September 7, 2012

CAB 12-6

Milliman

CLIENT ACTION Bulletin
Employee Benefits

PPACA Guidance: "Full-time" Employee Definition, 90-Day Waiting Period

SUMMARY **Federal regulatory agencies have explained the means by which employers that sponsor group health plans may determine the employees to be considered "full-time" and, therefore, who must be offered coverage under the Patient Protection and Affordable Care Act (PPACA). IRS *Notice 2012-58,* issued by the Department of Treasury in coordination with the Departments of Labor (DOL) and Health and Human Services (DHHS), expands on a "safe harbor" available under earlier guidance and specifies methods for calculating the full-time threshold for newly hired, variable-hour, and seasonal employees.**

The agencies also separately released *Notice 2012-59* (with the DOL and DHHS issuing it under differently named documents), addressing PPACA's 90-day waiting period limitation and its application to variable-hour employees in group health plans that base eligibility on an hours-of-service requirement.

In both notices, the agencies emphasize that plan sponsors may rely on the guidance at least through 2014. Comments to the agencies must be submitted by September 30, 2012.

DISCUSSION

Background

PPACA's "shared responsibility" provision requires that employers with 50 or more full-time workers offer healthcare coverage or be subject to penalties beginning in 2014. One penalty is an excise tax on an employer that fails to offer full-time employees the opportunity to enroll in its minimum essential coverage. The second penalty also is an excise tax, applying if the employer offers minimum essential coverage that is not affordable to the worker (or is insufficiently valuable) and the worker elects to receive a premium subsidy tax credit when purchasing insurance from the health insurance exchange. The first penalty is calculated by taking into account all full-time workers (with a 30-employee exemption). The second penalty is only assessed on the number of full-time employees receiving a premium subsidy tax credit.

Last year, the IRS released *Notice 2011-36* (and reinforced this year in *Notice 2012-17*), proposing a safe harbor method – in lieu of making monthly calculations – to determine a worker's full-time status. The proposal would allow employers to select from three to 12 consecutive months as a "look-back measurement period" in which to ascertain an employee's average hours of service. Those employees determined to be full time would then have to be treated as such during a subsequent "stability period" of at least six months and no longer than the look-back measurement period. The notice also provided that employers could avoid the affordability penalty by using the employee's Form W-2 wages rather than household income. If required health plan contributions are no more than 9.5% of W-2 wages, the employer would not be subject to the penalty.

Guidance on Full-time Definition

The newly issued *Notice 2012-58* permits plan sponsors to determine full-time status as follows:

- ***Ongoing employees*** – The new notice retains the safe harbor of the earlier guidance, including the concept of the look-back period (but now referred to as the "standard measurement period") for determining the number of hours of service, and the corresponding stability period during which an employee will be considered full time. Employers must apply this method uniformly and consistently for all employees in the same category. The categories permitted are: collectively bargained and noncollectively bargained employees; salaried and hourly employees; employees of different entities; and employees located in different states. To allow time to identify and enroll full-time employees after the standard measurement period, plan sponsors are permitted an optional

"administrative period" of up to 90 days. This period must not reduce or lengthen the standard measurement or the stability periods and must overlap the stability period.

- ***New employees who are reasonably expected to work full time*** – An employer can avoid the penalties if it offers coverage to full-time employees during the first three months of employment.
- ***Variable-hour and seasonal employees*** – The notice allows use of the safe harbors available for ongoing employees for new variable-hour and seasonal employees if the employer offers health coverage only to full-time equivalent employees. The combined standard measurement and administrative periods must not extend beyond the last day of the first calendar month beginning on or after the employee's one-year employment start date. The notice also provides examples to aid in the determination of a variable-hour or seasonal employee, along with explanations of how to apply an administrative period.

Affordability Safe Harbor

The new notice assures employers that an earlier proposed safe harbor (in *Notices 2011-73* and *2012-17)* allowing use of W-2 wages in determining affordability may be relied upon at least through 2014. The notice emphasizes that the safe harbor applies only for the determination of whether an employer is subject to penalties under PPACA's employer shared responsibility provision and does not affect employees' eligibility for health insurance premium tax credits.

Reliance Period

Notice 2012-58 extends the reliance period for issues covered by the notice at least until Jan. 1, 2015. More specifically, reliance on the notice includes a measurement period that begins in 2013 or 2014 and the associated stability period, which, according to the notice, may extend into 2014, 2015, or 2016.

90-Day Waiting Period

The agencies' separate guidance on PPACA's 90-day waiting period limitation prohibits a plan from conditioning eligibility by requiring a wait that exceeds 90 days, if eligibility is based solely on the lapse of a time period. And while other eligibility conditions are permissible, they must not be designed to avoid compliance with the 90-day rule. In addition, if an employee may elect coverage that would begin within the 90-day period but takes longer to do so, the employer will not be considered to have violated the 90-day requirement.

Notice 2012-59 also addresses the application of the 90-day waiting period limitation to variable-hour employees if the plan imposes an hours-of-service requirement. Under the notice, an employer will be in compliance if coverage for an eligible employee is effective within 13 months of his or her start date plus the fraction of a month remaining until the first day of the next calendar month if the start date is not the first day of the month.

ACTION

Employers that sponsor healthcare coverage for their employees should review the new notices and determine whether current plan designs and administrative systems can satisfy the requirements to avoid or reduce the PPACA penalties. Employers also may want to consider changes to the plan, such as eligibility requirements, and use of the optional safe harbors if they address the plan sponsor's particular needs. Employee/plan participant communications materials should be reviewed and modified if necessary. In addition, employers reviewing the guidance and finding the notices lacking on specific topics should consider submitting a formal comment letter to the agencies by the deadline of Sept. 30, 2012.

For additional information about the notices on full-time employee determinations or the 90-day waiting period limitation, or for assistance with a plan review for design modifications or compliance, please contact your Milliman consultant.