BREAKING NEWS

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Regulations Released on Health Care Reform's Employer Mandate

Recently, the Internal Revenue Service (IRS) released the long-awaited and highly-anticipated regulations on the Employer Mandate provision, formally called the Shared Responsibility for Employers Regarding Health Coverage[1]. These proposed regulations may be relied upon, pending the issuance of future final regulations. Highlights are as follows:

BACKGROUND: FREQUENTLY ASKED QUESTIONS

When does this begin?

- Begins January 1, 2014
- Non-calendar year plans: effective date may be the first day of the 2014 plan year only if the employer has offered coverage to at least one-third of its employees or are currently covering one-quarter of its employees
  - Employees eligible under the terms of the plan in place as of December 27, 2012, including new hires or employees who waived coverage, are eligible to enroll on the first day of the plan year in 2014 (e.g., March 1 plan years - all employees eligible under current plan year terms could enroll March 1, 2014)

Who does this apply to?

- Large employers with at least 50 full-time and full-time equivalent employees[2] (defined as employees with less than 30 hours of service per week; hours of service are added together and divided by 120 to get the full-time equivalent value)

  Example: Employer A has 45 employees who average 30 hours of service weekly and 30 employees with 29 hours of service weekly. 29 hours x 4 = 116 x 30 = 3,480 ÷ 120 = 29 full-time equivalent employees. 45 + 29= 74. The employer mandate will apply to Employer A.

- Employee numbers for the preceding year will be used to determine if a large employer in current year
- New employers reasonably expected to hire an average of at least 50 full-time employees, will be considered an applicable large employer at the time they are created
- An applicable large employer will be considered to have offered Minimum Essential Coverage (MEC) to all of its employees, so long as that employer offers coverage to all but 5% of its full-time employees and dependents for that month

[1] Passed as part of the Patient Protection and Affordable Care Act (PPACA), also referred to as Health Care Reform.
[2] Employers are never required to offer coverage to full-time equivalent employees. This calculation is only used to determine if the employer is an applicable large employer, subject to the employer mandate for full-time employees.

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What is an employer required to do?

- Provide affordable health coverage [3] with a minimum value to full-time employees (and their dependents) that average 30 hours of service or more per week
- Mandatory enrollment is not permitted
- Offers of coverage must be documented
- Report required information to the IRS on employer-provided health coverage beginning in 2015 for coverage provided on or after January 1, 2014 (forms yet to be developed)

What is the penalty?

- If no coverage is offered to any employee, the employer will be subject to a penalty of $2,000 per full-time employee (minus the first 30 employees) if at least one employee purchases insurance through the State-based Exchange and receives a premium tax credit[4] or cost-sharing subsidy
- If unaffordable or insufficient coverage is offered to any employee, the employer will be subject to a penalty of $3,000 per full-time employee that purchases insurance through the State-based Exchange and receives a premium tax credit or cost-sharing subsidy
- No penalty for not offering coverage during the first three months of employment
- No penalty for new variable hour employees (i.e., employees whose hours fluctuate) for up to six months if during the first three months the employer could not reasonably determine they were full-time employees
- Failure to offer coverage one day in a month counts as noncompliance for the entire month
- No penalty if the employee fails to timely pay their share of the premium
- Penalties assessed per calendar month, equal to 1/12 of $2,000 (or $3,000)

PROPOSED REGULATIONS

Minimum Essential Coverage

- Core, mandated coverage that must be offered to employees and dependents[5]. Future regulations will provide guidance on the specific definition of MEC

Affordability

- The employee's share of the premium for self-only coverage cannot be more than 9.5% of their household income
  - Employees are still eligible to receive a subsidy to purchase Exchange coverage if their household income is between 133% and 400% of the Federal Poverty Level[6] (FPL). Employers will not be subject to a penalty if the employee's premium for self-only coverage is not more than 9.5% of their wages, rate of pay or FPL
- Exceptions apply to allow employers to use Form W-2 wages, the FPL or hourly rate of pay x 130 (all are optional and choice of method rests with the employer)

[3] Affordability is defined as follows: the employee's share of the premium for self-only coverage cannot be more than 9.5% of their wages, the Federal Poverty Level (FPL) or their hourly rate of pay x 130 (all are optional and choice of method rests with the employer). Example: Employee B makes $9.00 an hour. Selecting the rate of pay affordability test, $9.00 x 130 = $1170 in monthly wages. Employee B premium for self-only coverage cannot be more than 9.5% of $1170 or $111.15.

[4] Premium tax credits and cost-sharing subsidies are discounts on insurance coverage and costs, available only to lower income individuals making between 133% and 400% of the Federal Poverty Level (FPL) (which for an individual is between $14,856 and $44,680).

[5] Dependents are children, stepchildren and foster children of the employee up to the age of 26. Dependents do not include spouses for purposes of the Employer Mandate.

[6] The FPL for the 2012-2013 year is $11,170 for a single person or $$23,050 for a family of four.

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Example of Form W-2 Wages Rule: Employee A's Form W-2 wages for 2013 was $45,000. Divided by 12 = $3,750 monthly wage. Employee A's portion of the premium for self-only coverage in the employer's lowest cost plan with MEC cannot be more than 9.5% of $3,750 or $356.25 per month.

Example of Rate of Pay Rule: Employee B makes $9.00 an hour. Selecting the rate of pay affordability test, $9.00 x 130 = $1170 in monthly wages. Employee B's premium for self-only coverage cannot be more than 9.5% of $1170 or $111.15 per month. Salaried employees use monthly salary wage.

Example of Federal Poverty Level Rule: The FPL for an individual is $11,170. $11,170 x 9.5% = $1,061.15. Therefore, Employee C's portion of the premium for self-only coverage cannot be more than $1,061.15 per year or $88.42 per month.

Minimum Value

- A Minimum Value Calculator (MVC) created by the IRS will calculate whether an employer-sponsored plan provides minimum value (60% of total allowed costs of benefits provided)
- Information related to the calculator, and benefits that are outside of the scope of the calculator, along with other methodologies in calculating minimal value, are contained in IRS Notice 2012-31 found at http://www.irs.gov/pub/irs-drop/n-12-31.pdf
- Large employers with over 50 employees are not required to provide essential health benefits

Employers with Multiple Entities or who are Part of a Control Group

- Internal Revenue Code (IRC) § 414 aggregate employer/control group rules apply. See: http://www.irs.gov/pub/irs-tege/epchd704.pdf; and http://www.law.cornell.edu/uscode/text/26/414
- Combination of multiple entities may be considered a single employer under a "control group". All employees (of each entity) in the control group will be counted as under a single employer when determining whether the employer is an applicable large employer subject to the Employer Mandate
- Employee/employer relationship is defined as the right to control and direct performance, details and means by which the result is accomplished
- Direct control not necessary
  - Leased employees are not treated as employees of the service recipient; rather of the leasing company
- **Special control group penalty rules**:
  - Penalties for failure to comply with the Employer Mandate is assessed on each entity separately

    Example: Employer A & B are part of the same control group. Employer A has some employees who received subsidized coverage through the Exchange because the offered plan was unaffordable. Employer B did not. The penalty is assessed and collected against Employer A only.
  - When employers do not offer any coverage to any employee, the penalty assessable is $2,000 for every employee, minus the first 30 employees, if at least one employee purchases insurance through the State-based Exchange and receives a premium tax credit or cost-sharing. If a penalty is assessed on any entity of a control group, the 30 employee "forgiveness" is divided among the entities in proportion to the number of full-time employees each entity possesses

Multi-employer Plans

- Multi-employer plans falling within the large employer definition, for purposes of being subject to the Employer Mandate, will not be treated as failing to offer the opportunity for full-time employees and dependents to enroll in MEC, if the following conditions are met:
  - Employer must make a contribution pursuant to a collective bargaining agreement (a.k.a., union-negotiated contract)
  - Coverage is offered to full-time employees and dependents
  - Coverage offered is affordable and provides the above-stated minimum value

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- Any penalties for noncompliance would be payable by the participating large employer member

Full-time Employees Entitled to be Offered Coverage

- ***Seasonal employees*** must be offered coverage if they meet the eligible full-time employee criteria
  - Seasonal workers are expected to work a maximum of 120 days (or four months); although the timeframe is not the only factor
  - Not included as a full-time employee (even if worked more than 30 hours per week) for purposes of determining whether the employer is subject to the Employer Mandate
  - Any “reasonable, good faith interpretation of the statutory definition” of a seasonal employee is acceptable
- ***Leased and temporary employees***. These employees are considered employees of the leasing or temporary agency. Anti-abuse rules are addressed in the regulations to prohibit these employers from sharing the leased or temporary employee with the client-leaser in an attempt to avoid compliance
- ***Full-time employees*** with an average of 30 or more “hours of service” per week (using a look-back measurement period)
  - The term “30 or more hours of work” changed to “30 or more hours of service” for an employee to be considered a full-time employee. The expanded definition includes actual hours worked and hours an employee is entitled to payment where no work was performed (e.g., holiday, sick-time, paid-time off, jury duty, paid leave, disability, etc.)
    - ***Salaried employees***: calculate hours of service in one of the following ways:
      1. Actual hours method: actual hours of service plus hours for which payment is made or due for vacation, sick, etc.
      2. Days-worked equivalency method: employee is credited with eight hours of service for each day the employee worked at least one hour
      3. Weeks-worked equivalency method: employee is credited with 40 hours of service per week for each week where the employee would be required to be credited with at least one hour of service per day for each day of that week, under these rules
    - ***Teachers and educational organization employees***: credited with hours of service for paid leave during traditional academic breaks. Unpaid leave, where a look-back period is used, the amount an educational organization is required to take into account in a calendar year, with respect to periods with zero hours of service, is limited to 501 hours
    - ***Commission Basis, Adjunct Faculty, Transportation Employees, and Similarly Situated Employees***: use “a reasonable method for crediting hours of service”

Look-back Measurement Method for Determination of Full-time Employees

- The previously proposed look-back method was adopted in these regulations. For details, see the previously released Barney & Barney Employer Mandate Strategic Guide and the illustrations below. Also see the proposed methodology regulations at: http://www.irs.gov/pub/irs-drop/n-12-58.pdf

Ongoing Employee Look-back Measurement Period Illustration:

MONTHS

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30
12 Months												3 Months			12 Months														
Standard Measurement Period												Administrative Period			Stability Period														

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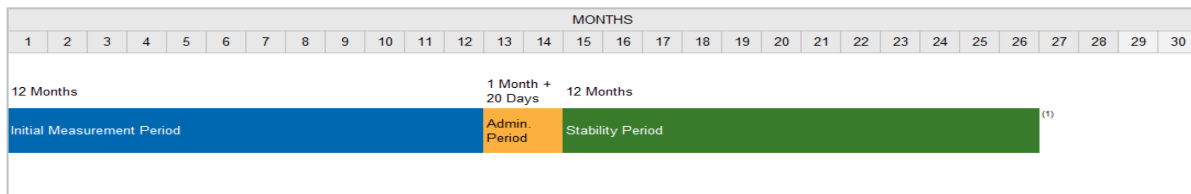
New Variable Hour Employee Look-back Measurement Period Illustration:



- The measurement periods for ongoing as well as new employees may also be coordinated in conjunction with the pay periods of an employer. Different measurement periods, stability periods, and administrative periods are allowed for the following employees:
  - Each group of collectively bargained employees covered by a separate collective bargaining agreement;
  - Collectively bargained and non-collectively bargained employees
  - Salaried employees and hourly employees
  - Employees whose primary places of employment are in different states
  - Employees of different entities (because the Employer Mandate applies to each entity, even for a "controlled group")

Change in Employment Status

- "Material change"[7] in employment status of a new variable hour or seasonal employee will result in treatment as full-time employee if occurring during the initial measurement "look-back" period
  - Treated as a full-time employee as of the first day of the fourth month following the change in status; or, if the material change occurs prior to the end of the initial measurement period (within the first three months) the employee is treated as full-time when the employee begins the first month after averaging 30 hours of service a week
- Rehires credited with no hours of service for at least a 26-week period are considered new employees

Transition Relief Rules

- **Non-calendar Year Plans**
  - In certain situations, plans in existence as of December 27, 2012 will have an effective date of the first day of the plan year beginning in 2014 (e.g., a plan year of March 1 will have an effective date of March 1, 2014 for purposes of complying with the Employer Mandate). The below options represent the three conditions available to permit a non-calendar year plan to delay compliance until the beginning of the 2014 plan year

    1. Employees (whenever hired) who would be eligible for coverage under the current plan year eligibility terms (i.e., plan eligibility terms in effect on December 27, 2012) or, who are eligible but waived coverage, must be offered affordable, MEC coverage no later than the first day of the 2014 plan year

       Example: Employer X has a plan year that runs July 1, 2013 through June 30, 2014. Under the terms of the current plan, employees are eligible for coverage if they work 32 hours or more per week. Employees X, Y & Z were hired on December 24, 2013 as full-time employees working 40 hours per week. Employees L, M, & N are ongoing full-time employees who waived coverage at open enrollment in June of 2013. Because Employees X, Y & Z are new employees who are eligible under the current plan terms, and Employees L, M, & N are existing employees eligible under the current plan terms, the employer is not required to offer them coverage until the 2014 plan year of July 1, 2014.

[7] Material change is defined as "had the employee begun employment in the new position or status," that same employee would have reasonably been expected to work 30 or more hours of service per week.

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2. Plan covers at least ¼ of its employees under one or more medical plans as of December 27, 2012

   Example: Employer L has 315 employees. The plan must have 79 employees enrolled in order for ¼ of the employees to be covered under the plan. If 79 or more employees are covered under the plan for the plan year beginning May 1, 2013, then the employer need not comply with the Employer Mandate until the first day of the plan year in 2014 (i.e., May 1, 2014).

3. Offers coverage to at least 1/3 of its employees at the most recent open enrollment period for the plan year that includes December 27, 2012

   Example: Employer C has 160 employees. At the August 1, 2013 open enrollment, the employer's plan offers coverage to all employees working 32 or more hours per week. Of the 160 employees, 100 of them work 32 hours per week of more; this is more than the 53 employees needed to meet the one-third threshold. This employer would not be required to comply with the Employer Mandate until August 1, 2014.

- **Transition Relief for Cafeteria Plan Mid-year Election Changes**
  - ➢ An employer is permitted to amend their cafeteria plan documents and allow their employees to change their elections at any time, retroactive, by December 31, 2014
  - ➢ Employees may prospectively (i.e., change medical plan elections before the next non-calendar year open enrollment period), revoke or change their election in order to effectuate the employer's changes implemented to comply with the Employer Mandate
- **Transition Relief for Determining Large Employer Status for 2014**
  - ➢ An employer has the option to determine its status as an applicable large employer by reviewing a period of at least six consecutive calendar months in the 2013 calendar year. The employer may choose any consecutive six-month period in the 2013 year in which to calculate whether it will be considered a large employer. Employers close to the 50 employee threshold must begin calculating employees no later than July 1, 2013
- **Transitional Variable Hour Employee Definition**
  - ➢ Until January 1, 2015, an employer will be required to assume, for purposes of calculating new variable hour employees, that the employee will continue to be employed by the employer for the entire initial measurement period (i.e., no less than three months, and for positions with true and consistently variable hours, no more than 12 months)
  - ➢ The status of any individual variable hour employee cannot be based upon an employer's expectation regarding aggregate turnover (i.e., the employer is not permitted to assume an employee will not be employed beyond the initial measurement period due to high turnover or a seasonal employee status)

ADDITIONAL INFORMATION

Employers are encouraged to contact their Barney & Barney representative to set up a demonstration of the Barney & Barney Health Care Reform Online Modeling Tool, as well as the Actuarial Value Calculator. These tools will help employers get a real dollar perspective on how much it will cost to comply with the remaining health care reform provisions. Additionally, the tool has every resource released by the regulatory agencies, as well as a bank of useful tools to help understand health care reform provisions that currently affect your plans, as well as provisions to become effective in future years. Be on the look-out for invitations to Barney & Barney's Compliance Mixer on January 24, 2013, 4:00 – 6:00 pm; Health Care Reform Update Webinar on February 5, 2013, 10:00 – 11:00 am; and, Health Care Reform Workshop on Administration of the Employer Mandate on February 12 (workshop time to-be-determined). Complete details on the above proposed regulations can be found at the links below.

Employer Mandate regulations, available at: http://www.gpo.gov/fdsys/pkg/FR-2013-01-02/pdf/2012-31269.pdf

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You may submit written comments on these regulations via mail to: CC:PA:LPD:PR (REG–138006–12), Internal Revenue Service, room 5203, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may also be hand-delivered Monday through Friday between the hours of 8 am and 4 pm to CC:PA:LPD:PR (REG–138006–12), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC. Comments may be submitted electronically via the Federal eRulemaking Portal at http://www.regulations.gov (Indicate IRS REG–138006–12 in the subject line) or individuals may call Oluwafunmilayo Taylor at (202) 622–7180

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