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What The Delay Of The Employer Mandate Means For Plan Sponsors

By Sarah Bassler Millar, Dawn E. Sellstrom, Summer Conley, Drinker Biddle & Reath LLP

Late on July 9, 2013, the Internal Revenue Service (IRS) issued Notice 2013-45 confirming the previously announced one-year transition rule for the employer "shared responsibility" mandate (also known as the "play-or-pay" mandate) and the related reporting obligations under the Affordable Care Act (ACA).

The IRS expects to issue proposed rules describing the information reporting requirements this summer. During this transition year, the IRS is encouraging employers and other reporting entities to voluntarily comply with the information reporting requirements (once the rules have been issued). Voluntary compliance may help entities test their systems and ease the way for when reporting will be mandatory in 2015. Once the IRS issues the proposed (and eventually final) reporting rules, reporting entities will be in a better position to assess whether voluntary reporting in 2014 is feasible and prudent.

In addition to providing relief from the healthcare coverage reporting obligations for 2014, the IRS notice confirms that the IRS will not assess penalties related to the employer mandate for 2014. The employer mandate generally requires that applicable large employers offer substantially all full-time employees affordable healthcare coverage that provides a minimum level of benefits or pay a penalty.[1] The related reporting obligations are intended to assist the IRS in identifying which individuals do/do not have the required minimum coverage, and in administering the employer shared responsibility mandate. Because compliance with the reporting obligation will be optional in 2014, the IRS will have no efficient mechanism for determining which employers may owe a penalty for a failure to offer affordable minimum essential coverage.

This transition relief appears to come with "no strings attached." Although the IRS guidance encourages employers to voluntarily comply with the employer mandate and maintain or expand healthcare coverage in 2014, the IRS will not impose penalties for a failure to do so. Notably, the guidance issued on July 9 also does not require employers to make "good faith" efforts to comply.

It's OK to Slow Down, but Don't Slam on the Brakes. As a result of this transition year, employers will have the option of deciding to what extent (if any) they will continue efforts to comply with the employer mandate during 2014. The transition relief is welcome news in that it relieves the pressure associated with updating plan documents and administrative systems, as well as the costs associated with expanding coverage. It also provides the opportunity for the IRS to issue additional guidance on how to apply the rules for special types of situations (e.g., whether an employer who uses a safe harbor method for determining full-time employee status for some employment classifications must apply that safe harbor to all classifications and how to handle changes in employment classification, such as moving from a known full-time position into a variable hour position). But, many employers still have a lot to do to prepare for 2015 when penalties will be assessed. For example, if an employer intends to use a safe harbor method of determining whether employees who work a variable schedule are full-time employees, in order to avoid being assessed penalties assessed for coverage failures in 2015, full-time employee status will need to be based on average hours worked during a measurement period ending in 2014. Most employers who administer their group health plan on a calendar year basis and use the safe harbor intend to use a one-year measurement period that will run from October 3, 2013 to October 2, 2014. In other words, employers may still need to start tracking hours worked in just a few months.

Employers who intended to rely on one of the transition rules previously announced for 2014 should keep in mind that the latest IRS guidance does not provide special transition rules for 2015. For example, prior guidance provided special transition rules in 2014 for extending coverage to dependents, a shorter measurement period if an employer used the variable hour employee safe harbor, for offering coverage under non-calendar year plans, and for employers contributing to multiemployer plans. The July 9 notice does not specify the extent to which any of these prior transition rules will be extended into 2015.

Note: *Although no penalties will be assessed for 2014, employers who wish to avoid the penalties in 2015 should evaluate what steps are still needed to offer affordable, minimum coverage to all full-time employees. Plans that operate on a fiscal year (rather than calendar year) basis should assess whether to implement any needed changes at the beginning of the plan year that begins in 2014, or delay such changes until January 1, 2015, and offer newly-eligible employees a mid-plan year enrollment opportunity.*

Other Group Health Plan Requirements Still Apply in 2014. As a reminder, this special transition rule does not affect other parts of the ACA. In particular, the various insurance reforms and mandated benefits that apply to group health plans beginning in 2014 will still apply. This means that for plan years beginning on and after January 1, 2014, all **group health plans** subject to the ACA must:

- Eliminate all pre-existing condition exclusions (regardless of age);
- Eliminate annual limits on the dollar amount of essential health benefits; and
- Eliminate waiting periods of longer than 90 days.

In addition, for plan years beginning on and after January 1, 2014, **non-grandfathered group health plans** must:

- Limit cost-sharing provisions as follows:
    - Insured plans in the small-group market must limit the annual deductible to $2,000/individual ($4,000/family);
    - All group health plans must limit in-network out-of-pocket maximums to $6,350/individual ($12,700/family);
- Not discriminate against a healthcare provider who is acting within the scope of that provider's license or certification; and
- Provide certain, nondiscriminatory benefits for individuals who participate in clinical trials.

Individual Mandate Still Applies. In addition, individuals will still be required to obtain healthcare coverage or pay a penalty for each month they do not have coverage, beginning January 1, 2014 (this is the individual "shared responsibility" mandate). Employers considering whether to expand coverage in 2014 should evaluate whether expanding coverage is a necessary or effective recruiting and retention strategy for individuals who may not have coverage now.

Exchanges (Marketplaces) Open for Enrollment October 1, 2013. Nothing in the IRS notice changes the effective date of the state insurance exchanges (marketplaces). Beginning on October 1, 2013, individuals will be permitted to enroll in qualified health plan coverage (to be effective January 1, 2014 or later) made available through the marketplaces. The IRS notice makes it clear that individuals who enroll in coverage on the marketplaces will continue to be eligible for a premium tax credit if their household income is within a specified range and they are not eligible for other minimum essential coverage. (As a reminder, "minimum essential coverage" includes employer-sponsored coverage that is affordable and provides the required minimum value; so, if an employee is eligible for affordable employer coverage, that person is not eligible for a premium tax credit if he or she obtains coverage through the marketplaces.)

Employers Must Send Notice of Exchanges (Marketplaces) Before October 1, 2013. All employers subject to the Fair Labor Standards Act (FLSA) must send all current

employees (not just employees who are benefit-eligible or plan participants) a notice informing them of their right to obtain coverage on the exchange (marketplace). These notices must be sent to current employees by October 1, 2013. Then, beginning October 1, 2013, employers must send this notice to new hires within 14 days of their start date. The Department of Labor (DOL) has issued a model notice, including instructions, which is available here (Information is linked under the heading "Notice to Employees of Coverage Options.")

Note: *Based on current DOL guidance, this notice must include information about whether the employer offers a group health plan that provides minimum value. Employers will need to evaluate how the exchange notice may be impacted by any decisions to delay extending coverage until 2015 – for example, if an employer does not offer affordable minimum coverage in 2014, but does so in 2015 (or does so for a larger class of employees), it may be appropriate to send an updated notice in the fall of 2014 even though the exchange notice is not required to be sent annually. Additional guidance from the DOL would be helpful.*

New Fees Still Apply. Nothing changes in the requirement to pay the various new ACA fees in the coming year. For example, there is no extension of the July 31, 2013 due date for the first year's fee required to fund the Patient Centered Outcomes Research Institute (PCORI). Similarly, the transitional reinsurance fee applicable to health insurance issuers and self-funded health plans and the annual fee imposed on health insurance issuers will still take effect in 2014.

Sarah Bassler Millar is a partner at Drinker Biddle and vice chair of the firm's Employee Benefits & Executive Compensation practice. Sarah guides clients on the design, implementation and operation of benefit plans to ensure consistency with plan terms and compliance with ERISA and tax code requirements.

Summer Conley, counsel in Drinker Biddle's Los Angeles, focuses her practice on a variety of employee benefit areas, including qualified plan work, executive compensation, and health and welfare issues such as HIPAA, COBRA, Section 125 and Healthcare Reform.

Dawn E. Sellstrom is counsel in Drinker Biddle's Chicago office. Dawn advises clients regarding employee benefit plan design, administration, technical compliance and fiduciary issues, with a focus on health and welfare plans.

[1] For more information about the employer mandate, *see* Drinker Biddle & Reath LLP's *IRS Proposed Regulations Provide Additional Guidance For Compliance With The Employer Shared Responsibility Rule,* Apr. 16, 2013, *available here*.

1620 Eye Street NW
Washington, DC 20006-4010
Phone: 202-833-1100 Fax: 202-833-1105