Employer Mandate “Play or Pay”

Beginning in 2014, certain large employers may be subject to a penalty tax for failing to offer *minimum essential health care coverage* for all full–time employees (and dependents) or offering eligible employer–sponsored coverage that is not "affordable" or does not offer "minimum value." **The penalty tax would be assessed if any full–time employee receives a premium tax credit for health insurance purchased through a health insurance exchange.**

An applicable large employer is one who employed an average of at least 50 full–time (or full–time equivalent) employees. For the purposes of the mandate, full–time is considered 30 or more hours of service per week and 130 hours of service per month.

While part–time employees are considered in the calculation for determining the number of full–time equivalent employees, an employer would not be assessed a penalty for not offering coverage to part–time employees, and part–time employees would not be considered in the calculation of any assessed penalty.

As stated above, an employer must include full–time equivalent employees when "counting" to determine if the mandate applies. Because of this rule, an employer cannot avoid being treated as a large employer simply by making its work force all part–time. At the same time, an employer would not automatically be required to pay the penalty just for qualifying as a large employer. The penalty tax is calculated based only on coverage for actual full–time employees (30 or more hours per week) and is determined monthly.

How to convert part–time employees into full–time equivalents

1. Calculate the aggregate hours of service in a month for employees who are not full–time employees for that month. (This number cannot exceed more than 120 hours of service for any employee.)
2. Divide the total hours of service from step one by 120.

The result is the number of full–time equivalents for that month.

Determining employer’s size is made retrospectively — employees are counted in 2013 to determine employer’s size status for 2014. The proposed regulations provide a transition rule that allows employers to choose any period of six consecutive months in 2013 (rather than the entire year) to determine their status in 2014.

An employer with 50 or more full–time employees can avoid large–employer status if:

- The employer’s workforce exceeds 50 or more full–time employees for 120 days or fewer during the calendar year, and
- The employees in excess of 50 employed during the 120 days were seasonal workers.

The penalty actually consists of two separate taxes. The first applies when the employer does not offer its full–time employees (and dependents) the opportunity to enroll in minimum essential coverage under an eligible employer–sponsored plan and any full–time employee is certified as having received a premium tax credit or cost sharing reduction.

The second applies when the employer offers its full–time employees to enroll in minimum essential coverage under an eligible employer sponsored plan and one or more employees is certified as having received a tax credit or cost sharing reduction because the coverage was either unaffordable or did not provide minimum value.

If the plan's share of the total allowed costs of benefits provided is at least 60 percent, the plan meets minimum value. A plan is considered affordable if the premium is less than 9.5 percent of the employee's income.

Calculating the penalty tax when coverage is not offered to full–time employees and at least one full–time employee received a premium tax credit.

A penalty of $2,000 for each employee eligible for coverage would be assessed, allowing for a 30–employee reduction. For example, an employer with 40 full–time eligible employees would be assessed the penalty on only 10 of those employees (40–30=10). The tax is payable monthly so in this example it would be (10 x 2,000)/12= $1,666.67. Even if only one employee receives the tax credit, the penalty tax would be based on the total number of full–time employees.

Calculating the penalty tax when coverage is offered, but it is either not affordable or doesn't meet minimum value and at least one full–time employee received a premium tax credit.

The penalty is $3,000 for each employee that receives a tax credit. It is also calculated monthly and there is no first 30–employee reduction. However, the penalty is capped so that it cannot exceed the amount of the "no coverage" penalty tax. If an employer's plan meets both minimum value and affordability and an employee opts out of the employer's plan, the employee would not be eligible for a tax credit and the employer would not be liable for a penalty tax.

Link to Minimum value calculator: http://cciio.cms.gov/resources/files/mv-calculator-final-2-20-2013.xlsm.

Determining full-time employees – safe harbor methods

The Employer Shared Responsibility provisions of the Affordable Care Act require a large employer to offer adequate health coverage to eligible full–time employees or be subject to a financial penalty. A full–time employee, for purposes of this provision, is one who works an average of 30 hours or more per week.

A large employer would be subject to a penalty if any full–time employee is certified to receive a premium tax credit or cost–sharing reduction payment. Generally this would occur when either the employer does not offer minimum essential coverage or if the minimum essential coverage that is offered is either unaffordable or does not provide minimum value.

Guidance via an IRS Notice describes safe–harbor methods that employers may use (but are not required to use) to determine full–time status for ongoing and new employees, including variable hour and seasonal employees. The guidance in IRS Notice 2012–58 will be valid at least through the end of 2014.

Ongoing employees — safe harbor

For ongoing employees, an employer will determine a timeframe between three and 12 months to use as a "standard measurement period" to look back at hours worked for employees. The employer has the flexibility to determine the length of the measurement period but it must be consistent for all employees in the same category.

If an employee averaged at least 30 hours per week during the standard measurement period, the employee is considered full time during a subsequent "stability period" regardless of the number of hours worked during the stability period. The stability period is at least six months and cannot be shorter than the standard measurement period.

If the employee was not full time during the measurement period, the employee would not be considered full time during the subsequent stability period. In this case, the stability period can be as long, but not longer than, the measurement period.

As noted above, employers may use different look–back and stability periods for different categories of employees. The categories that may be used are: collectively bargained and not collectively bargained; salaried and hourly; employees of different entities; and employees located in different states.

Since employers may need time between the measurement and the stability periods to determine which employees are eligible for coverage, as well as to notify and enroll employees, an employer may utilize an administrative period in between the measurement and stability periods. The administrative period may not reduce or lengthen the measurement or stability periods and may last up to 90 days.

New employees — safe harbor for variable hour and seasonal employees

Initial measurement period and stability period

Employers may use an initial measurement period (again between three and 12 months) to determine if new employees are full time. The employer measures the hours worked by the new employee during the initial measurement period. The stability period for the new employee must be the same length as the stability period for ongoing employees. Again, if an employee is determined to be full time during the measurement period, the stability period must be at least six months and no shorter than the initial measurement period and begin after the initial measurement period (and associated administrative period).

If a new variable hour or seasonal employee is determined not to be full time during the measurement period, the employer is permitted to treat the employee as not full time during the stability period that follows. The stability period for these employees must not be more than one month longer than the initial measurement period and must not exceed the remainder of the standard measurement period in which the initial measurement period ends.

Transitioning from new employee to ongoing employee

Once a new employee (who has been employed for an initial measurement period has been employed for an entire standard measurement period, the employee must be tested again for full–time status at the same time and under the same conditions as other ongoing employees.

For example, an employer chooses a calendar year standard measurement period that also uses a one–year initial measurement period for new employees that begins on the employee's start date. A new employee begins on Feb. 12. The employer would test the employee on the initial measurement period (Feb. 12 through Feb. 11 of the following year) and again based on the calendar year standard measurement period beginning Jan. 1 of the year after the start date.

An employee determined to be full time during an initial measurement period or standard measurement period must be treated as full time for the entire associated stability period.

Optional administrative period for new employees

The employer is again permitted to apply an administrative period before the start of the stability period. The administrative period must not exceed 90 days.

Variable hour employee

A new employee is a variable hour employee if it cannot be determined that the employee is reasonably expected to work an average of 30 hours a week.

Seasonal employee

If an employer's workforce exceeds 50 full–time employees for 120 days or less during a calendar year, and the employees in excess of 50 who were employed during that period of 120 or less days were seasonal employees, the employer would not be considered a large employer. A seasonal worker is one who performs labor or services on a seasonal basis, as defined by the U.S. Secretary of Labor, including retail works employed exclusively during the holiday season.

Examples

Review the guidance in IRS Notice 2012–58, [www.irs.gov/pub/irs-drop/n-12-58.pdf,](www.irs.gov/pub/irs-drop/n-12-58.pdf) for examples of how the safe harbors described above apply to variable hour employees and seasonal employees.