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The Affordable Care Act—Countdown to Compliance for Employers, Week 2: Explaining the Look-Back Measurement Method to Employees

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Many applicable large employers—i.e., employers that are subject to the Affordable Care Act's (ACA) employer shared responsibility rules—have a pretty good sense of what these rules are, how they work, and what they plan to do to comply. A subset of these employers has gained a sophisticated understanding of the employer shared responsibility rules, while another (hopefully much smaller) subset has only a vague sense that they need to do *something* by or in 2015 in connection with extending coverage to full-time employees.

Employers with large groups of employees who were previously not offered coverage, or those with large variable and contingent workforces, have generally been relieved to learn that, in the case of employees with unpredictable hours, **they may be able to determine the employee's status as full-time using the "look-back measurement method**." (For a description of the look-back measurement method, please see the IRS' "Questions and Answers on Employer Shared Responsibility Provisions Under the Affordable Care Act," Question 15). Even after having the particulars of the look-back measurement method explained to them more than once, the H.R. and finance professionals with front-line responsibility for compliance sometimes confess confusion about how these rules work. And even among those with a firm grasp of the particulars, there remains a lingering worry. Once management and H.R. have a grasp of the rules and have settled on a compliance strategy, they must next figure out how to explain the rules to employees in a way that complies with applicable law and actually works for employees (the two are not necessarily the same).

The ERISA Disclosure Rules

At bottom, the look-back measurement method for determining an employee's full-time status affects whether and when an employee must be offered group health plan coverage. It is, therefore, something that must be communicated to employees. How this communication is accomplished is dictated by another Federal law, the Employee Retirement Income Security Act of 1974 (ERISA). For group health plans that are subject to ERISA (i.e., all but governmental and church plans), this is the job of a "summary plan description" or "SPD." ERISA generally requires that the terms of an employee benefit plan (which includes group health plans) be set out in a written plan document, and

that the material terms of the plan be communicated to participants in an SPD in terms understandable to the average plan participant. Where there is an existing SPD, an amendment explaining the look-back measurement method and other ACA requirements can be added in a "Summary of Material Modifications" or "SMM."

Before the ACA, compliance with the ERISA SPD/SMM requirements was less than robust. Some employers relied on the glossy brochures issued by their insurance carrier to communicate the plan's terms, and the eligibility terms were set out on a page somewhere in the middle of an employee handbook. For any number of reasons (the look-back measurement method included), the ACA has put added pressure on having a compliant SPD. In the case of disputes over the right to benefits, courts routinely look to SPDs. A failure to have an SPD, or having an out-of-date SPD, can place the plan sponsor at a disadvantage. And now that the ACA has added new benefit requirements, there is a good deal more to argue about. There is also the prospect of daily penalties where a plan administrator fails to deliver an SPD once requested by a participant or beneficiary.

Particularly in the case of group health plans, the plan document and SPD are often combined into a single document referred to colloquially as a "wrap" plan document. While not all practitioners agree that wrap plan documents are a good idea, they appear to have gained wide acceptance. (In our view, the advantages of a wrap document far outweigh any possible disadvantages.)

Generally, an SPD must be provided within 120 days after a plan becomes subject to ERISA, and an SMM or an updated SPD must be issued not later than 210 days after the end of the plan year in which the material change was adopted. Where there has been a material reduction in covered services or benefits, however, the SMM or updated SPD must be issued within 60 days of the adoption of that material reduction. These are minimum requirements, and there are many cases in which earlier, or even advance, notice is required. For example, in the case of a mid-year plan amendment that must be disclosed in a "summary of benefits and coverage" or "SBC," the employer must notify participants at least 60 days prior to the effective date of the amendment. In addition, compliance with the ERISA fiduciary standards may dictate in favor of earlier or even advance notice.

Informal, Supplemental Notices

Where an employer wants to get out ahead of the formal ERISA disclosure rules, or where an understanding of ERISA's disclosure requirements is in short supply, some employers have sought to explain the look-back measurement method in a separate memorandum or other informal communication to employees. Not a bad idea in our view. Nothing prevents an employer from supplementing the formal ERISA disclosure requirements, and better and more complete communication benefits both the employer and the employee. Set out below is a sample of what such a communication might look like:

The Affordable Care Act (ACA) imposes new rules governing offers of group health plan coverage by employers to their full-time employees. For this purpose, we have chosen to determine which employees are full-time employees under the "look-back measurement method." These rules are explained at some length in our plan's summary plan description (SPD), which is available at [describe]. The purpose of this memorandum is to describe how the look-back measurement method applies to both newly hired and other (ongoing) employees. These rule are important, since they determine the circumstances under which employees qualify for coverage and when.

Upon hire an employee will be classified as full-time, part-time, variable hour, or seasonal.

- *A “full-time employee” is an employee who is expected to work on average 30 or more hours per week during each calendar month.*

- *A “part-time employee” is an employee who is not expected to work on average 30 or more hours per week during each calendar month.*

- *A “seasonal employee” is an employee who is hired into a position for which the customary annual employment is six months or less.*

- *A “variable hour employee” is an employee who we cannot determine is reasonably expected to be employed on average at least 30 hours of service per week during his or her “initial measurement period” (i.e., the 12-month period commencing the first day of the month following date-of-hire) because the employee’s hours are variable or otherwise uncertain.*

Employees classified as full-time will be eligible to participate in our plan on the first day of the calendar month immediately following three full months of employment (but only if they are still employed on that day). Part-time, seasonal and variable hour employees must first complete a 12-month initial measurement period (that starts on the first day of the month following date of hire) during which they are not eligible to participate in the plan. At the completion of the initial measurement period, an employee who has worked on average at least 30 hours of service per week during that period will be eligible for coverage on the first day of the next month (i.e., 13-and-a-fraction months after his or her hire date). Employees who qualify for coverage under this rule will remain eligible for a 12-month period (called the “stability period”) irrespective of their hours, provided they remain employed. An employee who fails to work on average at least 30 hours per week during his or her initial measurement period is not eligible for coverage during the corresponding stability period.

Employees who have been employed for some time are subject to similar rules, except that the testing period is a fixed, 12-month period that runs from November 1 to the following October 30. This period is called the “standard measurement period.” Once an employee has worked through a full standard measurement period, he or she is no longer classified as full-time, part-time, seasonal, or variable hour. He or she is instead an “ongoing employee.” An ongoing employee who works on average at least 30 hours of service per week during any standard measurement period will qualify for coverage during a stability period, which is the immediately following calendar year. An ongoing employee who fails to work on average at least 30 hours per week during any standard measurement period is not eligible for coverage during the corresponding stability period.

There are rules that govern the transition from newly-hired to ongoing employee that will affect when coverage might be available. In addition, where an employee experiences a break-in-service of at least 13-weeks, he or she may be treated as newly-hired upon their return. A similar result occurs under a “rule of parity” where a rehired employee may be treated as a new employee following a break of at least four weeks if the employee’s break in service is longer than the employee’s period of service immediately preceding the break in service.

If you have question about how these rules affect you, please call or contact [insert contact information].

NOTE: This notice makes some assumptions about the employer’s choice of measurement periods. Other options are available, of course. Many employers have selected an 11-month initial

measurement period, for example. This allows for a two-month administrative period during which an employee may be enrolled in the plan. Also, there is no requirement that the standard measurement period begin November 1, but the period between the end of the standard measurement period and the commencement of the corresponding stability period must not exceed three months.

Delivery—Electronic and Otherwise

While employers that elect to use the look-back measurement method are required by ERISA to explain how these rules impact employees and their beneficiaries in the SPD (summaries of benefits and coverage do not include eligibility), the notice above is merely supplemental. As a result, there are no restrictions or requirements on how the employer delivers the memorandum. An e-mail would do just fine. SPDs are a different matter. In general, an SPD must be provided in a manner that is“reasonably calculated to ensure actual receipt of the material.”

The Department of Labor has provided a safe harbor covering the electronic delivery of SPDs and other documents and information required by ERISA. But this safe harbor requires advance consent in instances where access to the employer’s electronic information system is not an integral part of the employee’s duties. The Department’s safe harbor rules were adopted in 2002. Much has changed since then, and electronic communications have become the norm. As a consequence, many employers have turned to e-mail notice as the default, without worrying about whether they qualify for safe harbor treatment. Employers that choose this approach should be aware that it is not without some risk.

Part 1 - Assessing New Normal

Part 3 - Trump Plan "Healthcare Reform to Make America Great Again"

Part 4 - Ryan Plan, “A Better Way”

Part 5 - Rep. Tom Price Plan(s): Future of ACA Week 5

Part 6- The Future of the Affordable Care Act Week 6: Focus on the Individual Health Insurance Market

Part 7- The Future of the Affordable Care Act Week 7: The American Health Care Act

Part 8- An Employer’s Guide to the Collapse of the American Health Care Act

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