Guidance Issued on the Definition of Full-time Employees and 90-Day Waiting Period Rules

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On Friday, August 31st the IRS released Notice 2012-58 which includes much anticipated guidance related to the definition of full-time employees for the purpose of the employer shared responsibility rules and related penalties contained in the Affordable Care Act (ACA). On the same day the Departments of Labor, Health and Human Services, and the Treasury (the Departments) released coordinated guidance on the ACA's 90-day waiting period limit in Notice 2012-59.

This guidance is of particular importance to employers which have employees with variable work hours or seasonal employees. The safe harbor described in Notice 2012-58 will allow many of these employers to limit the number of variable hour and seasonal employees who must be considered full-time.

Background

Beginning in 2014 "applicable large employers" may be required to pay a penalty (technically called an assessable payment) under two circumstances:

(1) The employer does not offer minimum essential coverage to all full-time employees, and at least one employee receives a premium tax credit or cost-sharing reduction (referred to collectively as a subsidy) when purchasing individual coverage through an Exchange.

(2) The employer offers its full-time employees the opportunity to enroll in coverage, however, an employee receives a subsidy because the employer's coverage either is "unaffordable", or does not provide minimum value.

- Coverage under an employer-sponsored plan is considered affordable if an employee's required contribution for simple coverage does not exceed 9.5% of the employee's household income.
- Coverage provides minimum value if the plan has an actuarial value of at least 60%.

Since the ACA coverage requirements apply only to full-time employees, this definition is critical to defining plan eligibility rules and determining an employer's risk for penalties. Unfortunately, the ACA statutory language is brief and leaves many questions unanswered. The ACA provides only that a full-time employee, for any given month, is an employee who works at least 30 hours per week.

Since the ACA was passed, employers have been looking for additional guidance to help determine exactly how this rule will be applied. Notice 2012-58 goes a long way toward clarifying the definition of full-time employee, but still leaves some questions unanswered.

In Notice 2012-58 the IRS describes an optional safe-harbor employers may use to determine an employee's full-time status. Under the safe harbor, 130 hours of service in a calendar month will be treated as the equivalent of 30 hours of service per week. Furthermore, employers may base an individual employee's full-time status on a look back measurement period as described below. Use of this approach is not required; rather it is an option employers may consider when determining health plan eligibility based on an employee's full-time status.

Measurement Periods

Employers will have the option to determine an employee's full-time status based on the employee's average hours worked over the course of a measurement period of between 3 - 12 months. If the employee has not worked an average of 30 hours per week (or 130 hours per month) for the entire measurement period, that employee would not be considered full-time.

Stability Periods

Once an employee has attained full-time status, the employer must continue to treat the employee as full-time for a corresponding stability period, regardless of the average number of hours worked during the stability period. The stability period must be at least as long as the measurement period, but can be no shorter than 6 months.

Administrative Period

Since employers will need some time for administrative purposes between the date an employee qualifies as

full-time and the date coverage must be offered, the rules allow for an administrative period of up to 90 days between the end of the measurement period and the beginning of the stability period.

Example

The following example from the IRS notice illustrates the use of 12 month measurement and stability periods:

ABC Company health plan eligibility rules state that only employees who work full-time during the measurement period are offered coverage. The company defines its relevant periods as follows:

- A 12-month stability period that begins January 1 to coincide with its health plan year.
- A 12-month measurement period that runs from October 15th to October 14th the prior year.
- An administrative period between the end of the standard measurement period (October 14) and the beginning of the stability period (January 1)
    - The administrative period allows the employer time to determine which employees worked full-time during the measurement period and notify them of their eligibility for the stability period/plan year beginning January 1.

Effect of the rule on two different employees:

- Employee A worked full-time during the measurement period 10/15/2012 thru 10/14/2013, and for all prior years. Employee A must be offered coverage for the entire 1/1/2014 – 12/31/2014 stability period/plan year, even if the employee A's average hours are reduced to less than full time during 2014.
- Employee B also worked full-time in prior years, but does not work full-time during the entire measurement period 10/15/2012 thru 10/14/2013. Employee B is not required to be offered coverage for the stability period in 2014.

Rules Apply to Variable Hour and Seasonal Employees Only

Importantly, the optional approach to defining full-time status only applies to "variable hour employees" and "seasonal employees". If an employee meets the definition of a variable hour or seasonal employee, then full-time status can be made contingent on meeting the requirements of the measurement period described above.

If, however, at hire date an employee is expected to work 30 hours per week for the entire initial measurement period, that employee must be treated as full-time and the measurement period rules would not apply. For these regular full-time employees, the 90-day waiting period limit applies.

Variable Hour Employee Defined

According to the guidance, a new employee is a "variable hour employee" if:

- Based on the facts and circumstances at the start date, it cannot be determined that the employee is reasonably expected to work at least 30 hours per week.
- A new employee who is expected to work 30 hours per week may still be a variable hour employee if their period of employment is expected to be of limited duration, and it cannot be determined that the employee is expected to work full-time over the initial measurement period.
    - Example: a retail worker hired at more than 30 hours per week for the holiday season who is expected to continue working after the holiday season, but is not expected to work at least 30 hours per week after the holiday season

Seasonal Employees

The ACA addresses the meaning of seasonal worker in the context of whether an employer meets the definition of an applicable large employer. However, the statute does not address how the term "seasonal employee" might be defined for purposes of determining the amount of any assessable payment. Due to this, the IRS states that *"through at least 2014, employers are permitted to use a reasonable, good faith interpretation of the term seasonal employee for purposes of (these rules)…"* It is expected that the IRS will release additional guidance on seasonal employees in the future.

Other Important Elements of the Full-Time Employee Rules

Special Rules Apply to New Employees

For new employees, the measurement period and the administrative period combined may not extend beyond the last day of the first calendar month on or after the one-year anniversary of the employee's start date. In other words, the stability period (and coverage) must begin no later than 13 months plus a fraction of a month after the employee's hire date.

Various Categories of Employees

The rules allow an employer to apply different full-time definitions for various categories of employees:

(1) Collectively bargained employees and non-collectively bargained employees

(2) Salaried employees and hourly employees

(3) Employees of different entities

(4) Employees located in different states

90-Day Waiting Period

The ACA provides that, for plan years beginning on or after January 1, 2014, a group health plan may not apply a waiting period that exceeds 90 days. In Notice 2012-59, the Departments clarify that the waiting period limit applies only to employees eligible for coverage as a full-time employee. Consequently, if an employer conditions eligibility on meeting full-time status during a measurement period as described above, the waiting period would not begin until the employee qualifies as a full-time employee.

Remember, however, that for new variable hour employees, coverage must begin no later than 13 months (plus a fraction of a month) after the hire date, so an employer could not impose a 12 month measurement period plus a full 90 day waiting period.

If a new full-time employee does not qualify as a variable hour or seasonal employee then the employer may not impose any more than a 90 day waiting period.

Summary and Open Issues

Notices 2012-58 and 2012-59 provide valuable guidance on employers' options for defining full-time status, however, a number of questions remain to be answered. The IRS has requested comments on a number of these issues including how the measurement period approach may (or may not) be applied to high turnover positions. Under the current guidance it does not appear that an employer is allowed to impose a measurement period on newly hired full-time employees just because the position has a high turnover rate.

Obviously if an employer's workforce is made up principally of full-time employees with very little variability in work hours, these rules will be of little use or interest. However, many employers with a significant number of variable hour or seasonal employees will find the safe harbor described here to be of utmost importance. Careful definition of full-time status could result in a significant reduction in the number of employees required to be offered coverage, and a decrease in the risk of potential employer penalties.

Copies of Notice 2012-58 can be found at www.irs.gov/pub/irs-drop/n-12-58.pdf, and Notice 2012-59 at www.irs.gov/pub/irs-drop/n-12-59.pdf.

Please contact your Parker, Smith & Feek Benefits Team if you'd like to further discuss your eligibility strategy.