Health Care Reform’s
Individual and Employer Mandates

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The U. S. Supreme Court held the Affordable Care Act (“Health Care Reform”) to be constitutional and the Fall elections are over. The publication of regulations and guidance by government agencies to implement its many requirements has begun and will continue through the coming months. If you have not already begun to do so, it is time to pay close attention to its requirements.

Two aspects of Health Care Reform are of particular interest to employers - the Individual Mandate and the Employer Mandate. The Individual Mandate requires most individuals, including your employees, to have certain levels of health insurance. The Employer Mandate requires certain employers to offer affordable, minimum essential health insurance to its employees or to pay a penalty. Both are effective January 1, 2014, but, as explained later in this paper, the make up of your workforce in 2013 is very important for the Employer Mandate.

This paper will explain the Individual Mandate and the Employer Mandate. The Individual Mandate will be discussed first. Then, the paper turns to the Employer Mandate which is much more complex with significant ramifications for all employers.

First a warning - this paper is a hard read. You may find you need to re-read parts of it several times until you understand it. That is not unique to you. Like much of Health Care Reform, the Individual and Employer Mandates are complex and incapable of being explained accurately in a simple, easy to read way without leaving out critical detail.

Some Important Terminology

Initially, it is important to understand some terminology used for both the Individual Mandate and the Employer Mandate.

Affordable. “Affordable” means that an employee’s contribution for employee-only health insurance coverage does not exceed 9.5% of the employee’s household income and the employer sponsored health plan pays at least 60% of the plan’s total costs of benefits. At this time, do not worry about the detail of what this means. For now, it is simply the concept that is important.
It is not always 9.5% of the employee’s household income. It is a sliding scale ranging from 3% to 9.5% depending on the amount of household income in relation to the federal poverty level.

60% of the plan’s total cost of benefits is determined by one of three methods established by IRS.

Health insurance coverage offered to dependents does not have to be affordable.

Many employers asked how they are supposed to know an employee’s household income. IRS responded to these concerns in a proposed regulation published on January 2, 2013, by proposing three safe harbors employers may use to determine “affordability”. Use of any of these safe harbors is optional; an employer does not have to use any of them.

(1) **Form W-2 Safe Harbor.** Under this safe harbor, coverage is considered affordable if the employee’s required contribution does not exceed 9.5% of that employee’s Form W-2 wages from the employer for that calendar year. There are special rules for partial year offer of coverage.

(2) **A Rate of Pay Safe Harbor.** Coverage is affordable under this safe harbor if the employee’s required contribution for employee-only coverage for the month does not exceed 9.5% of an amount equal to 130 hours multiplied by the employee’s hourly rate of pay as of the first day of the coverage period. For salaried employees, monthly salary is used instead of the 130 hours multiplied times the hourly rate of pay.

(3) **A Federal Poverty Line Safe Harbor.** This safe harbor is satisfied for a calendar month if the employee’s required contribution for employee-only coverage does not exceed 9.5% of a monthly amount determined as the federal poverty line for a single individual for the applicable calendar year divided by 12. For 2013, the federal poverty line for a single individual is $11,490 (for Alaska it is $14,350; for Hawaii it is $13,230).

These safe harbors are simply proposed at this time. They will not be definite until included in final regulations.

**Minimum Essential Benefits.** Actually, “minimum essential benefits” is not mentioned in this paper for the Individual Mandate or the Employer Mandate. However, it is often confused with “minimum essential coverage,” defined below, so it is worth noting the difference. Minimum essential benefits refers to benefits which must be included in the insurance coverages to be offered by the state exchanges and private insurers in the individual and small group markets. “Minimum essential coverage” is the concept used with the Individual Mandate and Employer Mandate.
What benefits must be included in the state exchange and individual and small group markets has not yet been definitely established. However, IRS recently published a proposed rule stating that “essential health benefits” must include items and services within at least the following 10 categories: (1) ambulatory patient services; (2) emergency services; (3) hospitalization; (4) maternity and newborn care; (5) mental health and substance abuse services; (6) prescription drugs; (7) rehabilitative and habilitative services and devices; (8) laboratory services; (9) preventive and wellness services and chronic disease management; and, (10) pediatric services, including oral and vision care.

**Minimum Essential Coverage.** “Minimum essential coverage” refers to providing a health insurance plan that meets the Individual Mandate’s requirements. It includes health plans that will be available through one of the state exchanges, coverage under certain government sponsored plans (e.g., Medicare, Medicaid, TRICARE, CHIP), eligible employer sponsored plans (a plan offered in the small or large group markets within a state), grandfathered health plans, and any other health benefits coverage as recognized by the Secretary of the Department of Health and Human Services.

**State Exchange.** “State exchange” means the insurance exchanges which each state must establish by 2014 to facilitate the purchase of qualified health plans. If a state does not do so, the federal government will establish the exchange for that state.

**Qualified Health Plan.** “Qualified health plan” refers to a health insurance plan that is certified by a state exchange, provides essential health benefits, follows established limits on cost-sharing, and meets certain other requirements. A qualified health plan will be certified by each state exchange in which it is sold.

**The Individual Mandate**

Beginning January 1, 2014, individuals are required to maintain minimum essential coverage each month or face a penalty. The coverage must be maintained for the individual and for the individual’s dependents. If an employer does not offer affordable, minimum essential coverage to its employees and their dependents and they do not otherwise have minimum essential coverage, they must buy the coverage themselves, either through a state exchange or in the individual insurance market.

**Who Is Subject to the Individual Mandate?**

All citizens and nationals of the United States and aliens who are lawfully present in the United States must comply with the Individual Mandate.

However, the following individuals are not subject to this Individual Mandate: (1) those with a religious conscience exemption; (2) incarcerated individuals; (3) undocumented aliens; (4)
individuals who cannot afford coverage (i.e., the required contribution for the insurance exceeds 8% of household income); (5) individuals with a coverage gap of less than three months; (6) individuals in a hardship situation as defined by the United States Department of Health and Human Services; (7) individuals with income below the income tax filing threshold; and, (8) members of Indian tribes.

The Penalty for Not Having Minimum Essential Coverage

If an individual who is required to have minimum essential coverage does not, the individual is subject to an annual penalty which is calculated monthly. Remember, Medicare and Medicaid are considered to be minimum essential coverage, so someone who is in Medicare or Medicaid is not subject to the penalty.

Calculating the amount of the annual penalty is rather complicated. The penalty is the lesser of: (1) the sum of the monthly penalty amounts (calculated as stated in the next paragraph); or, (2) an amount equal to the national average premium for qualified health plans with a certain level of coverage stated in the law and offered through a state exchange. Because (2) is based on state exchanges and they have not been created yet, we do not yet know what the amount of (2) will be.

The monthly penalty for any month is an amount equal to one-half of the greater of: (1) a flat dollar amount per individual; or, (2) a percentage of the individual’s taxable income. The monthly penalties for each month during a calendar year are then added together with the result being (1) in the preceding paragraph for the annual penalty calculation.

The flat dollar amount per individual is $95 in 2014, $325 in 2015, and $695 in 2016. After 2016, the amount is indexed to inflation. The flat dollar amount for individuals under age 18 at the beginning of a month is equal to one-half of the amounts just stated. The flat dollar penalty is capped at 300% of the flat dollar amount. For example, a family of four (two parents and two children over 18) would have a flat dollar penalty of $2,085 in 2016 because of the 300% cap.

The percentage of taxable income is an amount equal to a percentage of the individual’s household income (as defined in the law) for the taxable year that is in excess of the income tax filing threshold. The percentage is phased in at 1% in 2014, 2% in 2015, and 2.5% in 2016.

The penalty will be paid as a federal tax liability on income tax returns.

Strangely, however, individuals that fail to pay the penalty are not subject to any criminal penalties, liens or levies. One must wonder how the Individual Mandate will be enforced.
The Employer Mandate

The aspect of health care reform causing greatest concern for employers is the “Employer Responsibility” section, which also is effective on January 1, 2014. It is commonly called “the Employer Mandate.”

Actually, however, “Employer Mandate” is a misnomer. Health Care Reform does not require employers to offer health insurance coverage to employees and their dependents. Rather, the Employer Mandate imposes penalties on certain employers if they do not provide a required level of affordable health insurance for their full-time employees. It has been called a “pay or play” approach - pay a penalty or play by offering affordable, minimum essential coverage.

An employer needs to understand the Employer Mandate so it can determine its potential impact for it. Many of the Employer Mandate’s requirements will be clarified and expanded upon in guidance and regulations still to be published. However, enough is known from the law, itself, and proposed regulations of IRS to give an understanding of how it will work.

Some More Important Terminology

There is some more important terminology used for the Employer Mandate.

**Dependent.** A “dependent” is a full-time employee’s child who is under 26 years of age. A spouse is not a dependent for purposes of the Employer Mandate.

**Employee.** Whether or not an individual is an employee is determined under what is called the common law test, which is the usual test under the Internal Revenue Code. If your agency has the right to control and direct the individual, not only as to the results to be accomplished by the work but also as to the details and means by which that result is accomplished, the individual is your employee. However, IRS has said in its proposed regulations that leased employees as defined in another section of the Internal Revenue Code are not employees for purposes of the employer mandate. This leads to some confusion regarding leased employees (see, “What about Employee Leasing” on page 19 of this paper.)

**Full-Time Employee.** “Full-time employee” means an employee who is employed on average at least 30 hours per workweek. IRS has proposed that 130 hours of service in a calendar month will be treated as the monthly equivalent of at least 30 hours of service per week.

**Part-Time Employee.** “Part-time employee” means an employee who is not a full-time employee. It is an employee who is employed for less than 130 hours in the calendar month.

**Full-Time Equivalents.** “Full-time equivalents” are calculated by dividing the total hours of service of all part-time employees for a month (but not more than 120 hours for any one employee) by 120. The result is the number of full-time equivalents for the employer that month.
**Hours of Service.** “Hours of service” are expected to include: (1) each hour for which an employee is paid, or entitled to payment, for the performance of duties for the employer; and, (2) each hour for which an employee is paid, or entitled to payment, for time during which no duties are performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence. “Hours of service” is different than “hours worked” which is used for minimum wage and overtime pay purposes.

**Premium Tax Credit.** “Premium tax credit” refers to a federal tax credit to help individuals and families buy health insurance. It is available to individuals and families: (a) with a household income of at least 100% but not more than 400% of the federal poverty level for their family size; and, (b) who are not otherwise eligible for qualified minimum essential coverage (other than through a state exchange or in the individual insurance market) for a given month. Employees are eligible to claim this credit if their employer’s health insurance coverage is unaffordable or fails to pay at least 60% of the total costs of benefits. For 2013, for the 48 contiguous states and the District of Columbia, 400% of the federal poverty level is $94,200 per year for a family of four and $45,960 for an individual. For Alaska, it is $117,760 and $57,400 respectively. For Hawaii, it is $108,360 and $52,920 respectively.

**Cost Sharing Reduction.** “Cost sharing reduction” refers to a reduction in the amount individuals must pay for deductibles, co-insurance and co-payments. It is available to individuals: (a) with incomes between 100% and 400% of the federal poverty level for their family size; and, (b) who enroll in a certain level of coverage through a state exchange.

**Taxpayer Subsidized Coverage.** “Taxpayer subsidized coverage” means the individual receives either the premium tax credit, the cost sharing reduction, or both.

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**Determining the Employer Mandate’s Impact on Your Agency**

Determining the impact, if any, the Employer Mandate will have on your agency essentially is a two step process. First, determine whether or not your agency is subject to the Mandate. It may or may not be. Second, if it is subject to the Employer Mandate, determine if your agency may be assessed penalties under the Mandate.

**Step 1 - Is Your Agency Subject to the Employer Mandate?**

Your agency will be subject to the Employer Mandate for a calendar year if it employed an average of 50 or more full-time and full-time equivalent employees on business days during the preceding calendar year. *This means that, even though the Employer Mandate’s requirements do not begin in 2013, the number of full-time and full-time equivalent employees your agency has in 2013 will determine if your agency is subject to the Mandate in 2014.*

IRIS has proposed an optional way to determine coverage for 2014. If included in the final regulations, it will permit an employer to determine whether it is covered in 2014 by
reference to a period of at least six consecutive calendar months in 2013, as chosen by the employer, rather than for the entire 2013 calendar year. If the employer averages at least 50 full-time and full-time equivalent employees during the consecutive six month period it chooses, it will be covered by the Employer Mandate. If it does not, then, it will not be covered. It is possible that, by choosing the right six consecutive months or more period, an agency could avoid being covered. This six or more consecutive month option will be available for use only in 2013; it will not be available for any year thereafter.

An agency that is part of a group of employers that are treated as a single employer under the Internal Revenue Code, i.e., they are under common control or part of an affiliated service group, are treated as a single employer for purposes of the Employer Mandate. For example, a home care agency and another provider which are under common ownership will be collapsed and treated as a single employer, rather than two separate employers. Furthermore, this applies even if the employers are not in the same business. It could be a home care agency and a bowling alley. (Controlled and affiliated groups are defined in the Internal Revenue Code at 26 U.S.C. §414(b), (c), (m) and (o). If you need advice on this issue, I recommend you consult with a tax or employee benefits attorney.)

For an agency not in existence throughout the preceding calendar year, the determination of whether it is subject to the Employer Mandate will be based on the average number of employees it is reasonably expected to employ on business days in the then current calendar year.

**How to Count Employees.**

As mentioned earlier, part-time employees are converted to full-time equivalent employees for a calendar month by dividing the total hours of service by part-time employees (but not more than 120 hours for any one employee) that month by 120.

The number of full-time equivalent employees is then added to the number of full-time employees to determine if the employer has 50 or more full-time and full-time equivalent employees on business days during the calendar month.

IRS has proposed the following approach to determine if an employer is covered by the employer mandate: (a) calculate the number of full-time and full-time equivalent employees for each month in the year; (b) add together all the monthly full-time and full-time equivalent employee totals for the year; and, (c) divide that result by 12. If the result is less than 50, your agency would not be subject to the Employer Mandate the following year. If the result is 50 or more, your agency would be subject to the Employer Mandate the following year. A similar approach will be taken if a period of at least 6 consecutive calendar months in 2013 is used rather than the entire calendar year.

The following examples illustrate how the monthly calculation works conceptually. These examples are conceptual. They use just one month rather than calculating the entire year. To convert to entire year using IRS’s expected approach, you would do this calculation for each month in the year, add all the months together, and then divide by 12.
Example 1. Assume an employer has 30 employees who are employed an average of at least 30 hours per workweek (i.e., 130 hours of service in the month) and, therefore, are considered to be “full-time” employees. Also assume the employer has 40 part-time employees who have a total of 2,640 hours of service during the month. The part-time employees are converted to full-time equivalent employees by dividing 2,640 by 120, which equals 22 full-time equivalent employees. Then, the 22 full-time equivalent employees are added to the 30 full-time employees, which gives a result of 52 full-time and full-time equivalent employees for the month.

Example 2. Assume the employer has 5 employees who are employed an average of at least 30 hours per workweek (i.e., 130 hours of service in the month) and, therefore, are considered to be “full-time” employees. Also assume the employer has 30 part-time employees who have a total of 640 hours of service during the month. The part-time employees are converted to full-time equivalent employees by dividing 640 by 120, which equals 5 full-time equivalent employees. Then, the 5 full-time equivalent employees are added to the 5 full-time employees, which gives a result of 10 full-time and full-time equivalent employees for the month.

Example 3. Assume your agency and another provider are separate corporations but are under common ownership. Your agency has a total of more than 45 full-time and full-time equivalent employees for the month. The other provider has a total of 20 full-time and full-time equivalent employees for that same month. Because they are under common ownership, they are treated as a single employer. When treated as a single employer, the total number of full-time and full-time equivalent employees for the month is 65 (45 + 20 = 65).

Step 2 - If Your Agency Is Subject to the Employer Mandate, Will Penalties Be Assessed?

If your agency does not have a total of 50 or more full-time and full-time equivalent employees on average during the preceding calendar year (or during the six or more consecutive months you choose), it is not subject to the Employer Mandate and it does not need to be concerned about the Mandate or the Mandate’s penalties until the next year. For example, if your agency has a total of 30 full-time and full-time equivalent employees on average during 2013, it is not subject to the Employer Mandate in 2014.

If your agency does have a total of 50 or more full-time and full-time equivalent employees on average during the preceding calendar year (or during the six or more consecutive months you choose), it is subject to the Employer Mandate. For example, if your agency has a total of 55 full-time and full-time equivalent employees on average during 2013, it is subject to the Employer Mandate in 2014.

The ramifications of being subject to the Employer Mandate then depend on whether your agency does not or does offer affordable, minimum essential coverage to its full-time employees and minimum essential coverage to their dependents. Penalties can occur in either case.
Note: The penalties are based on the number of full-time employees, not on full-time equivalents. Full-time equivalents are used only to determine if an employer is subject to the Employer Mandate. Note, too, that whether an employer is subject to the Employer Mandate is calculated based on the previous calendar year or six or more consecutive months you choose. However, penalties are calculated on a monthly basis during the calendar year that the employer is covered.

If Your Agency Is Subject to the Employer Mandate and Does Not Offer Minimum Essential Coverage

If your agency is subject to the Employer Mandate, it must pay a penalty for a calendar month if:

(a) it does not offer minimum essential health insurance coverage to its full-time employees and their dependents; and,
(b) at least one full-time employee opts out of your agency’s coverage, purchases insurance through a state exchange, and receives the premium tax credit or cost sharing reduction that month, i.e., your agency’s coverage is not affordable to the employee.

The penalty for the month is 1/12th of $2,000 (i.e., $166.67) per full-time employee after the first 30 full-time employees.

Example: If an employer that is subject to the Employer Mandate for a calendar month meets the conditions stated above and has a total of 51 full-time employees, it must pay a penalty equal to $3,500.07 for that month. The penalty is calculated as follows: 51 full-time employees - 30 full-time employees = 21 full-time employees. 21 full-time employees is then multiplied times $166.67, which equals $3,500.07.

If Your Agency Is Subject to the Employer Mandate and Does Offer Minimum Essential Coverage

If your agency is subject to the Employer Mandate, it may be subject to a penalty even though it does offer minimum essential coverage to its full-time employees and their dependents.

Your agency must pay a penalty for a calendar month if:

(a) it does offer minimum essential health insurance coverage to its full-time employees and their dependents; and,
(b) at least one full-time employee opts out of your agency’s coverage, purchases insurance through a state exchange, and receives the premium tax credit or cost sharing reduction that month, i.e., your agency’s coverage is not affordable to the employee.
In this case the penalty is the lesser of:

(a) 1/12th of $3,000 (i.e., $250) for each full-time employee who receives the premium tax credit or cost sharing reduction that month; or,

(b) 1/12th of $2,000 (i.e., $166.67) per full-time employee after the first 30 full-time employees.

The reason for this penalty when the employer offers minimum essential coverage is to penalize an employer that offers minimum essential coverage which is so expensive its lower paid employees prefer to purchase taxpayer subsidized coverage through a state exchange than participate in the employer’s coverage.

Pay close attention to that penalty calculation and the difference between (a) and (b), above. (a) is not calculated based on all full-time employees or even full-time employees in excess of 30 full-time employees. (a) is calculated only on those full-time employees who receive the premium tax credit or cost sharing reduction that month. Depending on the specific situation for an employer, the penalty under (a) could be significantly less than the penalty under (b). There also are situations in which the penalty under (b) could be less than that under (a).

Example 1: Assume your agency has 51 full-time employees and offers minimum essential health insurance coverage to its full-time employees and their dependents. However, 10 of those full-time employees who qualify for the premium tax credit or cost sharing reduction opt out of your agency’s insurance and, instead, purchase coverage through a state exchange. In this case, your agency would pay a penalty of $2,500 for the month. The penalty is the lesser of: (a) 10 times $250, which equals $2,500; or, (b) 21 (i.e., 51 minus 30) times $166.67, which equals $3,500.07.

Example 2: Assume your agency has 26 full-time employees and offers minimum essential health insurance coverage to its full-time employees and their dependents. However, 10 of those full-time employees who qualify for the premium tax credit or cost sharing reduction opt out of your agency’s insurance and, instead, purchase coverage through a state exchange. In this case, your agency would not pay any penalty for the month. The penalty is the lesser of: (a) 10 times $250, which equals $2,500; or, (b) nothing because there are 30 or less full time employees.

Look-Back Method to Determine Full-Time Employees for Penalties

The Look-Back Method

IRS’s proposed regulation contains a look-back method employers may use to determine which employees must be treated as full-time employees for purposes of the Employer Mandate’s
The look-back method may be used only for determining and calculating penalties; it may not be used to determine if an employer is covered by the Employer Mandate.

Essentially, the look-back method permits looking at an employee’s full-time or part-time status over the past several months and then applying that status for that employee for several future months irrespective of how many hours of service the employee has during the future months. If the look-back method is not used, each employee’s status as full-time or part-time must be determined monthly which could result in the employee’s status changing each month.

The use of the look-back method is entirely optional. Employers are not required to use it. Each employer must determine if it is useful in its circumstances.

**Measurement Periods**

The look-back method involves different periods of time. They are:

- “standard” measurement and stability periods for ongoing employees;
- “initial” measurement and stability periods for new employees; and,
- an “administrative” period for both new employees and ongoing employees.

The “measurement period” is the period to be used to determine if an employee is full-time or part-time. The “stability” period is the period that an employee must then be treated as full-time or part-time based on the employee’s status during the employee’s measurement period. The administrative period is a period for making the determination of an employee’s full-time or part-time status and, if applicable, to offer the employee insurance coverage.

Like much of the Employer Mandate, the look-back rules are complex and a hard read. You probably will need to read and re-read this several times until you understand how it works. The difficulty is not you; it is the nature of the subject.

**Ongoing Employees**

Ongoing employees are those who have been employed by the employer for at least one complete Standard Measurement Period.

For ongoing employees, the measurement, stability and administrative periods are set by the employer as follows:

- **Standard Measurement Period.** The Standard Measurement Period is an employer established period of not less than 3 months or more than 12 months.
• **Standard Stability Period.** The Standard Stability Period is an employer established period of not less than 6 months, but it may not be less than the established Standard Measurement Period. For example, if the Standard Measurement Period is 8 months, the Standard Stability Period must be at least 8 months in length. If the Standard Measurement Period is 3 months, the Standard Stability must be at least 6 months in length.

• **Administrative Period.** The Administrative Period is an employer established period of up to 90 days between the Standard Measurement Period and the Standard Stability Period. It must overlap any prior Stability Period to prevent gaps in insurance coverage.

Subject to the rules stated above, the employer has flexibility in choosing how long the Standard Measurement Period will be and when it begins and ends. However, it must be uniform and consistent for all employees in any of the following categories of employees: (1) collectively bargained employees and non-collectively bargained employees; (2) salaried employees and hourly employees; (3) employees of different entities; and, (4) employees located in different states.

*Example:* This timeline shows how the periods could work for a Standard Measurement Period of 12 months beginning on October 15, 2012.

<table>
<thead>
<tr>
<th>10/15/12</th>
<th>10/14/13</th>
<th>1/1/14</th>
<th>12/31/14</th>
</tr>
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<tbody>
<tr>
<td>Standard Measurement Period (12 months)</td>
<td>Administrative Period (78 days)</td>
<td>Standard Stability Period (12 months)</td>
<td></td>
</tr>
</tbody>
</table>

If the employee is determined to be a full-time employee during the Standard Measurement Period, he/she would be considered to be a full-time employee during the Standard Stability Period (*i.e.*, until December 31, 2014), irrespective of how many hours of service he/she has during the Standard Stability Period.

The 78 day Administrative Period would be used to determine the employee’s full-time status during the standard measurement period and to offer/implement full-time employee insurance coverage, if any, effective on January 1, 2014. If no insurance coverage is offered, the employer may conclude to not have an Administrative Period at all or to make it very short simply to determine whether the employee was a full-time employee during the Standard Measurement Period.

**New Employees**

New employees present several issues including: what is their status if you expect them to work full-time; how to deal with variable hour and seasonal employees; and, how to transition from new to ongoing employee status.

(Page 12)
New Employees Expected to Work Full-Time

If, at the time of hire, a new employee is reasonably expected to average at least 30 hours of service per workweek (or 130 hours of service per month), the employee must automatically be treated as a full-time employee. If affordable, minimum essential health insurance coverage is offered to full-time employees, the coverage must occur within 90 days after the employee’s date of hire. If such insurance coverage is not offered within that time period, the employer becomes subject to the Employer Mandate’s penalties.

Variable Hour and Seasonal Employees

A “variable hour” employee is one whom the employer cannot reasonably determine will average at least 30 hours of service per workweek (or 130 hours of service a month) at the time of hire. Your “as needed” employees would seem to be variable hour employees. “Seasonal” employees have not yet been defined; they are not discussed in this paper because it is unlikely they will be important for home care.

For variable hour employees, the measurement, stability and administrative periods are set by the employer as follows:

- **Initial Measurement Period.** The Initial Measurement Period is an employer established period of not less than 3 months or more than 12 months.

- **Initial Stability Period.** The Initial Stability Period is an employer established period that is the same length as the Standard Stability Period established by the employer for ongoing employees.

However, for employees who are determined to not be full-time during the Initial Measurement Period, the Initial Stability Period may not: (1) be longer than the Initial Measurement Period plus 1 month; or, (2) extend beyond the Standard Measurement Period for ongoing employees (plus any associated Administrative Period) in which the Initial Measurement Period ends.

- **Administrative Period.** The Administrative Period is a period of up to 90 days, including any time between the employee’s date of hire and the time minimum essential insurance coverage is offered (excluding the Initial Measurement Period).

- **Combined Length of Initial Measurement Period and Administrative Period.** The Initial Measurement Period and the Administrative Period may not extend beyond the last day of the first calendar month beginning on or after the first anniversary of the employee’s start date. The start date is the first date on which an employee is credited with an hour of service with the employer.

As for ongoing employees, and subject to the rules stated above, the employer has flexibility in choosing how long the Initial Measurement Period will be and when it begins and
ends. It must be uniform and consistent for all employees in the same categories as for ongoing employees.

**Transition from New to Ongoing Employee Status**

After a new employee has completed an Initial Measurement Period and has been employed for a full Standard Measurement Period, the employee must be tested for full-time status under the ongoing employee rules for that Standard Measurement Period (regardless of whether the employee was full-time during the Initial Measurement Period).

However, if an employee who was full-time for the Initial Measurement Period is determined not to be a full-time employee for the Standard Measurement Period, the employer must continue to treat the employee as full-time for the remainder of the Initial Stability Period.

An example can be helpful.

**Example:** The following example assumes a new variable hour employee. The employer has chosen to use a 12 month Standard Measurement Period for ongoing employees that starts on October 15th and a Standard Stability Period which begins on January 1st. Also, there is an Administrative Period from October 15th through December 31st of each year. The employer offers minimum essential health insurance coverage to its full-time employees and their dependents.

The following timeline illustrates the treatment of a new employee under the New Employee rules.

```
10/15/14                   10/14/15               1/1/16             12/31/16
                                                                                   Standard Stability
ateria administrative

Period        Period                                Period
5/10/14                                 5/9/15               7/1/15              6/31/16

Hire Initial Measurement Administrative Initial Stability
Date Period          Period                           Period
```

In this example:

- If the New Employee does not average 30 hours of service per week (or has 130 hours of service per month) during the Initial Measurement Period (5/10/14 - 5/9/15), the employee will not be a full-time employee for the Initial Stability Period (7/1/15 - 6/31/16).

- However, notwithstanding what the employee’s status is during the Initial Measurement Period, if the employee averages at least 30 hours of service per week (or has 130 hours of service per month) during the overlapping Standard Measurement Period (10/15/14 -
10/14/15), the employee must be treated as full-time for the Standard Stability Period (1/1/16 - 12/31/16).

**Exception for Stability Periods Beginning in 2014**

IRS recognizes that employers who intend to adopt a 12 month measurement period and a 12 month stability period will face time constraints to do so during 2013. Therefore, solely for purposes of stability periods beginning in 2014, employers may adopt a transition measurement period that is shorter than 12 months but that is no less than 6 months long and that begins no later than July 1, 2013, and ends no earlier than 90 days before the first day of the plan year beginning on or after January 1, 2014.

**Use of Payroll Periods**

For employer’s administrative convenience, IRS will permit use of payroll periods in conjunction with a measurement period. (Payroll periods may not be used in place of calendar months to determine if an employer is covered by the Employer Mandate.)

For payroll periods that are one week, two weeks or semi-monthly in length, an employer is permitted to treat as a measurement period a period that ends on the last day of the payroll period preceding the payroll period that includes the date that would otherwise be the last day of the measurement period, provided that the measurement period begins on the first day of the payroll period that includes the date that would otherwise be the first day of the measurement period.

Similarly, an employer may also treat as a measurement period a period that begins on the first day of the payroll period that follows the payroll period that includes the date that would otherwise be the first day of the measurement period, provided that the measurement period ends on the last day of the payroll period that includes the date that would otherwise be the last day of the measurement period.

**Example:** An employer using the calendar year as a measurement period could exclude the entire payroll period that includes January 1 (the beginning of the year) if it includes the entire payroll period that includes December 31 (the end of the year). Alternatively, the employer could exclude the entire payroll period that includes December 31 of a calendar year if it includes the entire payroll period that includes January 1 of the calendar year.

**How Long Can You Rely on the Look-Back Method?**

IRS states that the look-back method may be relied on through the end of 2014. Although the Employer Mandate is not effective until January 1, 2014, employers who want to use the look-back method during 2014 will need to select measurement periods that begin before 2014.
What to Do about the Look-Back Method?

- Decide if you may want to use the look-back method for calculation of possible penalties on and after January 1, 2014. This may be a tentative decision because we can expect more to become known through 2013 about the Employer Mandate, available minimum essential coverage and its cost, and the look-back method.

- If you think you will want to use the look-back method, tentatively determine how long you want the Standard Measurement Period to be and when it will begin and end. Also, determine if you will have an Administrative Period and, if so, when it will begin and end. Finally, determine the length of the Standard Stability Period and when it begins and ends. Then determine the initial measurement period and initial stability period for new employees following the rules stated above for new employees.

- Consider whether use of the look-back method is even useful for your agency. It may be more work than simply determining whether an employee is full-time or part-time each month, especially if you decide to not offer affordable, minimum essential insurance. It seems to be most helpful if you do decide to offer affordable, minimum essential coverage because it will avoid the possibility of employees moving in and out of insurance coverage.

Some Observations about the Mandate

With all of the preceding in mind, a few observations can be made about the Employer Mandate:

- If your agency does not have a total of 50 or more full-time and full-time equivalent employees on average during 2013 or the six or more consecutive months you choose, the Employer Mandate will not apply to it during 2014. Of course, the make up of its workforce in 2014 will determine if it is subject to the Mandate in 2015.

- If your agency is subject to the Employer Mandate, remember that the penalties are calculated based on the number of actual full-time employees, not on the number of full-time equivalents. Full-time equivalent employees are used only to determine if the employer is subject to the Employer Mandate; they are not used for penalty calculation.

- Even if your agency is subject to the Employer Mandate, it will not be required to pay a penalty if it has 30 or less full-time employees for the month involved.

- Even if your agency is subject to the Employer Mandate, it will not be required to pay a penalty if none of its full-time employees purchase health insurance through a state exchange and qualify for taxpayer subsidized coverage during the month involved.
• If your agency offers affordable, minimum essential coverage to its full-time employees, employees do not have to participate in it. Some may not because they participate in Medicare, Medicaid or choose to be covered by a spouse’s minimum essential coverage. Doing so can meet the employee’s obligation under the Individual Mandate. However, it does not mean they are not your full-time employees for purposes of determining if your agency is covered by the Employer Mandate and for calculation of penalties. They are your full-time employees no matter what they do.

• If your agency is subject to the Employer Mandate, the Mandate applies to all of its locations. If a full-time employee at any location purchases health insurance from a state exchange and qualifies for taxpayer subsidized coverage, then full-time employees at all locations are added together to calculate the penalty to be paid.

• If your agency is part of a controlled or affiliated group of employers, all the employers are collapsed and treated as a single employer for certain purposes under the Employer Mandate but not for others.

They are treated as one employer in determining if they are covered by the Employer Mandate. Plus, in calculating liability for penalties, one reduction of 30 full-time employees is permitted in calculating penalties and that reduction must be allocated ratably among the employers which are treated as one employer based on each such employer’s number of full-time employees.

However, the determination of whether any of the employers is subject to a penalty and the amount of the penalty is determined on an employer by employer basis. The liability for and amount of any penalty is computed and assessed separately for each employer.

• The Employer Mandate defines a full-time employee as one who works an average of 30 hours per workweek (as mentioned earlier, IRS will treat 130 hours of service a month as being full-time). That is different than many agencies’ definition of what is a full-time employee today. Today, a full-time employee typically is considered to be one who is regularly scheduled to work either 32 hours or 40 hours per workweek. The Employer Mandate may lead an agency to consider redefining what it means by a full-time employee to have a consistent definition for all purposes.

• The way the Employer Mandate works, agencies may experience significantly different ramifications from it. You need to examine its impact on your agency. Do not assume what it means to another agency will be the same as for yours.

Strategies

There are a number of strategies your agency needs to consider in its planning. These focus only on the Employer Mandate. You also must consider their impact on other things important to your agency, such as recruitment, continuity of care, competitive environment, and what is administratively feasible. Similar agencies may choose different approaches based on
their own, individual circumstances. One size does not fit all.

• **Avoid Having 50 Full-Time and Full-Time Equivalent Employees on Average During Business Days in a Year or the Six Consecutive Months You Choose.** If you can do this, your agency is not subject to the Employer Mandate during the following calendar year. Remember, you can choose to use a six or more consecutive month period only for 2013; it is not an option for later years.

• **Move to a Workforce With As Many Part-Time Employees As Possible and As Few Full-Time Employees as Possible.** Because the penalties apply only with respect to full-time employees and not to full-time equivalents, the Employer Mandate works to encourage a workforce composed of a very small number of full-time employees with most employees being part-time. Health Care Reform gives an advantage to this model by providing a strong financial motivation for it - penalties under the Employer Mandate are not based on the number of part-time employees or full-time equivalents. It also may result in an agency not even being covered by the Mandate.

• **Reduce the Amount of Work for “As Needed” Employees.** Currently, if an “as needed” employee (sometimes called a “per diem” or “PRN” employee) falls within the companionship services exemption from minimum wage and overtime pay, the employee can be scheduled for any number of hours per workweek without needing to pay minimum wage or overtime pay under federal law. If the employee does not fall within that exemption, a key in scheduling is to keep the employee under 40 hours worked in a workweek in order to avoid overtime pay.

With the Employer Mandate, if an employee averages 30 or more hours per workweek (or 130 hours or more hours of service per month), the employee is a full-time employee that counts in determining if the employer is subject to the Employer Mandate and counts for calculation of penalties. This provides a motivation for agencies that are subject to the Mandate to rarely schedule “as needed” employees for more than 30 hours in a workweek (or 130 or more hours in a month) in order to avoid the employee being a full-time employee. Of course, this means fewer hours worked and less income for the employee than prior to the Employer Mandate. If it results in a large reduction in an employee’s hours of work and depending on state law, it could qualify the employee for unemployment compensation.

• **Paying the Penalties May Be Less Expensive than Providing Insurance.** Paying penalties under the Employer Mandate may be significantly less expensive than the cost of providing affordable, minimum essential coverage for full-time employees. Rather than encouraging employer provided health insurance, the Employer Mandate may actually make it more cost effective for an agency to stop offering health insurance altogether.

• **Reduce Employee Compensation to Help Pay for Health Insurance.** If an agency must pay for health insurance for the first time, it may lead to the agency reducing employees’ compensation to help pay for the insurance. Of course, doing so increases the likelihood that employees will opt to go to the state exchange for insurance and receive
taxpayer subsidized coverage which can result in penalties for the agency.

- **Be Sure Insurance is Affordable and Minimum Essential Coverage.** This avoids an employee qualifying for taxpayer subsidized coverage which avoids or, at least, reduces the penalties which may be payable. Even if you believe this is not financially viable for your agency, remember that, when the state exchanges are operational, the cost of insurance may be less than you anticipate.

- **What about Employee Leasing?** In my opinion, who is the employer of a leased employee for purposes of the Employer Mandate is not yet clear.

  In its proposed regulations for the Employer Mandate, IRS says an employee will be determined under what is called “the common law test.” The common law test looks at who controls the manner and means by which the work is performed. This would mean that in most cases, if your agency leases any employees, they would be employees of your agency rather than of the leasing company. This is because your agency controls the manner and means by which the work is performed by a leased employee. Consequently, if they are full-time employees of your agency, your agency would have the obligation under the Employer Mandate to offer the leased employees and their dependents minimum essential coverage or be exposed to liability for penalties. If the leasing company offers such insurance to them, it is not known whether that would be considered to be the same as your agency offering the coverage directly.

  However, it is not that straightforward. In its proposed regulations, IRS defines “employee” as follows:

  “The term employee means an individual who is an employee under the common-law standard. ... For purposes of this paragraph, a leased employee (as defined in section 414(n)(2)), a sole proprietor, a partner in a partnership, or a 2-percent S corporation shareholder is not an employee.”

  On its face, this seems to say a leased employee is not an employee. However, the problem is the reference to section 414(n)(2) of the Internal Revenue Code. That section states:

  “(2) Leased Employee. .... the term “leased employee” means any person who is not an employee of the recipient and who provides services to the recipient: if -

  (A) such services are provided pursuant to an agreement between the recipient and any other person (in this subsection referred to as the “leasing organization”),

  (B) such person has performed such services for the recipient (or for the recipient and related persons) on a substantially full-time basis for a period of at least 1 year, and

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such services are performed under primary direction or control by the recipient.”

This just doesn’t seem to fit together. The person is not an employee of the recipient but is under primary direction or control by the recipient? How can that be? If they are under the recipient’s direction and control, they are the recipient’s employee. If the person is a leased employee only after one year, what are they the first year for purposes of the Employer Mandate? Are they the recipient’s employee the first year but the leasing organization’s employee thereafter?

Hopefully, the situation concerning leased employees will be clarified in the final regulations.

**What about Using Temporary Staffing Agencies?** Using temporary staffing agencies to try to avoid the Employer Mandate does not appear to be a viable option. IRS has expressed concern that employers could purport to use temporary staffing agencies in situations where the client, e.g., your agency, is the individual’s common law employer and the staffing agency is used solely in an attempt to evade application of the Employer Mandate.

An example of its concern is that an employer could purport to employ its employees for only part of a week, such as 20 hours, and then hire those same individuals through a temporary staffing agency for the remaining hours of the week, thereby resulting in neither the “client” employer nor the temporary staffing agency appearing to employ the individual as a full-time employee.

Another example is where one temporary staffing agency would purport to employ an individual and supply the individual as a worker to a client for only part of a week, such as for 20 hours. A second temporary staffing agency would purport to employ the same individual as a worker to the same client for the remainder of the week, thereby resulting in neither temporary staffing agency nor the client appearing to employ the individual as a full-time employee.

IRS stated the final regulations will contain an anti-abuse rule to address these kinds of situations and provide:

“If an individual performs services as an employee of an employer, and also performs the same or similar services for that employer in the individual’s purported employment at a temporary staffing agency or other staffing agency of which the employer is a client, then all the hours of service are attributed to the employer for purposes of [the employer mandate.] Similarly, to the extent an individual performs the same or similar services for the same client of two or more temporary staffing agencies or other staffing agencies, it is anticipated that all hours of service for that client are attributed to the client, if the client is the common law employer, or, if not, one of the temporary staffing agencies (or other staffing agencies) that purports to employ the individual with respect to services
performed for that client.”

What To Do Now

The Employer Mandate is strongly opposed by many employers and employer trade associations. Consequently, efforts to modify or repeal the Employer Mandate can be expected in Congress. Due to the outcome of the Fall elections, repeal seems very unlikely. However, amendments may be possible.

Despite the potential for revision of the Employer Mandate, I recommend you proceed as if no changes will occur. Do not assume it will be changed. Remember, whether your agency will be subject to the Employer Mandate in 2014 depends on the make up of your workforce in 2013. You should not wait to begin planning for the Mandate’s potential impact on your agency.

Some things to do now:

• Begin to determine how the Employer Mandate will affect your agency and how, if at all, you may respond. It is entirely possible, especially for smaller agencies, the Mandate will not have any affect on an agency either because it is not subject to the Mandate or because it will not be subject to penalties because it has 30 or less full-time employees.

• Consider whether you can and want to try to re-constitute your agency’s workforce to maximize the number of part-time employees and reduce the number of full-time employees. Doing so may enable it to avoid being subject to the Employer Mandate if you can keep the workforce at less than a total of 50 full-time and full-time equivalent employees. Even if that cannot be done because of your agency’s size or because you conclude it is not advisable to do, having as few full-time employees as possible can reduce the exposure to penalties because penalties are calculated based on full-time employees, not on part-time employees or full-time equivalents.

• Even when you know your agency will be subject to the Mandate, you have decisions to make about whether to offer affordable, minimum essential insurance coverage for your full-time employees and their dependents or to pay penalties instead.

• In all of your analysis and planning, remember that penalties are calculated based on full-time employees, not on part-time employees or full-time equivalents. (I keep repeating this because many employers and commentators do not seem to understand that significant point.)

• As time goes by, work with your health insurance carrier to determine if the insurance your agency offers is “affordable” and, if not, can changes be made to make it so. Consider the state exchanges, too. Part of their purpose is to reduce the cost of insurance. If they are successful, providing insurance may become a viable option for you.

If insurance you offer is not affordable to the employees, it increases your agency’s
exposure to the Mandate’s penalties. It only takes one full-time employee, who receives taxpayer assisted coverage, to opt for coverage through a state exchange to subject your agency to penalties.

Until more is known concerning the detail of the Employer Mandate, you may not know for sure what you plan to do. Indeed, until final regulations are published, you cannot know exactly what you want to do. At this time, the best approach may be to do whatever gives you the greatest flexibility to adapt to whatever is the final detail and application of the Employer Mandate - keep your options open until more is known.

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When final regulations implementing the Employer Mandate are published, much more will be known concerning its precise application to your agency. We do not know when that will be, but IRS has scheduled a public hearing in Washington, D.C., on April 23, 2013, to receive public comments concerning its January 2, 2013, proposed regulation. A final regulation will be published sometime after that, probably by mid to late Summer. In the meantime, do not ignore the Employer Mandate’s potential impact. Your planning needs to begin for 2013 even though the Mandate is not effective until 2014.

You can download a copy of IRS’ proposed regulations at:

http://www.gpo.gov/fdsys/