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New Guidance Helps Employers Determine Who is a Full-Time Employee Under Pay or Play Penalty

By Mary V. Bauman; baumanm@millerjohnson.com; 616.831.1704

Important new guidance has been issued to help employers determine who is a full-time employee for purposes of the pay or play penalty under Health Care Reform. The new guidance is more flexible and workable for employers than earlier guidance.

Under Health Care Reform, employers with 50 or more full-time employees must offer group health coverage that satisfies certain requirements or pay a penalty. The pay or play penalty takes effect in 2014. The legislation defines full-time employee for this purpose as an individual who works, on average, at least 30 hours per week. Employers have been clamoring for further details to help sort out who is a full-time employee for purposes of the pay or play penalty. Newly-released IRS Notice 2012-58 offers safe harbor methods employers may, but are not required to, use. The safe harbor methods are for certain new hires and ongoing employees and are effective at least through the end of 2014.

NEW HIRES

Under the notice, when an employer must treat a new hire as a full-time employee for purposes of the pay or play penalty depends on whether the employee is reasonably expected to work full-time as of his or her date of hire vs. whether the employee is a variable hours employee or seasonal employee.

Employees Who are Reasonably Expected to Work Full-Time

Mary V. Bauman

If a new hire is reasonably expected to work full-time and the employee is offered health coverage on or before the conclusion of the employee's initial three calendar months of employment, the employer will not be required to pay a penalty with respect to the employee.

Variable Hours and Seasonal Employees

Under the notice's safe harbor method, variable hours and seasonal employees are not required to be offered health coverage as quickly as new hires that are reasonably expected to work full-time. For this second group of employees, an employer is not required to offer health coverage in order to avoid the pay or play penalty unless the employee actually works, on average, at least 30 hours per week during a "measurement period" of between three and 12 months. If a variable hours or seasonal employee works the required number of hours during the measurement period, the worker must be treated as full-time during a subsequent "stability period" which must be

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a period of at least six months, and no shorter than the initial measurement period. If the worker does not satisfy the full-time requirement during the measurement period, his or her stability period may not be more than one month longer than the initial measurement period. During the stability period, the employer will not be subject to the pay or play penalty if such a worker is not provided with health coverage, even if the individual works, on average, at least 30 hours or more per week.

An employee is a variable hours employee if, as of his or her hire date, it can't be determined whether the employee is reasonably expected to work, on average, at least 30 hours per week. Employers are permitted to use a reasonable good faith interpretation of the term "seasonal employee" for purposes of the guidance but it appears the IRS will likely consider the definition to include retail workers employed during holiday seasons, agricultural workers and ski instructors.

ONGOING EMPLOYEES

The notice also provides a safe harbor method for ongoing employees. Under the safe harbor, employers can apply a measurement period/stability period test similar to the one described above. An employee is treated as an ongoing employee (vs. a new hire) after the individual completes his or her initial measurement period. If an ongoing employee doesn't satisfy the "on average, at least 30 hours per week" test for a measurement period, the employer will not be required to pay a penalty if it does not offer the employee health coverage for the subsequent stability period (which can't be longer than the measurement period). This is true regardless of the employee's actual hours of work during the stability period.

ADMINISTRATIVE PERIOD

The employer may adopt an "administrative period" of up to 90 days in between the measurement period and stability period under the safe harbor for ongoing employees. The purpose of the administrative period is to give employers time to determine which ongoing employees are eligible for coverage and to notify and enroll employees. For example, the employer could adopt a 12-month measurement period beginning on October 15 of year one and ending on October 14 of year two. Then, instead of immediately beginning the stability period on October 15 of year two, the employer could adopt an administrative period and begin the 12-month stability period on January 1 of year three.

There is a similar administrative period available with respect to newly-hired variable hours and seasonal employees. In addition to the 90-day restriction, in no event can the initial measurement period and administrative period delay enrollment for a variable hours or seasonal employee who is full-time beyond the last day of the first calendar month beginning on or after the anniversary of the employee's start date. For example, if the employer uses a 12-month measurement period for newly-hired variable hours and seasonal employees, and the employee was hired on May 10, his or her measurement period would end on May 9 of the following year. The employer could maintain an administrative period after May 9 as long as the stability period for offering coverage to the newly-hired full-time employee began no later than July 1.

OTHER ISSUES ADDRESSED IN THE GUIDANCE

- Employers may use different measurement periods and stability periods for different groups of employees such as hourly employees vs. salaried employees, or collectively-bargained employees vs. non-collectively bargained employees.

- If an employer offers health coverage to its full-time employees, additional requirements must also be satisfied. Otherwise, lower income workers who enroll in health coverage through a state exchange and receive premium credits will trigger penalties for the employer. One of the requirements is that the employer's coverage is "affordable." Health Care Reform defines "affordable" as the employee's required premium not exceeding 9.5% of his or her household income. Previously, the IRS indicated that it intended to provide a safe harbor under which employers will be deemed to satisfy the affordability test for a year if the premium for single employee coverage under the employer's lowest cost health option does not exceed 9.5% of the employee's wages for that year (as defined for purposes of Box 1 on Form W-2). Notice 2012-58 confirms that the IRS will maintain this safe harbor approach, at least through the end of 2014, for purposes of satisfying the affordability test to avoid the pay or play penalty.

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- At the same time the above guidance was issued, a companion notice was also issued concerning the Health Care Reform ban on more than 90-day waiting periods for health coverage. The new waiting period rules take effect in 2014. In IRS Notice 2012-59, it was clarified that an employer adopting a measurement period approach to determine if a newly-hired variable hours or seasonal employee must be considered a full-time employee will not run afoul of the 90-day waiting period rule if coverage is made effective for a qualifying employee no later than the first day of the month on or after the date the employee completes 13 months of service. IRS Notice 2012-59 also provides that as long as an employee may elect coverage that would begin within 90 days of his or her date of hire, the 90-day waiting period limit will be deemed satisfied, even if the employee does not timely enroll.

If you have any questions concerning the new guidance or Health Care Reform, please contact the author or any other member of the Health Care Reform Team.

CONTACT US

If you have any questions about this new guidance or how any proposed health care reform changes will impact your organization, please feel free to contact Mary Bauman or another member of Miller Johnson's Health Care Reform Team.

If you would like to reprint articles, schedule a speaker, or receive our newsletter and alerts, please send an e-mail to healthcarereformteam@millerjohnson.com.

MILLER JOHNSON
Attorneys and Counselors

GRAND RAPIDS
p 616.831.1700
f 616.831.1701

KALAMAZOO
p 269.226.2950
f 269.226.2951

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These are some of the Miller Johnson attorneys available to answer your questions and provide assistance on issues related to health care reform (Patient Protection and Affordable Care Act and the Health Care and Education Affordability Reconciliation Act):

MARY V. BAUMAN, CHAIR
616.831.1704
baumanm@millerjohnson.com

FRANK E. BERRODIN
616.831.1769
berrodinf@millerjohnson.com

JAMES C. BRUINSMA
616.831.1708
bruinsmaj@millerjohnson.com

DAVID M. BUDAY
269.226.2952
budayd@millerjohnson.com

TONY COMDEN
616.831.1757
comdent@millerjohnson.com

WILLIAM H. FALLON
616.831.1715
fallonw@millerjohnson.com

JEFFREY J. FRASER
616.831.1756
fraserj@millerjohnson.com

RICHARD E. HILLARY
616.831.1774
hillaryr@millerjohnson.com

KENNETH G. HOFMAN
616.831.1721
hofmank@millerjohnson.com

LAURETTA K. MURPHY
616.831.1733
murphyl@millerjohnson.com

NATHAN D. PLANTINGA
616.831.1773
plantingan@millerjohnson.com

MARK E. RIZIK
616.831.1744
rizikm@millerjohnson.com

STEPHEN R. RYAN
616.831.1746
ryans@millerjohnson.com

CHRISTOPHER "C.J." SCHNEIDER
616.831.1738
schneiderc@millerjohnson.com

MATTHEW L. VICARI
616.831.1762
vicarim@millerjohnson.com

SARAH K. WILLEY
269.226.2957
willeys@millerjohnson.com

If you received this from someone else and wish to receive your own copy, please send your name, company name and e-mail address to healthcarereformteam@millerjohnson.com.