VENABLE LLP

The ACA's Impact on Nonprofits: Preparing Your Group Health Plan

Thursday, November 13, 2014, 2:00 p.m. – 3:30 p.m. ET

Venable LLP and Association TRENDS

Speakers

Thora A. Johnson, Esq., Venable LLP
Christopher E. Condeluci, Esq., CC Law & Policy

Agenda

- “Play-or-Pay” Rules
- Identifying Full-Time Employees
- Affordability and Minimum Value Standards
- Interacting with the Exchanges
  (the “Health Insurance Marketplace”)
- Next Steps

VENABLE® LLP

Introduction to the Play-or-Pay Rules

Introduction to the Play-or-Pay Rules

- Individual Mandate (effective January 1, 2014)
  - The Patient Protection and Affordable Care Act (ACA) requires individuals to maintain minimum essential coverage or pay a penalty tax.
  - Some individuals qualify for a premium subsidy from the government to purchase such coverage on the Exchanges.

Introduction to the Play-or-Pay Rules

- Employer Mandate (generally effective January 1, 2015)
  - A one-year delay; originally effective January 1, 2014
  - Special rules for fiscal year plans
  - The ACA imposes a mandate on large employers to offer minimum essential coverage to their full-time employees and their dependent children (up to age 26) or pay a penalty tax
  - In addition, if that minimum essential coverage is not affordable or does not provide minimum value, the employer is subject to a penalty tax

Introduction to the Play-or-Pay Rules

- The Employer Mandate applies to "applicable large employers," defined as "an employer that employed an average of at least 50 full-time employees [including full-time equivalent employees (FTEs)] on business days during the preceding calendar year."
  - Determined on a controlled group basis
  - Full-time means an average of 30 hours/week or 130 hours/month
  - Common law test used for identifying employees

Note – Special Transition Rule for 2015 – At least 100 full-time employees (including FTEs)

VENABLE LLP

Play-or-Pay – Penalty Tax Trigger

- A penalty tax is due for any month in which at least one full-time employee is certified to the employer as having purchased health insurance through an Exchange with a premium subsidy from the government for that coverage.

- An individual is NOT eligible for a premium subsidy offered through the Exchange if he or she is eligible for employer-sponsored coverage that is affordable and provides minimum value.

The Mechanics of the Play-or-Pay Penalties

The “No Coverage” Penalty

- Penalty for failure to provide coverage
  - If more than 5% of full-time employees are not offered coverage and even ONE full-time employee obtains a subsidy through an Exchange → the no coverage penalty is triggered

Note – Special Transitional Rule for 2015 – if more than 30% (not 5%)

The "No Coverage" Penalty

- Penalty for failure to provide coverage
  - Penalty = $2,000/year * TOTAL number of full-time employees
    - Assessed on a monthly basis ($166.67/employee/month)
    - First 30 *(80 for 2015)* full-time employees are disregarded
- Penalty applies on an employer-by-employer basis and not on a controlled group basis
- Be careful not to play AND pay

Identifying Full-Time Employees

- An employee is full-time if he or she works an average of at least 30 hours of service/week or 130 hours of service/month
- Hours of service
  - Each hour for which an employee is paid, or entitled to payment, for performance of work; and
  - Each hour for which an employee is paid, or entitled to payment, for vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military leave, or leave of absence

Identifying Full-Time Employees

- There are two measurement methods of determining “full-time” status

  1. The monthly measurement method

  2. The look-back measurement method

The Monthly Measurement Method

- Ongoing employees
  - Determine each employee's status as a full-time employee by counting the employee's hours of service for the prior calendar month
  - Little margin for error (5%, *30% for 2015*)
- New hires
  - If full-time, must be offered coverage no later than the first day of the first calendar month immediately following three full months of employment
    - Ex: Hired June 15 into full-time position, must be offered coverage as of October 1 to avoid penalties
  - Remember, maximum 90-day waiting period

The Look-Back Measurement Method

- Safe harbor to determine if employee is full-time
  - If an employee averages 30 or more hours of service per week during a measuring period → he or she should be treated as “full-time” (*i.e.*, offered coverage) during the subsequent stability period
  - There is an administrative period between the measuring period and the stability period to (1) determine if an individual is full-time, and (2) offer coverage

Measuring Period	Administrative Period	Stability Period

The Look-Back Measurement Method

- **Standard Measuring Period** = 3 to 12 months
- **Standard Administrative Period** = Up to 90-day period between a standard measuring period and a corresponding stability period
- **Standard Stability Period** = 6- to12-month period immediately following the standard measuring period (and any applicable administrative period)

The Look-Back Measurement Method

Ongoing Testing of Employees

Standard Measuring Period 1 (11/1/13-10/31/14)	**Administrative Period 1** (11/1/14-12/31/14)	**Stability Period 1** (1/1/15-12/31/15)	
	Standard Measuring Period 2 (11/1/14-10/31/15)	**Administrative Period 2** (11/1/15-12/31/15)	**Stability Period 2** (1/1/16-12/31/16)

The Look-Back Measurement Method

- New hires
  - Any individual reasonably expected to work at least 30 hours per week is automatically considered a "full-time" employee
  - All other employees = variable hour
    - Includes part-time employees (*i.e.*, employees not expected to work 30 hours/week)
    - "Seasonal employees" (even if they are initially expected to work 30 or more hours per week)

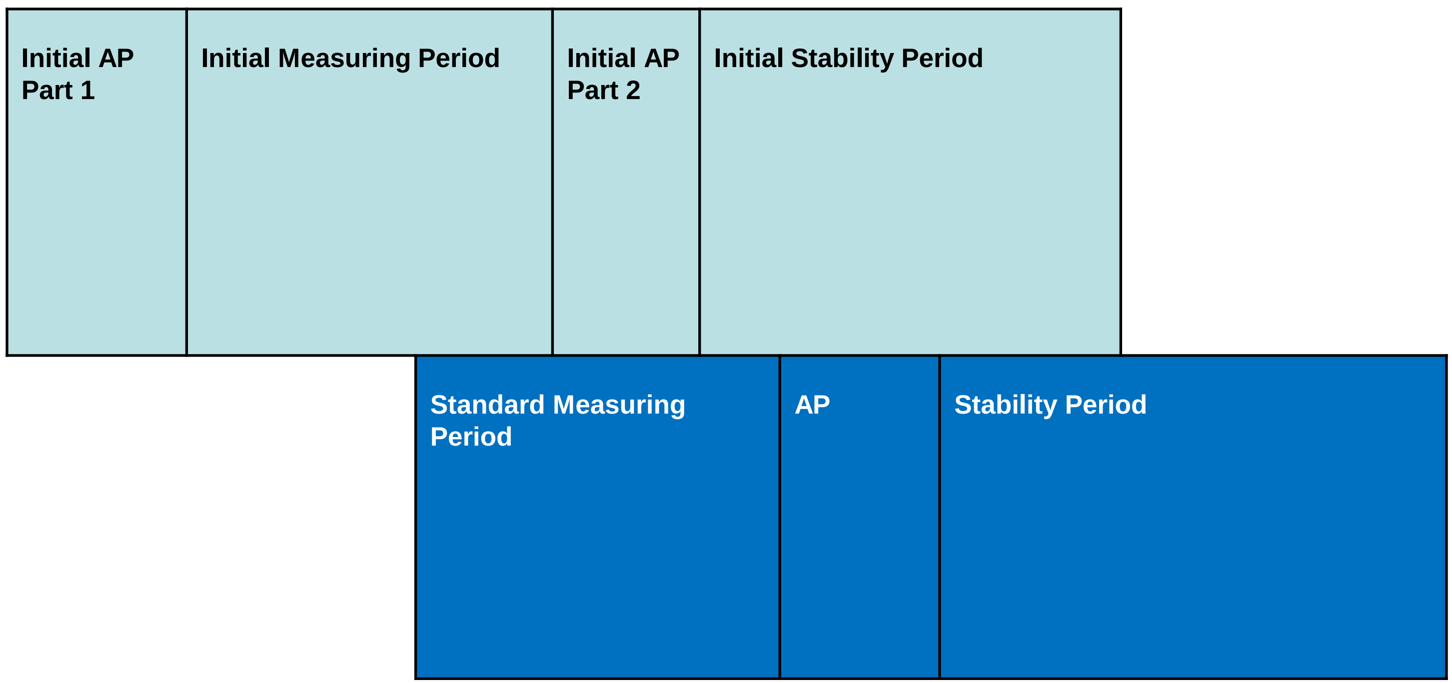
The Look-Back Measurement Method

- New hire reasonably expected to work 30 hrs/week
  – Must be offered coverage no later than the first day of the first calendar month immediately following three full months of employment
  – Again, remember the maximum 90-day waiting period
- New hire variable hour employee
  – **Initial Measuring Period** = 3 to 12 months from date of hire
  – Overlaps with first full **Standard Measuring Period** after employment begins

VENABLE LLP

The Look-Back Measurement Method

Testing for New Variable Hour Employees



The Look-Back Measurement Method

- Change in employment status rule
  - General rule: No changes in eligibility until next stability period
- Special rules apply to unpaid leaves of absence (such as unpaid FMLA leaves)
- Special rehire rules apply
  - Generally, rehires can be classified as new employees (and, therefore, subject to a new initial measuring period) only if they are not credited with any hours of service for at least 13 consecutive weeks

Using Different Measurement Methods

- Different measurement methods are permissible <u>only</u> for the following categories of employees
  - Employees employed by different entities
  - Salaried vs. hourly
  - Employees in different states
  - Collectively bargained vs. non-collectively bargained
  - Each group of collectively bargained employees

- Can't use monthly measurement for employees with predictable hours and look-back measurement method for all others

Determining Which Method to Use

- Monthly measurement
  - Not necessarily a planning tool
  - Little margin for error
  - Best for employers:
    - That offer minimum essential coverage to ALL employees
      - Use of a “skinny” or “basic” plan
    - Have employees who work steady hours
      - All employees work at least 30 hours/week, or
      - The hours worked by each employee do not vary

Determining Which Method to Use

- Look-back measurement method
  - Large portion of workforce has hours that vary; for example:
    - on call
    - per diem
    - shift
    - seasonal
  - Employer does not want to offer coverage to ALL employees
  - Employer okay with delay in coverage

The “Unaffordability” Penalty

- Penalty for not providing affordable/minimum value coverage
- Applies if:
  – Employee’s share of the premium for lowest-cost employee-only coverage would exceed 9.5% of the employee’s income, or an affordable plan does not provide minimum value—pay at least 60% of the allowed costs under the plan, <u>AND</u>
  – The employee receives a subsidy through an Exchange

The “Unaffordability” Penalty

- Penalty for providing “unaffordable” coverage
  - Penalty = $3,000/year/employee
  - Assessed on a monthly basis ($250/employee/month)
  - Applies only to employees who actually receive a premium subsidy for coverage on an Exchange

The "Unaffordability" Penalty

- Safe harbors for determining if the cost of coverage exceeds 9.5% of employee's income
  - Form W-2 compensation
  - Rate of pay
  - Federal poverty limit

- Minimum value
  - Safe harbor plan designs
  - Minimum value calculator
  - Actuarial analysis

Interaction with the Exchanges

Subsidies Offered through the Exchanges

- GENERAL RULE: An individual is NOT eligible for subsidies offered through the Exchange if he or she is "eligible" for employer-sponsored coverage
  - So, even if your employees are subsidy-eligible, they CANNOT opt out of employer coverage, go to the Exchange, and access the subsidies

Subsidies Offered through the Exchanges

- EXCEPTION: The employer-sponsored coverage (1) is "unaffordable" [*i.e.*, the employee's contribution for the lowest cost for self-only plan exceeds 9.5% of the employee's household income (or certain other "safe harbor" measures)] or (2) does NOT provide "minimum value" (*i.e.*, the employer coverage does not pay for at least 60% of the benefits provided under the plan)
  - In this case, depending upon an employee's income, an employee may opt out of employer coverage, go to the Exchange, and access the subsidies

Enrollment in the Exchanges

- Open enrollment period
  - Initial open enrollment period was Oct. 1, 2013 to March 31, 2014
  - For 2015, open enrollment is Nov. 15, 2014 to Feb. 15, 2014
- Special enrollment periods
  - Through April 15, 2014 for individuals who experienced difficulty enrolling in the Exchanges because of IT issues
  - Final Exchange regulations enumerate 9 special enrollment periods, including a special enrollment period upon becoming “eligible” for a premium subsidy because employer plan is “unaffordable” or not “minimum value”
  - HHS has authority to develop additional special enrollment periods

Enrollment in the Exchanges

- Enrollment process
  - The employee must access the Exchange [through, for example, Healthcare.gov or a "web-broker entity" (WBE)]
  - Complete an application for enrollment in a "qualified health plan"
  - Complete an application for premium subsidy

Interaction with the Exchanges

- Verification process
  - If an employee goes to the Exchange and applies for a premium subsidy, the Exchange will ask the employee for information about his/her employer plan
    - If the employee indicates that his/her employer plan was “unaffordable” or did not provide “minimum value,” the Exchange must access an electronic data source to verify whether this information is correct
    - If no electronic data source of information is available, the Exchange will contact the employer directly, asking the employer to verify the information

Interaction with the Exchanges

- Appeals process
  - If the employer is non-responsive, the Exchange must give the subsidy to the employee
    - The employer will be assessed a penalty tax by the IRS
    - Once assessed, the employer may appeal the determination and present information showing that its plan was “affordable” and provided “minimum value”

Next Steps

Next Steps

- Determine whether to play or pay
- Determine measurement method
- Update plan documentation
- Establish record-keeping system
  - Identify full-time employees
  - Document offers of coverage
  - Gather information for new reporting
- Determine whether employer should change from a fiscal plan year to a calendar plan year

Questions?

Thora A. Johnson, Esq., Venable LLP
tajohnson@Venable.com
t 410.244.7747

Christopher E. Condeluci, Esq., CC Law & Policy
chris@CClawandpolicy.com
t 703.209.0690

To view an index of Venable's articles and presentations or upcoming seminars on nonprofit legal topics, see www.Venable.com/nonprofits/publications or www.Venable.com/nonprofits/events.

To view recordings of Venable's nonprofit programs on our YouTube channel, see www.youtube.com/user/VenableNonprofits.