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What Employer Shared Responsibility Does Not Say

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So much energy has been spent on what the final regulations on the employer shared responsibility tax and the related final reporting regulations (the "ESRR"), that some of the most significant considerations have been missed because people have focused on the complex details and have not focused on what these regulations do not say or require. Sometimes what is not said is as important as or more important than what is said. This is intended to dispel some myths circulating and encourage everyone to take a step back and remember the big picture of the employer shared responsibility tax and related reporting rules.

It is critical to remember the big picture when you look at the complexity of these regulations and remember these are only the rules for tax assessment and for reporting of coverage offers and coverage provided. The tax is assessed on the applicable large employer member and reporting is done by the same entity (i.e., the individual legal entity within the controlled group of entities that has 50 or more full-time employees or full time employee equivalents). This alert will refer to an employer as a short hand for an applicable large employer member, the party on which the ESRR taxes are assessed. *While the ESRR include a complex set of rules for determining who is a full-time employee, not every violation of the complexities will necessarily result in a tax assessment. In other words, there may be more than one way for an employer to defeat an ESRR tax assessment when the employer considers the ESRR in total and the various alternatives an employer has under all the other applicable laws.*

Taxes will be assessed under Code section 4980H(a) (the "A Tax") when an employer fails to offer at least 95% (70% in 2015) of its full-time employees coverage and this is measured on a month by month basis because the tax is assessed on a month by month basis- Yes this means the 95% must be met on a monthly basis, much like the over-reporting relief of 98% must be satisfied on a month by month basis and that an applicable large employer member must know who its full-time employees as defined by the ESRR are to know it meets the applicable percentage thresholds.

Taxes will be assessed under Code section 4980H(b) (the "B Tax") when a full-time employee with income below a certain level obtains coverage on the insurance marketplace and gets a premium tax credit or cost sharing reduction from the marketplace and such employee's employer does not offer him or her coverage that both provides minimum value and is "affordable" as determined by the ESRR standards. There are two affordability standards one for the premium tax credit and a separate one for the B Tax. The percentage for the premium tax credit the individual receives is indexed per the statute and has been adjusted from 9.5% to 9.56% for 2015. The standard for affordability for imposition of the B Tax in the statute is tied to whether the premium tax credit is provided to an individual (this will automatically pick up the 9.56% standard when calculated after year end).In order to ease the administrative burden for employers in trying to plan for avoiding the B Tax, the IRS provided employers with 3 alternative safe harbors to determine "affordability" of their coverage (akin to the percentage of household income for the premium tax credit for the individual, but not requiring retroactive determination or the data for the full household income). The safe harbor's determination of "affordability" is specified in the regulations as 9.5% of certain income measures (W-2, Rate of Pay and the federal poverty level), without the indexing provided in the premium tax credit. This slight inconsistency is something of which the government is aware and they recognize the confusion it causes.

The key thing to remember as one looks at the complexity in the ESRR determination of full-time employee status, is that while the complexity is necessary to determine full-time employee status to know whether the A Tax applies, *not every slip up in calculating if an individual is a full-time employee will necessarily result in a penalty under the B Tax or in failure to satisfy the safe harbor to avoid the A Tax. With that quick review of the big picture, consider what the regulations do not say… and what that means for an employer.*

1. *The ESRR does not require an employer to use the ESRR rules for determining full-time employee status to determine plan eligibility.* Plans must only use those rules to determine on whom an A Tax or B Tax is assessable and how to defend against assessment on the wrong person. Plans can keep their eligibility terms,

but must consider whether any changes might be necessary to the plan's eligibility requirements to minimize exposure to the A Tax or B Tax.

2. *The ESRR full-time employee status determination rules are never required to be incorporated into a plan document.* The ESRR never require that its rules for full-time employee status determination be incorporated into any plan document. However, if an employer chooses to use those rules to determine eligibility for its health plan, then they need to be incorporated into the plan document because the plan document under ERISA must explain who is and who is not eligible. An employer may be able to minimize its potential A Tax and B Tax exposure without adopting all of the ESRR rules on full-time status determination depending upon the employer's current eligibility rules.

3. *The ESRR rules never require an employer to identify in advance which method it will use for a particular category of employees for a particular calendar year*. This means you do not currently need to decide which rules you will use to determine full-time employee status to defend against any tax assessment for 2015, but if you do not designate and set up the data collection and administrative scheme in advance, you must capture the hours worked by month data and the coverage offered and provided by calendar month data in order to be able to report and defend against assessment later. Record capture, retention and complying with the reporting requirements must be considered carefully if this approach is used as well as strategically determining how to minimize the employer's tax exposure for the A Tax and the B Tax.

4. *The ESRR rules do not require an employer to adopt the same rules for determining on which employees an A Tax or B Tax might be assessed for more than one year at a time, but only to use the same method within one of the specified categories of employees for a particular calendar year*. The employer is free to vary the full-time status determination methods it will use for its employees each year by each category and these choices are not required to be specified in a plan document or in any collective bargaining agreement because these are tax rules and not eligibility rules. This permits the employer to have the flexibility in future years to make changes if the economic or business climate changes for the employer.

5. *While there are a complex set of rules for determining full-time employee status in the regulations under both the monthly method and the lookback stability method, not every violation of each of those detailed rules will result in any tax issue, only those that drop the employer below the safe harbor threshold for the A Tax or that result in an employee obtaining coverage and a premium tax credit from the marketplace if the employee's income is low enough will result in a penalty.* There are ways an employer can structure its health coverage offering to low income employees that might be eligible for the premium tax credit to avoid the "B Tax" and not violate any of the tax law requirements prohibiting discrimination in favor of the highly compensated.

6. *The ESRR rules and the existing non-discrimination rules for self-insured group health plans do not prohibit an employer offering its least compensated employees an additional subsidization of their premiums to keep it affordable, but not extend such subsidization to persons who are not likely to be eligible for the premium tax credit as long as the subsidization does not violate any of the tax laws prohibitions on discrimination or any other laws prohibitions on discrimination*.

7. *The preamble to the ESRR discusses that dependents aging out of the health plan might need to be provided coverage to the end of the month; however, the ESRR does not include such a requirement. Remember the A Tax is avoided as long as coverage is offered for each day in a month and a dependent aging out of the health plan's coverage should be offered COBRA coverage for the duration of the month and thus the offer of coverage would be provided for the month*. Second, the B Tax is tied to offering coverage that is affordable and provides minimum value, the COBRA coverage would provide minimum value and coverage affordability is only tested currently on the employee only premium basis, not on the basis of the premium the family pays.

8. *The ESRR never states that its rules are the only rules an employer must consider. The ESRR never states that its rules replace or override any of the existing rules governing how an employer offers health benefits to its employees*. Employers cannot operate their health plans solely based on the ESRR, but must also consider the cafeteria plan rules and the regulations on changes in status which permit mid-year changes in benefit elections and the ESRR do not amend or override the cafeteria plan rules. The ESRR and the cafeteria plan rules do not fit

neatly together and can produce different results. Remember that both rules must apply so that you do not make changes for ESRR that may jeopardize the pre-tax nature of the benefits under your cafeteria plan. No one ever said this would be easy.

It is important to consider what the ESRR does not say and what this means as employers plan for ESRR next year. The above list of what the ESRR does not say is not complete or exhaustive, but is an attempt to pick up some key items. While employers planning for ESRR face many rules, remember the ultimate objective is to be able to defend against any tax assessment and to do that the employer must capture and retain the appropriate data and records of hours worked, coverage offered and coverage provided by calendar month (The pay period convention for determination of full-time employee status is only for that purpose. Coverage offered and provided after transition relief expires must be on the calendar month basis). Remember there is some transition relief and to watch exactly what relief each type of transition relief provides and for which year. There is no get out of jail free card type of relief once an employer is subject to the ESRR based on its prior calendar year employment statistics.

How the ESRR applies to acquisitions of trades or businesses as asset sales or stock sales may be analyzed in a number of different ways, employers engaging in acquisitions of assets or stock of another business need to consider how and when those employees will become its full-time employees under the ESRR, as it currently exists, or may exist under future guidance (the provision for "predecessor employer" in the ESRR is "reserved" for future guidance.)

Employer Shared Responsibility Reporting Clarification

Draft reporting forms and instructions were issued in August for the employer to use in reporting on coverage offered and provided in 2015. The IRS also released questions and answers on reporting on their website. The questions on the reporting of the offers of coverage clarify that the IRS will not impose a penalty for failure to report or incorrect reporting for 2015 offers of coverage and for coverage provided as long as the employer makes a good faith effort to comply. The general method of reporting is completing the Forms 1094-C and 1095-C for offers of coverage. There are two alternative methods for certification of qualifying offers and over reporting. The questions clarify there must be only one Form 1095-C filed by the employer for each full-time employee. IRS personnel have clarified that employers planning to use the 98% rule to over report in 2015, must satisfy the 98% requirement in each month in 2015. The draft instructions confirm the 98% rule must be met for all months in the year and provide clarification on the alternate reporting, but until these are finalized the IRS is not bound by their contents.

OTHERE SUMMER HIGHLIGHTS

Post-Windsor Group Health Plan Changes

While health plans are not required to cover spouses of employees, health plans that extend coverage to domestic partners but not same gender spouses, should consider how such a choice may impact the health plan's compliance with other laws.

CMS on June 3, 2014 announced that for Medicare Secondary Payer purposes HHS will recognize any marriage legally entered into in a U.S. jurisdiction (the 50 states, territories and D.C.) or a foreign country that recognizes the marriage effective as of January 1, 2015. So if a spouse is entitled to Medicare as a spouse based upon the Social Security Administration's rules, then the individual is a spouse for Medicare's working aged rules and protections. This means that group health plans must recognize and pay claims for same-sex spouses in their group health plans after January 1, 2015 as spouses with Medicare Secondary Payer protections if they are protected by the working aged provisions. If the group health plan has a broader definition of spouse, it may pay claims using the broader definition. The spouse reporting under MMSEA 111 must include the same-sex spouses in the reporting effective as of January 1, 2015. If the group health plan does not recognize same-sex spouses but covers such individuals as domestic partners, the employer still must recognize such individuals as same-sex spouses for federal income tax purposes and for purposes of Medicare Secondary Payer protections in priority of claim payments vis-a-vis Medicare and to prevent any discrimination against the working aged as a spouse under the Medicare Secondary Payer rules, and for MMSEA 111 reporting.

This means even if the group health plan has not expanded their definition of spouse to include same sex spouses, the plan will need to process claims and provide the plan data/eligibility feed to Medicare under MMSEA 111 recognizing the same-sex spouse effective as of January 1, 2015.

Proposed FMLA regulations recognize as a spouse persons who were legally married in the state in which the marriage was celebrated. Thus, the Department of Labor has proposed following the IRS definition of who constitutes a spouse post-*Windsor.* The change to the FMLA regulations will not be effective until issued as final regulations. No effective date on this proposed change until it is issued in final regulations.

December 31, 2014 – This is the deadline by which cafeteria plans/flexible benefit plans must recognize same-sex spouses for federal income tax purposes if the marriage was celebrated in a state which recognizes same-sex marriage. An amendment is required if "spouse" is defined as opposite gender or by referencing section 3 of DOMA definition.

There are still unanswered questions regarding how *Windsor* impacts COBRA and COBRA notification requirements, among other issues related to *Windsor.*

Other Health Plans Deadlines to Watch

September 22, 2014 – All group health plans' business associate agreements need to be updated for the 2013 changes to the HIPAA Privacy and Security Regulations.

September 30, 2014 – Distribute summaries of benefits and coverage for 2015 plan year for calendar year plans.

October 15, 2014 – For all group plans seeking the Medicare Prescription Drug Subsidy, the plan must provide the Medicare prescription drug creditable coverage notice by October 15, 2014. This is a condition that must be satisfied to receive the prescription drug subsidy.

November 5, 2014 – Large group self-insured health plans must have applied for on the CMS website so it will be able to use its health plan identifier on standard electronic claim transactions beginning no later than November 7, 2016. Subhealth plans also must obtain members. Subhealth plans are loosely defined and appear to be similar to a benefit package or benefit option offered under the group health plans such as a PPO or HMO or HDHP option. The health plan identified will be used as part of the standard electronic claims transaction. The guidance is not crystal clear and some vendors are filing also as an Other type of entity. All of the registration is done on the government's website and there is a manual to assist plans in registering for this number.

November 15, 2014 – Self-insured group health plans and health insurers (other than dental or vision plans or retiree plans, HRAs, EAPs, HSAs, health flexible spending accounts, prescription drug only coverage, or wellness programs) are subject to the transitional reinsurance fee for 2014 ($63), 2014 ($44) and 2016 at a yet to be determined per covered life rate. Self-insured group health plans must submit their 2014 enrollment count by November 15, 2014, pay $52.50 per covered life by January 15, 2015 for the 2014 year and pay the $10.50 per covered life balanced for 2014 no later than November 15, 2015.

Remember to Update Notices

Remember to update (1) COBRA notices for the changes, related to the health insurance marketplace that were added in the most recent model notices in the DoL website; (2) CHIP Notices for the updated notice related to state children's health insurance program and Medicaid contact information.

Wellness Program

The Equal Employment Opportunity Commission ("EEOC") is pursuing enforcement actions against wellness programs it believes to not be "voluntary." The EEOC filed suit against a Wisconsin based employer that "required" its employees to submit to medical exams and inquiries that were not "job related" as a violation of the Americans with Disability Act. The EEOC's attorney indicated that the wellness program cannot be compelled by imposing enormous penalties such as 100% of the premium cost or fining the employee for not participating in the wellness program. Such enforcement actions should be monitored.

Pregnancy Discrimination Act Enforcement Guidelines Updated

The updated enforcement guidelines were effective when issued. The guidelines include examples of when denying a pregnancy leave may be treated as having a disparate impact making the leave denial actionable and the guidelines also incorporate how the Pregnancy Discrimination Act interacts with the Americans with Disabilities Act and the ADA

Amendments Act of 2008 which substantially broadened the reach of the ADA. The guidelines look at certain pregnancy conditions and related disorders that may result in pregnancy physical restrictions or related limitations and provide examples of when these may constitute a disability protected by the ADA.

Independent Contractor Reclassification

Recent cases in the Ninth Circuit and in Florida Federal District Courts have reclassified independent contractors as employees. While these cases impacted the individual's status and employment rights, they also need to be watched as those decisions reclassifying employees will impact an employer's employee health benefit plans as well and the employer's obligations under the employer shared responsibility tax.

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