time employees (and their dependents), or the employer does offer such coverage but it is either "unaffordable" or does not meet the ACA "minimum value" criteria. A "full-time" employee is one who is employed on average at least 30 hours per week.

- **"Affordability" Determination**. The IRS intends to issue proposed regulations or other guidance permitting employers to use an employee's Form **W-2 wages (as reported in Box 1) as a safe harbor in determining the affordability of employer coverage.** This "safe-harbor" approach was previously described in Notice 2011-73 (9/13/2011). Under the ACA, an employer is subject to a potential "assessable payment" penalty if an employee's cost for self-only coverage is "unaffordable"—defined as costing more than 9.5% of the employee's household income. Notice 2011-73 proposed allowing an employer to determine "unaffordability" by reference to an employee's wages, since employers generally will not know the amounts of employees' household income

- **Full-time Employee Definition**. Treasury and the IRS intend to issue proposed regulations or other guidance that would allow employers to use a "look-back/stability period safe harbor" method based on the approach outlined in Notice 2011-36 for purposes of determining whether an employee (other than a newly-hired employee) is a full-time employee. This approach basically allows an employer to define a "full-time" employee as one who worked at least 30 hours per week over the past three months. It is particularly useful where employees' hours fluctuate over pay periods or months. Thus, it is expected that the guidance will allow look-back and stability periods not exceeding 12 months.

- **Newly-hired Employees.** The guidance is also expected to provide that, in certain circumstances, employers have six months (rather than only three) to determine whether a newly-hired employee is a full-time employee for purposes of section 4980H and will not be subject to a section 4980H penalty during that six-month period with respect to that employee. I.e., where it cannot reasonably be determined as of the date of hire whether an employee is expected to work full-time or part-time, and during the first three months the employee either works part-time, or works full-time but on an annual basis is expected to work part-time. (E.g., employee is hired October 1 to work in a retail sales position that is full-time through December but is expected to be part-time on an annual basis.)

3. 90-day Waiting Period.

- **Coordination with Shared Responsibility Provisions.** Upcoming guidance will address how the employer shared responsibility provisions and the 90-day waiting period limitation are coordinated. The guidance is expected to provide that an employer who imposes a 90-day waiting period as allowed by law (and so does not provide health coverage to a full-time employee during the first three months of employment) will not be required to pay the employer responsibility payment for that employee during that three-month period.

- **Only Applies to Eligible Employees.** The FAQs specify that the 90-day waiting period requirement will not require employers to offer coverage to part-time employees or any other category of ineligible employees. The 90-day limit merely prohibits requiring an *otherwise eligible* employee to wait more than 90 days before coverage is effective. Thus, large employers can choose to limit coverage to full-time employees (i.e., those who work at least 30 hours per week, as defined in the ACA and in guidance). Additionally, the 90-day waiting period does not apply to small employers who choose *not* to offer coverage to any employee.

- **Start Date of 90-day Period.** The Departments intend to retain the definition in existing regulations that **the 90-day waiting period begins when an employee is *otherwise eligible* for coverage under the terms of the group health plan.** Thus, if the only eligibility criteria were full-time employment and an employee was hired as a full-time employee, the maximum allowable waiting period for that employee would begin on the date of hire and could not exceed 90 days. However, if an individual was hired as a part-time employee and in fact worked on a part-time basis for six months before becoming a full-time employee, such employee could be required to wait 90 days from the date *full-time* employment began before becoming eligible to enroll in the employer group health plan.

- Other conditions for eligibility under the terms of a group health plan would generally be permissible, unless the condition is designed to avoid compliance with the 90-day waiting period limitation. Examples of permissible eligibility conditions include full-time status, a bona fide job category, or employee having a specific license.

- It is anticipated that upcoming guidance will allow employers to impose eligibility conditions that require employees to complete a specified cumulative number of hours of service within a specified period, so long as the required cumulative hours of service do not exceed a number of hours to be specified in upcoming guidance. The Departments request comments on how this possible approach would apply to plans that credit hours of service from multiple different employers and plans that use hours banks. Future guidance will address rules for other employees (not newly hired), such as employees transferred from one employment classification to another.