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Final Affordable Care Act Employer "Play or Pay" Mandate Regulations Largely Preserve Status Quo

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On February 10, 2014, the Internal Revenue Service issued final regulations interpreting the employer "play or pay" mandate under the Patient Protection and Affordable Care Act (PPACA). The regulations are effective January 1, 2015.

Employers looking for significant changes from the proposed regulations will be disappointed. The final regulations largely mirror the proposed regulations, with material changes primarily consisting of additional transition relief. The key changes from the proposed regulations[1] include the following:

Transition Relief

- If certain requirements are met, large employers with less than 100 full time employees or full time employee equivalents during 2014 are exempt from the mandate until January 1, 2016 or, if later, the first day of the plan year beginning in 2016.
- To avoid the penalty that is based on the employer's entire full time employee workforce for 2015, a large employer is only required to offer coverage to 70% of its full time employees, instead of the 95% threshold that is applicable for 2016 and later years.
- For 2015 only, an employer will be deemed to have offered coverage if it is offered no later than the first payroll period that begins in 2015.
- Employers with non-calendar year plans are subject to the mandate based on the start of their 2015 plan year, provided certain requirements are met.
- Certain transition guidance contained in the proposed regulations is continued in the final regulations for 2015, including: (1) the requirement to offer dependent coverage is waived if certain requirements are met, and (2) an employer can use an initial measurement period to measure full time employee status as short as six months and have an initial stability period of up to 12 months.

Coverage Provided Through Other Entities

- Coverage offered by a professional employer organization (PEO) or other employee staffing firm to an individual who perform services for a client-employer that is the individual's

common law employer will be treated as being provided on behalf of the client-employer, if the fee the client-employer pays to the staffing firm is higher than the fee the client-employer would pay if the employee was not enrolled in such coverage.

Action Item: Companies who utilize staffing agencies under circumstances where the company could be considered the common law employer should ensure their staffing agency agreements require the agency to offer qualifying coverage to agency employees who work full time on behalf of the client and that the fee for such employees is higher than the fee otherwise required if such coverage was not offered.

- Coverage offered to an employee on behalf of a contributing employer under a multi-employer plan, single employer Taft-Hartley plan, or multiple employer welfare arrangement (MEWA) is treated as made by the employer. In addition, transition relief provided in the proposed regulations for employers that contribute to multiemployer plans is continued indefinitely until further notice.

Dependent Coverage

- Foster children and stepchildren are excluded from the definition of dependent.
- A child who is neither a U.S. citizen nor U.S. national is excluded unless the child resides in the U.S. or a country contiguous to the U.S. or fits within an exception for certain adopted children.

Hours of Service

- The preamble to the final regulations states that a method of crediting hours is not reasonable if it takes into account only a portion of an employee's hours of service, with the effect of characterizing as a non-full-time employee an employee in a position that traditionally involves at least 30 hours of service per week. As an example, the preamble provides that it is unreasonable not to take into account travel time for a travelling salesperson compensated on a commission basis.
- Hours of service does not include service provided by (1) bona-fide volunteers for a government or tax-exempt entity, (2) students under a federal or state sponsored work study program, and (3) until further guidance is issued, work performed by a member of a religious order who is subject to a vow of poverty in performing tasks required as a member of the order.
- Guidance is provided for calculating hours of service for "on call" employees, adjunct faculty, and layoff hours for airline industry employees and others.

Measurement Periods

- The final regulations largely retain the look-back measurement, administrative and stability periods in the proposed regulations, subject to several modifications, including:
  - New, non-seasonal employees, who reasonably are expected to work full time as of their start date must be offered coverage not later than the first day of the month immediately following the completion of the employee's first three full calendar months of employment. This rule applies solely for purposes of the employer mandate and does not ensure compliance with PPACA's prohibition of waiting periods in excess of 90 days.

- A non-exclusive list of factors to consider in determining whether a new, non-seasonable employee reasonably is expected at the employee's start date to be a full-time employee has been added.

- New seasonal employees continue to be treated in the same manner as new variable hour employees (i.e., new, non-seasonal employees for whom it cannot reasonably be determined as of the employee's start date that the employee will be full time) by permitting an initial measurement period of up to 12 months to determine whether the employee is full time. However, the final regulations define a seasonal employee as an employee who is employed in a position for which the customary annual employment period is six months or less. The six-month period should begin each calendar year in approximately the same part of the year, such as summer or winter. Periods extending beyond six months due to unusual circumstances (e.g., an unusually long ski season for a ski instructor due to heavy snow) are disregarded.

- New part-time employees (i.e., employees whom the employer reasonably expects to be employed on average less than 30 hours of service per week) are subject to the same initial measurement period rules as new seasonal or new variable hour employees; the employer can use an initial measurement period of up to 12 months to determine whether a part-time employee was employed on average at least 30 hours of service per week and, therefore, a full time employee. In addition, if a new part-time employee's employment status is changed during the initial measurement period, such that if the employee had begun employment in the new position or status, the employee reasonably would have been expected to work full time, the employer is required to treat the employee as a full time employee no later than the first day of the fourth month following the change in status.

- An employees who is terminated or otherwise not credited with an hours of service, and who is then subsequently rehired or otherwise credited with an hour of service, may be treated as a new employee only if he or she was not credited with at least one hour of service for 13 consecutive weeks (rather than 26 weeks under the proposed regulations) or, if less, a period of at least four consecutive weeks that exceeds the number of weeks that the employee's period of employment preceded the period in which no hours of service were credited.

- As an alternative to the look-back measurement, administrative and stability periods, the final regulations provide rules for measuring full-time status on a monthly basis.

Affordability

- The "rate of pay" safe harbor may be used for an hourly employee even if the employee's hourly rate of pay is reduced during the plan year. In contrast, the "rate of pay" safe harbor continues to remain unavailable for a non-hourly employee if the non-hourly employee's base salary is reduced during the plan year.

Offering Coverage

- An employer is not required to give an employee an opportunity to opt-out at least once per year if the coverage provides minimum value and is either offered at no cost to the

employee or a monthly cost of no more than 9.5 percent of the monthly equivalent of the federal poverty line for that employee.

- An employee's election of coverage from a prior year that continues for the next year unless the employee affirmatively elects to opt-out constitutes an offer of coverage.
- An employer is not treated as failing to offer coverage during a plan year for an employee whose coverage is terminated during such year for failing to timely pay premiums, but only if the plan complies with certain provisions of the COBRA regulations regarding timely payment.

Conclusion

Given the length of time that it has taken to finalize these regulations, some employers were understandably hopeful that the final regulations would incorporate many of the numerous comments on the proposed regulations that were submitted on behalf of the employer community. But, with the exception of new transition relief, the final regulations largely maintain the framework of the proposed regulations. While this may not be viewed as a favorable development by some employers, other employers may view it positively, in that there are only a few modifications in the final regulations that employers likely will need to incorporate in their employer mandate compliance strategy.

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[1] For an overview of the proposed regulations, please see *Overview and Practical Implications of Proposed Rules Requiring Employers to Offer Health Coverage or Pay a Penalty*, available at www.paulhastings.com/publications.