EXPERT UPDATE

More Explanation on the Shared Employer Responsibility Provision (Play or Pay)

HENDERSON BROTHERS

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Our HBI staff has been fielding a lot of questions about this particular health reform provision. We expect HHS and the Department of Treasury to continue to release additional guidance and clarification in addition to the lengthy notices and FAQs already produced. This particular update is a summary of the questions we have been receiving along with the responses and suggestions we have been providing.

Independent Contractors versus Full-time Employees

Some of our "large employer" clients have suggested they will consider hiring independent contractors in the future instead of hiring full-time employees in order to avoid the mandate of providing health coverage to full-time staff. While this may appear to be a great strategy, employers should be aware that this practice could lead to misclassification. State and federal authorities have already been highly focused on employee misclassification, and now PPACA gives them one more reason to heavily scrutinize an employer's operation when a contingent workforce exists.

The proposed regulations adopt the "common law standard," which has been recognized and applied by businesses well before health reform legislation was passed. This standard states that an employment relationship exists between an individual and a company whenever the company for whom the services are performed has the right to control and direct the individual who is performing the services, the result that is to be accomplished, and the details and means by which the result is accomplished. Under this standard, an employment relationship exists if the individual doing **the work is subject to the will and control of the employer, i.e., the employer directs what shall be done and how it shall be done.** With this standard, it is not necessary for the employer to actually direct or control the manner in which the services are performed, but it is sufficient if the employer has the RIGHT to do so. The common law standard is applied for determining an employee's employer and subsequently what entity is obligated to provide affordable minimum value coverage in accordance with section 4980H.

Controlled Companies and Penalties

As communicated in a previous Expert Update, all employees of a controlled group of companies and affiliated service groups are taken into account when measuring employees to determine large employer status. It is important to understand that while the aggregation rules are used for determining large employer status, the penalties that are applied when no coverage is offered or unaffordable coverage is offered applies SEPARATELY to each member of the controlled group. If one employer provides affordable minimum value coverage to its employees, but another employer within the controlled group of companies offers no health coverage, the penalty will apply to the one employer that does not offer minimum essential coverage.

Good Faith Interpretation of the definition of "Seasonal Worker"

The Play or Pay provision of health reform refers to DOL regulations that interpret the Migrant and Seasonal Agricultural Workers Protection Act. This Act provides that "labor is performed on a seasonal basis where, ordinarily, the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the

year." After consideration, the DOL, Treasury Department and the IRS have determined that, for the purposes of section 4980H (Play or Pay), the term "seasonal worker" is not limited to agricultural or retail workers. Until further guidance is provided, employers may apply a reasonable, good faith interpretation of the term seasonal worker when counting employees and determining whether they should be treated as full-time employees.

Full-time Employees Expected to Work Less Than One Year (High Turnover Positions)

As communicated in a previous compliance update, the proposed regulations provide that a new employee is a variable hour employee if, based on the facts and circumstances at the start date, it cannot be determined that the employee is reasonably expected to be employed on average at least 30 hours per week. Some companies employ individuals who work 30 or more hours in the beginning of employment for a few months, but after that few months, the employees work well under 30 hours per week, or it is anticipated that they will work for a limited duration. The proposed regulations permit these employees to be treated as variable hour employees in 2014 if, based on the facts and circumstances as of the start date, the period in which they work 30 hours or more per week is expected to be of limited duration and it cannot be determined that the employee will work an average of 30 hours per week or more over the entire initial measurement period. However, beginning in 2015, employers will be required to assume that although the employee's hours of service will vary, the employee will continue to be employed by the employer for the entire initial measurement period; accordingly, the employer will not be permitted to take into account the likelihood that the employee's employment will terminate before the end of the initial measurement period.

Calculating Hours of Service Using Payroll Periods

The Departments anticipate that many employers will use the optional look-back measurement periods to identify full-time employees. Using the measurement period, administrative period and stability periods illustrated in the proposed regulations will be cumbersome. However, this proposed method appears to be the best approach to make certain all full-time employees are offered coverage; especially when an

employer has a large variable hour workforce. As communicated in a previous Expert Update, the measurement periods must extend for at **least three months**, and these measurement periods may extend for as many as **twelve months**. For most employers, the use of payroll period data will not be necessary. But, some of our clients have indicated that pulling data is difficult, and the only manner in which this information can be produced is from the payroll system. The proposed regulations permit an employer to use successive payroll periods instead of calendar months for measuring hours worked—as long as the proper adjustments are made so that the time measured is equivalent to months. Employers may need to adjust the starting and ending dates of their measurement periods in order to avoid splitting employee's regular payroll periods.

Remember, the proposed regulations indicate that an employee's hours of service should include:

1) Each hour for which an employee is paid, or entitled to payment for the performance of duties;

2) Each hour for which an employee is entitled to paid time off, including vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence.

A previous Notice described a potential rule that would limit paid time off to a 160-hour limit. In response to comments and concerns about this limit, the proposed regulations remove this 160-hour limit, so that ALL periods of paid leave must be taken into account.

Different Measurement Periods for Different Classes of Employees

An applicable large employer may apply different measurement periods, stability periods and administrative periods for different classes of employees. Notice 2012-58 illustrated that the following category of employees can be measured with different durations:

- Each group of collectively bargained employees covered by a separate CBA
- Collectively bargained and non-collectively bargained employees
- Salaried employees and hourly employees
- Employees whose primary places of employment are in different states

Feel free to contact your HBI consultant for further information.

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