

Putting the ACA Health Reform Pay or Play Penalty Puzzle Together & Finding the Safe Harbor That Fits

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The health care reform employer mandate puzzle's final piece was released completing the puzzle. The Internal Revenue Service and Department of Treasury (the "IRS") recently issued more final regulations on the Affordable Care Act ("ACA") penalty tax. The additional guidance on the reporting requirements includes reporting transition rules, alternatives and options for some of the reporting requirements, but these are not the same as the safe harbors as contained in the penalty tax regulations and there is no get out of the reporting requirements free card because it is used for more than just the penalty tax. *Employers need to be careful when relying on a safe harbor or transition rule for the penalty tax to understand that relief on the penalty tax does not mean that they are relieved from the reporting requirements. The relief and transition rules for the penalty tax do not apply to the related reporting requirements. Similarly, relying on a reporting transition rule or alternative method of compliance does not mean that such relief extends to protect the employer from the penalty tax or penalties related to failing to report.* The reporting requirements are used by the IRS to administer not only the employer mandate (or pay or play penalty) but also to determine which individuals qualify for the health care premium tax credit and which individuals must pay the individual mandate penalty. So even if the employer covers 100% of all employees and dependents, the employer reporting still is necessary for the overall ACA administrative scheme for implementation to work.

A Simplified Reminder of When the Pay or Play Penalty is Assessed

The penalty is imposed on an Applicable Large Employer (a controlled group that employs 50 or more full-time employees or full-time employee equivalents) for either (1) failure to offer affordable minimum value coverage to all or at least 95% of its full-time employees and their dependents and at least one of the full-time employees receives a premium tax credit to help pay for coverage on the marketplace, or (2) offering coverage to full-time employees that is not affordable or does not provide minimum value and at least one such full-time employee purchases coverage on the marketplace/exchange and obtains a premium tax credit on the marketplace to help pay for coverage.

Two New Reporting Requirements

In order for the IRS to enforce the employer mandate, the IRS must know which employees are "full-time" and to which the employer offered health coverage and which employees or dependents had health coverage for a particular month. The first reporting requirement applies to self insured group health plans and health insurance issuers and requires reporting to the IRS and the employee of all persons whom the self-insured health plan provided minimum essential coverage and requires them to collect the names, tax identification numbers and birthdates of all employees, spouses and dependents so they can report to whom they provided minimum essential coverage. So this requires reporting on everyone to whom a self-insured health plan or health insurer provides minimum essential coverage. This report is also provided to the individuals who elect or purchase the coverage by providing it to the "responsible person" for their use on their individual tax return. This requires collection of tax identification numbers, names and birthdates of all dependents covered. Self insured employer plans should plan to solicit for this additional identifying information for covered dependents at annual enrollment, and at initial enrollment for new hires, and to follow up at least one additional time during the calendar year to collect missing information to be able to avoid imposition of the penalty related to failing to report this information for each covered individual.

The second reporting requirement requires the Applicable Large Employer Members who offer coverage to report the full-time employees (as defined under the penalty tax rules) to whom it offered coverage with minimum value that was affordable, using 9.5% of the federal poverty level as the standard of affordability. This also mandates providing each of the full-time employees with statements regarding for which months coverage was offered to them.

Employers must know who is a full-time employee and the dependents and spouses of such employee to know on whom they must report to the IRS regarding to whom coverage was offered; however, they must report on all persons to whom

coverage was provided who are the responsible persons for such individual's reporting of compliance with the individual mandate. There are penalties for failing to file complete returns or reports for both of the newly required reports and for reporting inaccurately and for distributing incorrect reports of \$100 per form up to \$1,500,000 per year (there is a report sent to the IRS and a form provided to each FTE). While some alternative methods may limit the information that must be provided to the full-time employees, only one of the alternative compliance methods eliminated the obligation to initially determine which employee was a full-time employee, provided the ALE Member can later either prove the individual was not a full-time employee, or pay the penalties for not complying with the reporting requirements. Thus, data for making the full-time employee determination either must be captured or the employer must be prepared to pay all the applicable penalties.

The employer must also know which employees are full-time employees (as defined by the regulations and as explained at a high level in our last alert) for each month of the year beginning in 2015, for measurement periods starting in 2014, or for December 2014 if the employer uses the monthly facts and circumstances test, in order for the employer to know on whom it must report to the IRS regarding whether affordable coverage was offered for any particular month in a calendar year to such full-time employee, and how much such coverage cost and also the dependents' and spouses' names, Social Security Numbers and dates of birth. Employers must request the dependent social security numbers two times each year to demonstrate they have made a good faith effort to be able to avoid a penalty for failing to include such information in the required reports as to whom the plan provides minimum essential coverage.

The definition and determination of who is a full-time employee in the final penalty tax regulations will have implications for (1) an employer's record capture and retention to enable an employer to defend against pay or play penalty tax assessments, and (2) the employer's ability to comply with the reporting requirements and avoid penalties for incomplete or inaccurate reporting. The definitions were discussed in more detail in our last alert and are not repeated here. You may find our last alert at <http://www.winstead.com/NewsEvents/PublicationsSpeeches>.

Transition Rules, Safe Harbors and Alternatives

Transition Rule For Employers with 50 to 99 FTEs or FTEEs for Pay or Play Penalty Tax and Certain Reporting Requirements

Employers who have 50 or more individuals who are treated as either FTEs or FTEEs and less than 100 will not have to pay the assessable penalty for any individual in 2014 or 2015 and the pay or play penalty will not apply to those ALEs until 2016. For employers with 100 or more employees who are either FTEs or FTEEs on more than 120 days in the prior calendar year will be required to comply in 2015 and pay the penalty in 2015 for anyone who does not meet the requirements.

Such employers are also relieved from certain parts of reporting requirements under transition rules for the same year by permitting the employer to certify its compliance with the transition rule on the transmittal form, but the relief does not extend to relieve the employer from furnishing the statements to the full-time employees related to the month in which they were each offered coverage. If the plan is self-insured, the plan must also report to whom it provided minimum essential coverage and the calendar months in which such coverage was offered. This includes providing a statement to the individual employee and his dependents regarding who was covered in which months.

95% Safe Harbor/Transition Rules for the Penalty Tax and Related Alternate Rule for Reporting on Coverage Offered

The penalty tax regulations included a safe harbor permitting an employer to avoid the penalty for failure to offer coverage if the employer met the safe harbor by offering affordable coverage to all but 5% of its employees, or if greater to all but 5 employees. This safe harbor is expanded for 2015 to permit employers to avoid the penalty tax under Code section 4980H(a) for failure to offer affordable coverage if the employer offers affordable coverage to all but 30% of its FTEs, or it offers affordable coverage to at least 70% of its employees as of the first day of the 2015 plan year, then no 4980H(a) penalty (the penalty for failing to offer coverage) applies for the months in the plan year during calendar year 2015. This expansion of the safe harbor applies for 2015 if certain other requirements are satisfied.

If an employer uses this safe harbor with respect to avoiding the penalty tax, there is an alternative method to comply with the reporting requirements related to offers of coverage by certifying that at least 95% of its full-time employees, spouses and dependents were offered coverage, and if this certification is made, the employer may instead of providing Form 1095-C to all of its full-time employees, provide to each of its full-time employees a statement to be defined in the

instructions to the form regarding whether the employee received a qualifying offer of health coverage for all, some or none of the months, and if less than all for which months, along with other information. Note this statement is still required to be provided to only full-time employees. This reporting alternative is available for 2015 as an optional method.

95% Safe Harbor Rule for the Penalty Tax combined with the 98% Alternate Reporting Rule

However, if the 95% Safe Harbor from the shared responsibility penalty tax is combined with the 98% Safe Harbor Reporting Relief (explained below), the ALE Member can avoid determining whether any particular employee is a shared responsibility penalty tax “full-time employee” until an employee goes to the exchange and gets a premium tax credit and the IRS assesses a penalty tax on such individual. At the time of such assessment, the employer must then be able to either determine if the individual was not a full-time employee or it must pay the assessed penalty tax.

It is important to remember that even if the employer uses this safe harbor to avoid imposition of the 4980H(a) penalty for failure to offer coverage, it still may be subject to the penalty under 4980H(b) when an employee seeks coverage from the marketplace and obtains a premium tax credit if the employer’s coverage is either not affordable or does not provide minimum value and then must be able to pull the data to defend itself against the penalty tax.

98% Safe Harbor for Reporting Relief

The reporting regulations related to the offer of coverage included a new temporary safe harbor to avoid certain portions of the reporting requirements, but no relief was provided for the penalty tax, if the employer offered coverage to 98% of all employees; however this provides relief from a portion of the reporting requirement on Form 1095-C and does not negate all of the reporting requirements, nor does it fully eliminate the need to determine which employees are full-time. If the individual uses only the 98% safe harbor for reporting relief, it will not exempt the ALE Member from any penalties if it failed to report on a full-time employee. Thus, this alternative method may provide some temporary relief and it delays determining full-time status until contacted by the IRS, but at that contact, the ALE Member must be able to either prove the individual was not a “full-time employee” based upon its records of hours worked, or it must pay the applicable shared responsibility penalty and the penalties for failure to report on the full-time employees.

Special transitional rules exist for non-calendar year plans

There are other transition rules that may apply to non-calendar year plans if certain conditions are satisfied. However, this alert is not addressing the non-calendar year plan rules.

The other transition rules and many of the details that need to be considered as an employer plans for avoidance or minimization of the pay or play penalty, being able to document its compliance, and planning to comply with both of the new reporting requirements and information returns are not covered by this alert. Careful review of all the details of each of the separate regulations should be done with respect to each individual situation. This is only a brief overview of the regulations and some of the related concerns and is not intended to constitute legal advice.

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