

Updates Regarding Automatic Enrollment, Employer Shared Responsibility, and Waiting Periods in the Affordable Care Act; Additional Feedback Solicited

On February 9, 2012, the U.S. Departments of Labor, Health and Human Services, and Treasury (the Departments) issued FAQs on open questions under the *Patient Protection and Affordable Care Act*. The FAQs, contained in Notice 2012-17 and Technical Release 2012-01, are available [here](#) and [here](#).

Once again signaling a readiness to respond to employer comments and concerns, the Departments have provided a provisional update on rulemaking in three areas and solicited additional comments from interested parties.

Automatic Enrollment

The Affordable Care Act requires employers of at least 200 full-time employees to automatically enroll eligible employees and automatically continue employees' enrollments, unless they opt out of coverage. The FAQs provide that the Department of Labor will not be ready to issue guidance on this provision prior to 2014 and reiterate that employers will not be required to comply until final regulations have been issued and take effect.

Employer Shared Responsibility

The FAQs continue an ongoing dialogue between the Treasury Department, the Internal Revenue Service (IRS) and the employer community regarding Code section 4980H, under which certain large employers who fail to offer full-time employees (and their dependents) the opportunity to enroll in affordable quality health care coverage may be subject to a shared responsibility penalty. The FAQs reiterate the intention of Treasury and IRS to issue proposed regulations or other guidance under section 4980H and they also address several topics expected to be included in that upcoming guidance:

- **Affordability Safe Harbor.** The FAQs reiterate the intent to include a previously proposed employer safe harbor that allows employers to determine the affordability of coverage offered to employees by reference to their W-2 wages rather than to their household income.
- **Determination of Full-Time Employee Status.** The FAQs indicate that future guidance is anticipated to include a method for determining the full-time status of an employee that is based on a previously proposed look-back and stability period approach. In addition, the FAQs provide, for the first time, a proposal for determining whether a newly hired employee is full-time for purposes of the employer shared responsibility provisions. The FAQs propose a framework under which employers would have the ability to use a six-month determination period for employees with less predictable work schedules. An employee's classification would depend on the employer's reasonable expectation when the employee is hired, based on facts and circumstances, and on whether the employee's hours worked over the first three months can be reasonably viewed as representative of the hours the employee will work annually.
- **Interaction with 90 Day Waiting Period Rules.** The FAQs indicate that Treasury and the IRS plan to coordinate the proposed regulations or other guidance under section 4980H with the Departments' guidance under section 2708 of the *Public Health Service Act*, which prohibits employers from imposing a waiting period of longer than 90 days on employees who are otherwise eligible for

coverage. The guidance is expected to provide that an employer who fails to offer coverage to a full-time employee during his first three months of employment will not be subject to an employer shared responsibility penalty with respect to that employee during that three-month period.

Permissible 90 Day Waiting Period

The FAQs provide additional guidance relating to the Affordable Care Act's limitation on any waiting period for eligible employees to a maximum of 90 days. In this regard, the FAQs:

- Clarify that the prohibition on waiting periods in excess of 90 days does not itself place any additional duties on an employer to provide coverage to any particular class of employees.
- Indicate that future guidance will permit significant flexibility on determining the start of the waiting period. The guidance will likely permit the 90-day period to begin only when employees have become eligible for employer-sponsored coverage by satisfying certain criteria (such as reaching full-time status or obtaining a license) that are not designed to avoid the 90-day waiting period limitation.
- Clarify that eligibility conditions other than those based solely on the passage of time are permissible and that future guidance is expected to provide that employers may continue to require employees to complete some minimum number of hours of service prior to becoming eligible for coverage.

The FAQs request comments on these topics by April 9, 2012. They can be submitted electronically to e-ohpsca-er.ebsa@dol.gov.

If you have any questions about the details provided in these FAQs, or about Affordable Care Act implementation generally, please contact a member of the Ropes & Gray [employee benefits practice](#) or your usual Ropes & Gray advisor. For access to other information about the Affordable Care Act, please visit the Ropes & Gray [Health Reform Resource Center](#).