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GUIDANCE ISSUED ON FULL-TIME EMPLOYEE STATUS AND THE 90-DAY WAITING PERIOD LIMITATION

(September 4, 2012)

Who is a full-time employee for purposes of the shared responsibility provision applicable to "large" employers under the ACA (sometimes referred to as the employer mandate)? Coordinated guidance was issued last Friday, August 31, 2012 by the IRS, HHS and DOL as follows:

- Notice 2012-58 *Determining Full-Time Employees for Purposes of Shared Responsibility for Employers Regarding Health Coverage (§ 4980H)*
- Notice 2012-59 *Guidance on 90-day Waiting Period Limitation Under Public Health Service Act § 2708*

The 90 day waiting period rules apply to employer group health plans of all sizes, while the employer shared responsibility rules apply to employers with 50 or more full-time employees – meaning actual full-time employees plus full-time equivalent employees combined -- on business days during the preceding calendar year. Full-time employee with respect to any month is an employee who is employed on average at least 30 hours of service per week (130 hours of service in a calendar month would be treated as the monthly equivalent of 30 hours of service per week).

If you are an employer with fewer than 50 full-time employees in business days in 2013, then the employer shared responsibility rules and the attached guidance will not be of concern to you in 2014. However, if you have 50+ full-time employees in 2013, then the employer shared responsibility rules will apply to you in 2014. The attached guidance is important because any penalty assessments under the employer shared responsibility rules in § 4980H are calculated based on actual full-time employees (not equivalents) employed by you during each month in 2014.

<u>NOTICE 2012-58</u>

Notice 2012-58 describes safe harbor methods that employers may use (but are not required to use) to determine which employees are treated as full-time employees for purposes of the shared employer responsibility provisions of § 4980H. While this guidance is relatively complex, here is what most employers need to know now about these safe harbor methods:

- *Reliance*. The guidance in Notice 2012-58 may be relied upon by employers at least through the end of 2014. Employers will not be required to comply with any subsequent guidance on the issues addressed in the Notice that is more restrictive until at least January 1, 2015.

- *Safe Harbor Groups*. There are optional safe harbor methods for the following groups of employees:
    - Ongoing employees who have been employed by the employer for a length of time
    - New employees who are reasonably expected to work on average at least 30 hours per week as of their start date
    - New variable hour employees in cases where it cannot be determined if they will reasonably be expected to work on average at least 30 hours per week as of their start date
    - New variable hour employees who, after a period of employment, will transition from the new variable hour employee safe harbor rules to the ongoing employee safe harbor rules

- *Safe Harbor Methods*. While there are slight differences in the length and timing of the safe harbor methods relative to the groups of employees, each method generally contains the following:
    - A standard/initial measurement period of 3 to 12 calendar months chosen by the employer and used as a form of "look-back" period to determine whether an employee has worked on average at least 30 hours per week during the standard/initial measurement period.
    - A subsequent stability period of at least 6 calendar months but no shorter than the standard/initial measurement period where the employer would treat the employee as full-time, or not, based on the employees hours of service during the standard/initial measurement period, regardless of the employees actual hours of service during the subsequent stability period.
    - An optional administrative period not to exceed 90 days (and subject to other rules) between the end of the standard/initial measurement period and the start of the associated stability period to determine employee eligibility and to notify and enroll employees determined to be full-time employees.

- *Other Rules of Note*.
    - Employers may use measurement periods and stability periods that differ either in length or in their starting and ending dates for the following categories of employees, provided they are uniform and consistent for all employees in the same category:

        - collectively bargained employees and non-collectively bargained employees
        - salaried employees and hourly employees
        - employees of different entities
        - employees located in different States
    - An employee or related individual is not considered eligible for minimum essential coverage under the plan (and therefore may be eligible for a premium tax credit or cost-sharing reduction through an Exchange) during any period when coverage is not offered, including any measurement period or administrative period prior to when coverage takes effect.

NOTICE 2012-59

Notice 2012-59 provides temporary guidance on what the IRS/HHS/DOL will consider as compliance with the ACA's 90 day waiting period limitation, which applies to plan years beginning on or after January 1, 2014. This guidance will remain in effect at least through the end of 2014. The Notice indicates that any regulations or other guidance on these issues applicable for periods after 2014 will provide adequate time to comply with any additional or modified requirements. This guidance is meant to coordinate with Notice 2012-58 above.

- A group health plan and a health insurance issuer offering group coverage may not use a waiting period that exceeds 90 days.

- A waiting period is the period of time that must pass before coverage for an employee or dependent who is otherwise eligible to enroll under the terms of the plan can become effective.
    - Being eligible for coverage means having met the plan's substantive eligibility conditions (such as being in an eligible job classification or achieving job-related licensure requirements specified in the plan's terms).

- If a group health plan conditions eligibility on an employee regularly working a specified number of hours per period (or working full time), and it cannot be determined that a newly-hired employee is reasonably expected to regularly work that number of hours per period (or work full time), the plan may take a reasonable period of time to determine whether the employee meets the plan's eligibility condition, which may include a measurement period that is consistent with the timeframe permitted for such determinations under Code section 4980H (see above discussion of Notice 2012-58).

  - An employer may use a measurement period that is consistent with section 4980H, whether or not it is an applicable large employer subject to section 4980H.

- Except where a waiting period that exceeds 90 days is imposed after a measurement period, the time period for determining whether such an employee meets the plan's eligibility condition will not be considered to be designed to avoid compliance with the 90-day waiting period limitation if coverage is made effective no later than 13 months (plus any partial month) from the employee's start date.

GENERAL BACKGROUND ON § 4980H (Related to Notice 2012-58)

Generally, by way of background, § 4980H provides that an applicable large employer is subject to an assessable payment if either:

- the employer fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan and any full-time employee is certified by the exchange to receive a premium tax credit or cost-sharing reduction, or
- the employer offers its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage and one or more full-time employees is certified by the exchange to receive a premium tax credit or cost-sharing reduction (generally because the employer's coverage either is not affordable or does not provide minimum value as those terms are defined in the ACA).

The assessable penalty amount is the lesser of:

- $3,000 ($250 per month) times the number of actual full-time employees receiving premium assistance through the exchange (where the employer offers FT employees enrollment in a GHP); or
- $2,000 ($167 per month) times the number of all actual full-time employees minus 30 full-time employees.

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Please contact me if you have any questions.

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