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Latest Employer Mandate Guidance Brings Additional Relief, Clarity

After granting all employers a reprieve from the employer mandate penalties for 2014, the IRS has provided additional headline-making temporary relief from the employer mandate penalties for some employers for 2015, and additional transition relief for all employers. Prior to the latest round of guidance, employers with at least 50 full-time equivalent employees during 2014 were to be required in 2015 to either offer affordable health insurance coverage providing minimum value to at least 95% of their full-time employees or pay a penalty under the employer mandate.

Final regulations issued in February regarding application of the employer mandate provide additional relief and transition guidance:

- **Employers with 50-99 full-time equivalent employees in 2014.** These employers will not face any penalties for failure to comply with the employer mandate in 2015, provided certain requirements are met. First, an employer must not reduce the size of its workforce or the overall hours of service of its employees in order to obtain the relief. However, if the employer has bona fide business reasons for doing so (other than avoidance of penalties), the relief will still be available. Second, employers must not eliminate or materially reduce the health coverage, if any, offered as of February 9, 2014. Finally, employers must certify that they have not taken the above-mentioned prohibited actions, if they wish to be afforded this relief.
- **Computation of number of full-time equivalent employees for 2015.** Employers may use a reference period of as short as six consecutive months in 2014 to determine the number of the employer's full-time equivalent employees and whether the employer is required to offer coverage for 2015, instead of the full calendar year as will be required in future years.
- **When employers will be treated as offering coverage to employees for 2015.** Employers subject to the employer mandate in 2015 need only offer affordable coverage providing minimum value to 70% of their full-time employees (and their dependents), instead of 95% as will be required in 2016 and following. Note that even if an employer subject to the employer mandate offers coverage to at least 70% of its full-time employees (and their dependents) in 2015, the employer may still be subject to an annual penalty of $3,000 times the number of full-time employees (if any) who receive a premium tax credit for subsidized coverage in the public marketplace.
- **Employers with plan years that do not start on January 1, 2015.** These employers will not be subject to penalties for failing to offer qualifying coverage to their eligible full-time employees for any month prior to the start of the 2015 plan year, provided that certain requirements are met. First, the plan must be in effect as of December 27, 2012. Second, the employer must not have modified its plan year since December 27, 2012, to start at a later date. Third, the employer must offer affordable coverage providing minimum value to at least 70% of its full-time employees (and their dependents) on the first day of its 2015 plan year. Finally, the relevant eligibility criteria are those that were in effect as of February 9, 2014. This relief will not prevent the employer from having to comply

with its reporting requirements under Code Section 6056, which requires employers to provide employees and the IRS with certain information relating to coverage offered to employees, when those rules are issued.

- **Employer penalty for failure to offer coverage in 2015.** Employers that are subject to the employer mandate and fail to offer coverage to at least 95% (or 70% for certain employers in 2015) of their full-time employees may exclude 80 full-time employees, instead of 30 as will be the case in 2016 and following, in determining the amount of the penalty. This relief is available only if the employer did not modify its plan year after February 9, 2014 to begin on a later calendar date.
- **Coverage of dependents of full-time employees for 2015.** Employers subject to the employer mandate are not required to offer coverage to the dependents of their full-time employees, provided that the employer is taking steps to provide such coverage in 2016 and the employer did not already offer dependent coverage in its 2013 or 2014 plan years.
- **Coverage offers made in January 2015.** An employer will be treated as offering coverage to its full-time employees on January 1, 2015 if it provides coverage no later than the first day of the payroll period that begins in January 2015. This relief is necessary because an employer is not treated as offering coverage in a calendar month, and therefore may be subject to a penalty, unless the employer offers coverage for all days during the month.

In addition to this welcome relief, the final regulations provide much needed guidance on the application of the employer mandate including:

- **New Employers.** The determination of whether a new employer is subject to the employer mandate during its first calendar year is based on whether the employer reasonably expects at the time the business comes into existence to have at least 50 full-time equivalent employees.
- **Employers that Become Large Employers.** For the first year that the employer is a large employer, an employer will have until April 1 of the first year it is a large employer to offer affordable coverage without being liable for the $2,000 employer mandate penalty. This rule does not apply if the employer was subject to the employer mandate for any preceding year (or would have been, but for a delay in the effective date). For example, employers that had 50-99 employees in 2014 will need to offer coverage no later than the first pay period beginning in January 2016.
- **Aggregation of Business Entities.** While separate business entities may be aggregated in determining whether the businesses are subject to the employer mandate, the penalty determination is applied separately to each business entity. However, for purposes of determining the amount of the penalty for failure to offer coverage to at least 95% (70% for 2015) of the employer's full-time employees (and their dependents), the 30 full-time employee reduction (80 employee reduction for 2015) is allocated ratably among the business entities that are aggregated, based on the number of full-time employees employed by each entity.
- **Determination of Offering of Coverage.** Even if separate business entities are aggregated for purposes of determining whether the businesses are subject to the employer mandate, each business entity is analyzed separately in determining whether the business entity offers coverage to its employees. For example, each separate business must offer coverage to at least 95% of its full-time employees under the mandate, without regard to whether the aggregated business entities offer coverage to at least 95% of their aggregated full-time employees.
- **Full-Time Employees Performing Services for Multiple Business Entities.** If a full-time employee performs services for two or more business entities that are aggregated, the employee is treated as a full-time employee only of the business entity for which the employee performs the most hours of service during the applicable calendar month.
- **Full-Time Employee Determination.** For purposes of identifying a full-time employee, the hours of service that the employee performs for certain related business entities are combined.
- **Dependent Coverage.** To comply with the employer mandate, employees must provide coverage not only to their full-time employees but also to the dependents of their full-time employees. A dependent for this purpose includes children and adopted children who have not reached the age of 26, but does not include spouses, stepchildren and foster children. A dependent is treated as a dependent for the entire month during which the dependent attains age 26.
- **Worker Classification.** A worker is an employee for purposes of the employer mandate only if the worker is an employee under the common law standard, which uses a facts and circumstances test based primarily on direction and control. Sole proprietors, partners in a partnership, 2-percent S corporation shareholders, certain real estate

agents and direct sellers, and individuals who meet the technical definition of "leased employee" in the Code are not treated as employees for any purpose of the employer mandate including determining whether coverage is provided to at least 95% of an employer's full-time employees.

- **Worker Classification – Section 530 Relief.** Section 530 of the Revenue Act of 1978 provides relief from certain employment tax provisions in the case of misclassified workers provided that certain requirements are met. However, that relief is not available under the employer mandate and cannot be relied upon to reduce the penalties applicable to an employer subject to the employer mandate. This means that even if an employer has a reasonable basis for not treating an individual as an employee, the employer could be subject to retroactive employer mandate penalties if the IRS determines otherwise.
- **On-Call Employees.** Employers must use a reasonable method of crediting hours of service for employees who are on-call, which include crediting one hour of service for every on-call hour for which the employee is compensated. Generally, it is not reasonable for an employer to fail to credit an employee with an hour of service for any on-call hour for which the employee is treated as working under Department of Labor rules and regulations.
- **Professional Employer Organization Employees.** Temporary and other workers paid by third parties may still be common law employees of the recipient, rather than the firm that issues the W-2. However, the IRS provided limited relief to the recipient organization with respect to the employer mandate. Under this limited relief, the IRS will treat an offer of coverage as being made by a professional employer organization on behalf of a client employer if the fee paid by the employer to the professional employer for an employee enrolled in health coverage is higher than the fee that the client employer would pay for the same employee if the employee did not enroll in health coverage.
- **Seasonal Employees.** If the customary employment of an employment position is six months or less and typically begins around the same time of year each year, employees occupying that position generally can be considered seasonal and can be treated as variable hour employees when determining full-time status over the course of a measurement period.
- **Rehired Employees.** A rehired employee is generally considered as a new employee if the employee experiences a break in service of at least 13 weeks. However, this rule does not apply to educational organizations, which are subject a 26-week break-in-service rule.
- **Student Employees.** The hours of service of student employees participating in federal or state-sponsored work-study programs are not counted in determining an employer's number of full-time employees or full-time equivalent employees.
- **Volunteers.** The hours of service of volunteers, who do not receive and are not entitled to receive compensation in exchange for their services, are not counted in determining an employer's number of full-time employees or full-time equivalent employees. In addition, volunteers who are employees of a government entity or a tax-exempt organization are not counted in determining an employer's number of full-time employees or full-time equivalent employees if the only compensation received is in the form of reimbursements for reasonable expenses or reasonable benefits and nominal fees customarily paid by similar entities to such volunteers.
- **Ability to Decline an Offer of Coverage.** Employers are required to provide employees with an effective opportunity to decline an offer of coverage, unless the coverage provides minimum value and is offered at no cost or at a cost that is no more than 9.5% of the federal poverty line for a single individual (divided by 12).
- **Medium of Coverage Offers.** Offers of coverage may be made electronically.

The final regulations and preamble provide much detail regarding the application of the employer mandate. Employers are advised to be cautious in applying the general principles outlined above, as there are caveats and prerequisites to many of the general rules. For more information, contact one of the attorneys below or your Jones Walker relationship attorney.

— Timothy P. Brechtel and B. Trevor Wilson

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, please contact your Jones Walker relationship attorney or:

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