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Benefits Alert: COVID-19 Implications for ACA Determinations

Chamberlain Benefits Update - Benefits Alert: COVID-19 Implications for ACA Determinations

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The COVID-19 pandemic has raised several interesting issues for employers and employees under the Affordable Care Act (ACA). This client alert will address the challenges employers are facing due to the pandemic and their effect on ACA compliance, as well as potential exposure to employer mandate penalties.

General overview of the ACA rules and ESRPs

The ACA added Section 4980H to the Internal Revenue Code (IRC), which applies to applicable large employers (ALEs). An employer is an ALE for a calendar year if, on average, it employed at least 50 full-time employees during the previous calendar year (including full-time equivalent hours for part-time employees).

IRC Section 4980H provides for an excise tax (ESRP), commonly referred to as the employer mandate penalty or “play or pay” rules. Under these rules, an employer can be subject to an ESRP under either IRC Section 4980H(a) if they do not offer "minimum essential coverage" to at least 95% of their full-time employees and their dependents, or IRC Section 4980H(b), if the employer fails to offer its employees affordable coverage and any full-time employee seeks and receives coverage through the ACA marketplace using the available premium tax credits.

For purposes of the employer shared responsibility rules, employers are allowed to choose one of two methods for determining an employee’s full-time status— the monthly measurement method or the look-back measurement method. To simplify, the monthly measurement method is a retrospective measure of the hours worked in a calendar month, while the look-back method averages hours worked in a measurement period to determine prospectively the employee’s status in a prospective “stability period.” The status (part-time or full-time) earned by the employee for the stability period under the look-back method will apply to the entire period, regardless of the hours worked by an employee during that period, until the employee is terminated.

Determining full-time status

When an employee takes a leave of absence, the ACA treats the hours of leave differently depending on whether the leave is paid or unpaid when determining an employee’s full-time status.

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- *Paid leave*: hours an employee is paid or entitled to payment due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty, or leave of absence are included as hours worked when determining the total hours the employee worked during the measurement period.
- *Unpaid leave*: Generally, an employee is not credited with hours of service during an unpaid leave of absence.
- *Special unpaid leave*: jury duty, military leave, or FMLA leave is not counted as hours worked. Rather, the time on these special unpaid leaves is factored into the full-time/part-time determination by reducing the length of the measurement period by the time spent on one of these leaves. For example, if an employer has a 12-month measurement period and an employee was on unpaid FMLA leave for three months, the employer would calculate the employee's average hours over the 9 months worked. This special unpaid leave rule only affects employers using the look-back measurement method (it does not affect employers or classes of employees using the monthly measurement method).

Impact of new leave provisions provided by the Families First Coronavirus Response Act (FFCRA)

Employers now need to know whether emergency paid sick leave and public health emergency leave, both of which were contained in the FFCRA, will be treated as FMLA leave and/or sick leave. These new leave requirements apply to employers with under 500 employees. A larger employer that is considering voluntarily expanding its leave programs in a similar manner should keep in mind the ACA requirements for determining full-time status.

- *Emergency Paid Sick Leave*: As with other types of paid leave, time an employee is out for reasons covered by this provision should be counted as hours worked for purposes of determining full-time status under the ACA. Employees on this type of leave should have their hours included with their hours worked.
- *Public Health Emergency Leave*: This expanded FMLA leave does not fall under the FMLA definitions of special unpaid leave provided by the IRC Section 4980H regulations. To the extent this time off is unpaid, then no hours would be credited. However, due to the new requirements for emergency paid sick leave or for employees to use available paid time off (the specifics of which are outside the scope of this summary), at least some of this period will likely be paid. In that case, those hours will need to be credited and included along with hours worked.

The requirements for paid leave are subject to further developments as forthcoming regulations should further define this leave and the required salary continuation.

In addition, other leave situations are arising to deal with the impact of COVID-19:

- *Paid but not working*: Some employers are continuing to pay their employees while their businesses are closed. Based on the current IRS guidance and regulations, employers should treat this time as time worked (as it is paid) and hours should be included in the full-time status determination calculation.
- *Furloughs*: Some employers have furloughed employees, which is akin to an unpaid leave of absence and would not count as hours worked. As guidance stands now, a furlough would not be considered one of the special unpaid leaves (FMLA, jury duty, military leave), so it would not reduce the length of the measurement period when using the lookback method.

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- *Offers of coverage*: Employers that are implementing new unpaid leave policies do not have to remove the offer of coverage, even if a COVID-19-related leave of absence causes an employee's average hours worked to fall under the 30 hours-per-week threshold for full-time status. For example, if at the end of the measurement period, an employee only averages 28 hours due to being on an unpaid leave due to COVID-19, the employer may continue to treat him or her as eligible for health benefits. However, employers should consult benefits counsel regarding the ability to implement any eligibility changes under their plan documents and insurance agreements, including stop-loss coverages.

Measuring full-time status

The issue of whether employees retain full-time status during a COVID-19 leave will depend on the measurement method the employer uses for determining the full-time status of its employees.

When using the look-back measurement method, the change in hours over a few months may not be enough to move employees into a different status when averaged over the entire measurement period. For example, if a restaurant scales down the hours worked by its employees or furloughs part of its workforce because it no longer needs staff to cover tables for patrons dining in, the reduced hours will bring down the average hours worked for the affected employees for the next stability period. Depending on the length of the crisis, this may or may not be enough to change employees' status from full-time to part-time.

Under the monthly measurement method, a change in hours in a single month generally will change an employee's determination. For example, healthcare industry employees who have traditionally been part-time may now be working significantly more hours, which could lead to a full-time determination for several months at a time. If those employees work 130 hours or more in any month and are not offered qualifying health insurance coverage, they could subject the employer to ESRP liability. On the other hand, employees who are placed on unpaid furlough would have a reduction in hours and would not be considered full-time for any months during which they do not work 130 hours. If health coverage is rescinded during this time, these employees should not be able to trigger an ESRP penalty during any month they were not working full-time hours.

Implications

For employers with classes of employees that use the monthly measurement method, then its exposure to the A penalty could increase if there is an increased workload for employees (such as in the healthcare industry). If a group of employees that were not offered health insurance (due to being part-time) now work full-time hours for a number of months, those employees could pose an ESRP liability risk under the A penalty. If there are enough affected part-time employees suddenly working full-time hours, such that the percentage of full-time employees offered coverage falls below 95%, the employer could be subject to the A penalty.

In contrast, the B penalty exposure of an employer using the monthly measurement method would likely be $0 for employees on unpaid furlough, because employees who remain active under the monthly measurement method but have no hours of service will be not be considered full-time for any month in which they have zero (or less than 130) hours of service.

The look back method creates a different situation. In that case, any employee who was determined to be full-time retains that status for the duration of the stability period. Therefore, an employee who is placed on an unpaid leave of absence retains full-time employee

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status until actually terminated from employment. If the employee is not terminated but loses his or her offer of coverage under the employer's health plan (and the price of the COBRA offer is unaffordable), then the employer could incur B penalties if that employee gets coverage through the ACA marketplace with the help of a premium tax credit.

There are regulations and other guidance that allow a change in measurement methods when an employee has a true change his or her employment situation, but the new method has to be applied prospectively and only after a transition period. It is unlikely this guidance will help an employer change a group of furloughed employees from the look back method to the monthly method during the period of the crisis.

In contrast, if an employee is terminated, the employer is not liable for ESRPs for that employee for any month that the employee is not an active employee.

Generally, furloughs are treated differently by different employers. In some cases, employees on furlough continue to be offered health insurance. This should protect against any A penalty liability, as any employees that maintain full-time status (under the look back method) are still under an offer of coverage. There can be issues with the affordability of the coverage if the employee is not being paid and premiums remain the same (or the offer is converted to COBRA and the premiums increase). If any employee is able to enroll in subsidized coverage through the health insurance exchanges, this could result in a B penalty for the employer. Any employer that is able to do so should consider further subsidizing or instituting a premium holiday for furloughed employees that are unpaid or on reduced salary.

If you have questions about how the ACA may affect your company's leave and health insurance policies during the COVID-19 crisis, please contact one of our benefits attorneys listed below.

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