

ACA EMPLOYER MANDATE FINAL REGULATIONS: AN OVERVIEW

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The Treasury Department recently issued final regulations under Code Section 4980H, which sets forth the shared responsibility (or “employer mandate”) provisions of the Affordable Care Act (“ACA”). The final rule contains few surprises, though it does delay application of the mandate for mid-size employers until the beginning of the 2016 plan year.

Background

The employer mandate provisions of ACA, originally slated to take effect in 2014, apply to employers that average 50 or more full-time employees during the preceding calendar year (“Applicable Large Employers” or “ALEs”). For the limited purpose of determining ALE status only, an employer must count full-time employees and full-time equivalent employees. ACA defines full-time employee, for ALE and all other employer mandate purposes, as an employee who works at least 30 hours per week.¹

Under the employer mandate, ALEs that do not offer affordable, minimum value health coverage to full-time employees risk annual monetary penalties.

The penalty for failure to offer coverage (the “no offer” penalty) will be assessed if (1) the employer fails to offer coverage to all its full-time employees, (2) one of the affected full-time employees gets coverage through the exchange operating in that state, and (3) qualifies for a subsidy through the exchange. An individual who obtains coverage through an exchange will qualify for a subsidy if his or her household income is between 100% and 400% of the federal poverty level. The annual no offer penalty is \$2,000 per full-time employee (disregarding the first 30 full-time employees).

If the employer offers coverage to full-time employees but the coverage is either unaffordable or does not meet minimum value standards, the “high cost/low value” penalty will be assessed if (1) one of the employees with respect to whom the coverage is unaffordable or of low value declines the employer’s coverage, (2) gets coverage through the exchange operating in that state, and (3) qualifies for a subsidy through the exchange (using the poverty level guidelines, above). The annual high cost/low value penalty is the lesser of (a) \$3,000 per full-time employee who gets subsidized exchange coverage, or (b) the no-offer penalty.

Proposed Regulations

The proposed regulations, published on December 28, 2012, set forth, among other things, detailed rules for counting employees, including full-time and full-time equivalent employees, for purposes of determining both ALE status and which employees an ALE must make an offer

¹ Treas. Reg. § 54.4980H-2(b).

of coverage to avoid risk of penalties. As painfully detailed as the proposed employee counting rules were, they left and raised a number of questions, including what a reasonable definition of seasonal employee might be and what constitutes a reasonable hours-crediting method for adjunct faculty or on-call employees.

Responding to comments on the proposed regulations as well as the political maelstrom surrounding all things ACA, on July 9, 2013, in Notice 2013-45, the IRS announced a delay of the employer mandate reporting obligations and penalties for *all* ALEs until the 2015 plan year.

The Final Regulations: Another Delay

Fast-forward to February 12, 2014: the final regulations arrive, bringing with them another welcome delay in the reporting obligations and potential penalties under the employer mandate. ALEs that qualify for the delay will not be subject to the employer mandate until the first day of the plan year that begins in 2016. However, unlike the delay afforded employers in Notice 2013-45, the delay provided in the final regulations applies only to a subset of ALEs: those employers with an average of 50 to 99 full-time and full-time equivalent employees (“mid-size” ALEs).

To determine if it qualifies as a mid-size ALE, an employer can use either the 2014 calendar year, or, under transition guidance, any consecutive 6-month period in 2014. 79 Fed. Reg. 29, p. 8574 (February 12, 2014). It is important to note that employers that may benefit from using the seasonal *worker* exception to ALE status (explained below) should consider using the entire 2014 calendar year to determine its ALE status, because the seasonal worker exception will be applied on a calendar year basis regardless of the transition relief.

ALEs must meet two additional conditions in order to qualify for the delay. The first condition relates to the size of the employer’s workforce: using February 9, 2014 as a benchmark, an employer may not reduce the size of its workforce during 2014 for the purpose of qualifying for the delay. In other words, an employer cannot RIF its way to mid-size ALE status. A reduction in force for (well-documented) *bona fide* business reasons, however, is not prohibited.²

The second condition relates to the health care coverage an employer offered as of February 9, 2014 (if any): a mid-size ALE will not qualify for the delay if, during the 2014 or 2015 plan years, it eliminates or materially reduces the coverage it offered as of February 9, 2014. That prohibition has three constituent elements: (1) a mid-size ALE must continue to offer an employer *contribution* for employee-only coverage that is at least 95% of the dollar amount or the percentage paid by the employer on February 9, 2014 (if any); (2) if employee-only *benefits* change during the 2014 or 2015 plan years, the new benefits must provide minimum value (as defined for purposes of the high cost/low value penalty); and (3) the employer must not narrow or reduce the class(es) of employees (or dependents) who were *eligible* for the employer’s coverage as of February 9, 2014.³

While more limited than the earlier delay, the delay of employer mandate obligations until 2016 will likely benefit a significant number of mid-size employers – and not just those mid-size

² 79 Fed. Reg. 29, p. 8574 (February 12, 2014).

³ *Id.*

employers that haven't started planning. Those mid-size employers that were already gearing up to implement the employer mandate in 2015 are perhaps best-situated to take full advantage of the delay: they will have the 2015 plan year as a dry-run for 2016.

Highlights of Other Guidance in the Final Regulations

Transition Relief for the "Offer of Coverage" Requirement

The original employer mandate "offer of coverage" provisions required an ALE to offer coverage to all its full-time employees in order to avoid a no offer penalty. The proposed regulations softened *all* to *substantially all*, which the proposed regulations define as 95% of the employer's full-time employees. The preamble to the final regulations provide a transition rule for the 2015 plan year (and only the 2015 plan year): an employer can avoid the no offer penalty during the 2015 plan year if it offers coverage to at least 70% of its full-time employees. The threshold reverts to 95% for 2016 plan year, even for those mid-size ALEs that qualify for the delay until 2016.⁴

Dependent Coverage

Notably, the final regulations adopt the definition of "dependent" from the proposed regulations, which includes children but not spouses. However, the final regulations exclude both foster children and stepchildren from the definition of dependent.

The final regulations also extend to the 2015 plan year the transition relief provided for in the proposed regulations regarding coverage of dependents: an ALE will not be subject to a penalty for failure to offer coverage (or for offering coverage that is high cost/low value) to dependents in 2015 if "taking steps" toward offering dependent coverage for plan year 2016. This relief includes relief for employers that are offering coverage to some but not all dependents as defined under the final regulations.

Crediting Hours of Service for Adjunct Faculty

The basic hours-crediting rule for determining full-time employee status for the employer mandate is substantially similar to the rule currently applicable to crediting hours of service for qualified retirement plan purposes: an employee must be credited for (1) every hour of service for which "an employee is paid, or entitled to payment, for the performance of duties for the employer, and (2) each hour of service for which an employee is paid, or entitled to payment by the employer on account of a period of time during which no duties are performed due to vacation, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence."⁵

With respect to employees whose compensation is not based primarily on hours (as opposed to salaried employees, for whom still different rules apply), the proposed (and final) regulations extoll employers to use a "reasonable method" for crediting hours of service. The preamble to

⁴ *Id* at p. 8575.

⁵ Treas. Reg. § 54.4980H-1(a)(24).

the proposed regulations helpfully provided that “it would not be reasonable method of crediting hours ... in the case of an instructor, such as an adjunct faculty member, to take into account only classroom or other instruction time and not other hours that are necessary to perform the employee’s duties, such as class preparation time.”⁶

The preamble to the final regulations offers a safe harbor hours-crediting method for adjunct faculty which, while it does provide some certainty for academic employers, may well be more generous than the methods such employers thought were “reasonable”. The preamble to the final regulations stresses that the safe harbor is not the only reasonable method for crediting hours for adjunct faculty; however, as with most safe harbors, it is likely to be treated as a floor.

Under the safe harbor rule, which employers can rely upon through at least the end of the 2015 plan year, adjunct faculty are to be credited with:

- 2-1/4 hours of service per week for each hour of teaching time (i.e., an extra 1-1/4 hours for preparation, grading, etc.);

PLUS

- 1 hour of service per week for each additional hour outside the classroom for *required* duties such as office hours or attendance at faculty meetings.⁷

Crediting On-Call Hours

The proposed regulations did not directly address on-call hours. In response to comments, the preamble to the final regulations provides that employers must use a reasonable method for counting on-call hours, and states that it is *unreasonable* to fail to credit an employee with an hour of service for any on-call hour for which:

1. Payment is made or due by the employer;
2. For which the employee is required to remain on the employer’s premises; or
3. For which the employee’s activities while on-call are subject to substantial restrictions.

Seasonal Employees

For purposes of determining full-time employee status for the no offer and high cost/low value penalties, both the proposed and final regulations use the term “seasonal *employee*”. The final regulations supply a much needed definition of seasonal employee: an employee in a position with a *customary* annual employment period of no longer than 6 months. “Customary”, in turn, means “by nature of the position” rather than based on the employer’s typical turnover rate. Additionally, the employment period of a seasonal employee must begin at approximately the

⁶ 79 Fed. Reg. 29, pp. 8551-8552 (February 12, 2014).

⁷ *Id.*

same time each year.⁸

Consistent with the proposed regulations, the final rule provides that seasonal employees are to be treated under the same rules applicable to variable hours employees for purposes of determining whether they are full-time employees, even if, upon hire, they are reasonably expected to work at least 30 hours per week. This is significant because it enables employers to employ an initial measurement period to a seasonal employee thereby avoiding the need to make an offer coverage to seasonal employee during that measurement period and possibly avoiding the need to offer coverage in the subsequent stability period, provided the seasonal employee does not work an average of at least 30 hours per week during the initial measurement period. This militates in favor of using a 12-month initial measurement and stability period.

Point of clarification: many employers (and some practitioners) took from the proposed regulations the notion that the definition of a seasonal employee was one who worked no more than 120 days per year. The confusion stems from the fact that, consistent with Code section 4980H(c)(2)(B), the proposed (and final) regulations provide what is known as the “seasonal *worker* exception” for purposes of determining ALE status.

Code section 4980H(c)(2)(B)(ii) and the regulations define the term “seasonal worker” to include workers who perform labor or services on a seasonal basis (consistent with a reasonable good faith interpretation of 29 CFR 500.20(s)(1)) and retail workers employed exclusively during holiday seasons. The regulations provide that employers may apply a reasonable good faith interpretation of the term. The seasonal *worker* exception to ALE status provides that “an employer shall not be considered to employ more than 50 full-time employees if (I) the employer’s workforce exceeds 50 full-time employees for 120 days or fewer during the calendar year, and (II) the employees in excess of 50 employed during such 120-day period were seasonal workers.”⁹ The regulations clarify that the seasonal worker exception is applied on a calendar year look-back basis.

Thus, the seasonal worker exception may help an employer avoid ALE status, and the seasonal employee definition (which is more generous) may enable an ALE to avoid offering coverage to seasonal employees without risk of penalty.

Conclusion

The final regulations under Code section 4980H contain something to disappoint all stakeholders: a delay, but only for mid-size employers; a definition of seasonal employee, which is more generous to employers than to seasonal employees; a safe harbor for crediting adjunct faculty hours, which errs on the side of over-crediting, rendering a potentially useful rule unattractive to many academic employers. The list could go on (after all, this is only a selective overview of the final regulations) and, at the rate that delays and other “tweaks” to the employer mandate and other features of ACA have been multiplying, this won’t be the last such list for employer mandate guidance.

⁸ Treas. Reg. §54.4980H-1(a)(38).

⁹ Code section 4980H(c)(2)(B)(i).