

International Municipal Lawyers Association
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Work Session III: Health Care Reform
Affordable Care Act:
Play or Pay Implementation for Municipal Employers

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Today's Agenda

- Employee Coverage Choices
- "Play or Pay" Employer Mandate
- Reporting
- Employee Classification and Retaliation Issues
- Q&A

Employee Coverage Choices

- Individual Mandate effective 1/1/2014
  - Must have “minimum essential coverage” or pay a penalty
  - Exceptions for financial hardship & short gaps
- Minimum essential coverage includes:
  - Employer-sponsored coverage (including COBRA)
  - Medicare, Medicaid, TriCare
  - Coverage through “Exchanges”
  - Individual insured coverage

Employee Coverage Choices

- **Premium Tax Credits**
  - Available in Individual Coverage Exchange (not in Small Employer (SHOP) Exchange)
  - Household income = 100% - 400% of federal poverty line (FPL); for 2013, in continental US:

	100% FPL	400% FPL
Individual	$11,490	$45,960
Family of 4	$23,550	$94,200

  - Not eligible if enrolled in employer-sponsored plan or eligible for employer-sponsored plan that meets affordability & minimum value requirements

"Play or Pay" Employer Mandate

- Two potential penalties:
  - No coverage penalty
  - Insufficient coverage penalty
- Generally effective January 1, 2015, following announcement of one-year delay in enforcement
  - Any additional relief for fiscal year plans?
  - Must children be offered coverage in 2015?
  - Is transition relief still available for multi-employer plans?

Coordination with 90-Day Waiting Period

- There is a separate prohibition on waiting periods in excess of 90 days – Effective January 1, 2014
  - Separate penalty for violations - $100 per person for each day of noncompliance PHSA § 2723(b)

No Coverage Penalty

- "Large employers" that, during a calendar month,
  - do not "offer" health "coverage" to "substantially all" "full-time" "employees" (and their "children" up to age 26) &
  - have at least one full-time employee receive a Premium Tax Credit

  owe a penalty for that month of $166.67 for **every** full-time employee (except 30). ($2,000/year)
- Applies separately to each member of a controlled group, but 30 employee exclusion is allocated ratably among controlled group members.

Insufficient Coverage Penalty

- "Large employers" that, during a calendar month, offer health coverage that either:
  - is not "affordable,"
  - does not provide "minimum value," or
  - is only offered to "substantially all" full-time employees & their children up to age 26

  owe a penalty for that month of $250 for each full-time employee who receives a Premium Tax Credit. ($3,000/year)
- Penalty capped at "no coverage" penalty (monthly)
- Applies separately to each member of a controlled group

What is a "Large Employer?"

- Employed, on average, 50 or more full-time employees and "full-time equivalent" employees during prior calendar year
  - Count all full-time employees for each month in prior year
  - Add all hours for part-time employees for each month (max 120 per employee) and divide the total by 120 (full-time equivalents)
  - Add full-time and full-time equivalents for each month
  - Add totals for each month and divide by 12

- Exclude "seasonal workers" if only exceed 50 full-time employees for 120 days or less & employees over 50 are "seasonal workers"

- "Full-time equivalent" only applies to determine "Large Employer" – no coverage requirement or penalties for non-full-time employees

Controlled Groups

- "Large Employer" determined on a "controlled group" basis
- Also, Employer Mandate penalties apply separately to each member of a controlled group
- Guidance reserved for government employers; use good faith interpretation of rules under IRC § 414(b), (c), (m), & (o)
- Notice 89-23 – (i) 80% of governing board are representatives of or directly or indirectly controlled by another entity, (ii) 80% of operating funds from another entity & a degree of common management or supervision
- Relationship to IRC § 414(d) definition of governmental plan?

Who is an "Employee?"

- Determined based on the common-law "right to control" standard
  - Does employer have the right to control the details of how the services are performed?
- Contingent workforce issues: "employees" may include independent contractors, contractor workers, and temporary and leased employees
- Different than FLSA's "economic realities" test, which will be used to determine employees who receive notice of coverage options

Who is a "Full-time Employee?"

- Employers will need to certify who are their full-time employees
- Identifying Full-Time Employees:
  - monthly average of at least 30 hours of service/week or 130 hours/month
  - hours of service = each hour for which an employee is paid or entitled to payment for either (i) work; or (ii) time off (*e.g.* vacation, holiday, sickness, disability, layoff, jury duty, military, or other leave of absence)
  - hours of service do not include hours worked outside the U.S.

How and When to Determine Who is a "Full-time Employee"

- Monthly "real time" or
- Look back safe harbor:
  - All ongoing employees – determine full-time status based on standard "measurement period" & treat as full-time for standard "stability period"
  - New hires who are variable hour or "seasonal" – also determine full-time status based on initial "measurement period" & treat as full-time for initial "stability period"
  - Other new hires are full-time based on reasonable expectation at time of hire

How and When to Determine Who is a "Full-time Employee"

- Look Back Safe Harbor for Ongoing Employees -- ongoing employees = worked throughout at least one standard Measurement Period
  - look back to a prior standard Measurement Period (3-12 months) to determine full-time status.
  - coverage must be provided during a "Stability Period" that is at least 6 months, but no shorter than measurement period.
  - optional Administrative Period (up to 90 days) must overlap with prior Stability Period.

Measurement Period (3-12 months)	Administrative Period (up to 90 days)	Stability Period (6-12 months; no shorter than Measurement Period)

How and When to Determine Who is a "Full-time Employee"

New Hires – Expected Full-Time

- If a new hire is reasonably expected to work full-time:
  - must be treated as full-time and coverage must be offered at or before end of initial full three calendar months of employment
  - but compliance with "calendar month" rule could still violate 90-day waiting period rule: coverage must be provided by the 91st day after the employee becomes eligible (assuming the employee enrolls) to satisfy BOTH rules.

How and When to Determine Who is a "Full-time Employee"

New Hires –Variable and Seasonal

- Look Back Safe Harbor
  - variable hour:
    - can't reasonably determine on start date if employee is expected to average 30+ hours/week during initial Measurement Period
    - effective 2015, can't take into account likelihood that employment may terminate
  - seasonal employee – good faith interpretation pending further guidance
  - initial Measurement and Stability periods are unique to each new employee

How and When to Determine Who is a "Full-time Employee"

New Hires –Variable and Seasonal

- Look Back Safe Harbor
  - initial Measurement Period (3-12 months), beginning on any date between start date and first day of calendar month after start date.
  - administrative period of up to 90 days (includes all days between start date & coverage date other than Measurement Period)
  - initial Measurement + Administrative Periods cannot extend beyond last day of first calendar month beginning on or after anniversary of start date = dovetails with 90-day waiting period rule
  - Stability Period – same length as for ongoing employees
    - if determined to be FT, at least 6 months, but no shorter than Measurement Period
    - if not FT, cannot be more than 1 month longer than initial Measurement Period and can't go beyond standard Measuring Period (+administrative period) in which initial Measuring Period begins

How and When to Determine Who is a "Full-time Employee"

- Measurement, Administrative, and Stability Periods can vary among different employee categories
  - union v. nonunion
  - different bargaining units
  - salaried v. hourly
  - different states of employment
- Change in employment status during Stability Period does not change classification/coverage for remainder of Stability Period
- Transfers between classifications?

How and When to Determine Who is a "Full-time Employee"

- Leaves of absence under look back safe harbor:
  - Full-time status during stability period continues during continued employment, including during leave of absence, furlough, strike, etc.
  - Measurement period also continues during these times away from active employment

How and When to Determine Who is a "Full-time Employee"

- Breaks in Service and Rehires
  - May treat as new employee if no hours of service with any controlled group member:
    - for at least 26 consecutive weeks, or
    - a period of at least 4 consecutive weeks that exceeds the period of prior employment (rule of parity)
  - If treated as continuing employee:
    - measurement & stability periods continue upon return to work, but
    - exclude any special unpaid leave (FMLA, USERRA, jury duty) or credit employee with those hours
    - appears to apply even if return is with different controlled group member

Managing who is a "Full-time Employee"

- **Limiting Hours to Below 30**
  - Not prohibited by current "play or pay" guidance
  - Some employers are doing this
  - Are there some employees who will want this in order to take advantage of Exchange coverage?
  - Consider normal discrimination concerns

Who Must Be Offered Coverage?

- "Must Offer" = effective opportunity to enroll (or decline enrollment) no less than once each plan year
  - If coverage terminated due to failure of employee to timely pay premium, deemed offered through end of "coverage period"
- "Coverage" includes insured and self-insured group health plans:
  - Employer-sponsored
  - Multiemployer plan coverage (special rules apply)
  - Leasing company coverage? (not clear)
- Is COBRA an "offer" of coverage – arguably yes
  - Important for furlough/strike/leave of absence during stability period
  - But, COBRA "offer" of coverage is likely not affordable

Who Must Be Offered Coverage?

- "Substantially All" means all but the greater of 5% or 5 employees
  - intentional or inadvertent
  - applies separately to each controlled group member
- "Dependent" means an employee's "child" under age 26
  - "Child" includes natural child, adopted child, stepchild & foster child
  - Need not be dependent on the employee
  - Does not include spouse

What is "Affordable?"

- Employee cost for employee only coverage in lowest cost option ≤ 9.5% of employee's household income
- Safe harbors:
  - Form W-2, Box 1 wages
    - Issue: unpaid leaves may result in unaffordable coverage, particularly if coverage offered during leave
  - Rate of pay
    - 130 x rate of pay for hourly; monthly salary for salaried
    - Issue: pay rate must remain constant throughout year
  - Individual federal poverty line
    ($11,490 for 2013 in the continental U.S.)
- Wellness program incentives (other than tobacco use) are ignored in determining affordability

What is "Minimum Value?"

- Plan must pay at least 60% of actuarially projected cost of covered services
- Determined using a standard population based on the population covered by self-insured group health plans
- Regulations allow various options to determine minimum value:
  - Online minimum value calculator developed by HHS & IRS
  - Checklist of plan characteristics to compare the plan's covered services with a benchmark
  - Certification by an actuary

Reporting Obligations

- In January 2016, employers must report to the IRS and employees about compliance with the employer mandate (Code § 6056)
- In January 2016, health insurers and self-insured plans must also report to the IRS and covered individuals about employer-sponsored coverage that allows employees to comply with the individual mandate (Code § 6055)
    - Note: statute indicates employers **need social security numbers or taxpayer identification numbers** for all covered employees and dependents in order to fully complete these filings

Paying Employer Mandate Penalty

- Based on the reports it receives from employers, individuals, and Exchanges, the IRS will estimate the employer mandate penalty and send notices to employers in 2016 (or later)
- Employers may contest the estimated penalty
  - The Exchange will also notify employers of employees receiving Premium Tax Credits
- After considering employer objections, the IRS will issue an "assessment," which is the formal determination of the amount of the penalty owed
- Employers may pay the assessment or contest it through the normal tax controversy mechanisms
- The penalty is not reported on a tax return

Nondiscrimination Issues

- For municipal employers, Code § 105(h) prohibits discriminating based on eligibility for or benefits in self-insured health plans in favor of 5 highest paid officers,, & employees in top 25% of comp
- ACA expands Code § 105(h) to fully-insured coverage effective when final regs are issued
- Code § 125 prohibits discriminating in cafeteria plan benefits in favor of highly compensated individuals (currently comp of $115,000 or higher)
- All nondiscrimination rules currently apply on a controlled group basis

Premium Tax Credit Retaliation (FLSA § 18C)

"No employer shall discharge or in any manner discriminate against any employee with respect to his or her compensation, terms, conditions, or other privileges of employment because the employee (or an individual acting at the request of the employee) has –

- received a premium tax credit or cost sharing subsidy;
- provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of, any Federal labor law;
- testified, assisted, or participated, or is about to testify, assist, or participate, in a proceeding about such violation; or
- Objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any Federal labor law."

- Employee starts by filing retaliation complaint with OSHA

Q&A

- Doc No. 3198038_1