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## Health Care Reform Proposed Regulations on Employer Penalties

The Internal Revenue Service recently issued proposed regulations on the employer penalties under the Health Care Reform Act (HCRA). Beginning in 2014, “applicable large employers” must either (i) offer coverage to full-time employees (and their dependents) that is both affordable and provides minimum value, or (ii) pay one of two “shared responsibility” penalties.

**Determining Number of Full-Time Employees.** In general, employers with 50 or more “full-time employees” or “full-time equivalent employees” are subject to the employer shared responsibility rules.

- Full-time employees are employees that average 30 hours or more per week.
- A full-time equivalent employee is two or more employees who work less than 30 hours per week individually, but whose combined hours add up to 30 per week. For example, 100 half-time employees (i.e., employees who average 15 hours per week) equal 50 full-time employees.
- An employer’s status as an applicable large employer is determined each year on a look-back basis. For example, if an employer has a combination of at least 50 full-time and/or full-time equivalent employees for 2013, it will be subject to the shared responsibility provisions in 2014.

**Shared Responsibility (i.e., Penalty) Payments.** There are two separate shared responsibility penalties.

- **Penalty No. 1 – Penalty for Failing to Provide Health Coverage to Enough Employees.** This Penalty applies when (i) an employer does not offer health coverage to at least 95% of its full-time employees, and (ii) one or more of the full-time employee(s) receives a premium tax credit to help pay for coverage on a publicly run insurance exchange (Exchange). For each month in which both (i) and (ii) exist, the amount of this penalty is the product of (A) the number of full-time employees

employed for the current year, minus 30, times (B) \$166.67 (*i.e.*, 1/12 of \$2,000). For purposes of this calculation, a full-time employee does not include a full-time equivalent.

- **Penalty No. 2 – Failure to Provide Affordable Coverage with Minimum Value to Certain Employees.** This Penalty applies when an employer offers health coverage to at least 95% of its full-time employees, but one or more full-time employee(s) (i) receive a premium tax credit to help pay for coverage on an Exchange, and (ii) either (A) the employer did not offer coverage to that employee, or (B) the coverage was either not “affordable” (see the safe harbor definitions below) or did not provide minimum value. For each month in which both (i) and (ii) exist for one or more full-time employees, the amount of this penalty is the product of (A) the number of those full-time employees, times (B) \$250 (*i.e.*, 1/12 of \$3,000). This penalty is capped at the number of the employer’s full-time employees for the month, minus 30, times \$166.67 to ensure that an employer who offers coverage will never be penalized more than an employer who does not.

**New Developments.** Some of the most noteworthy highlights of the new proposed regulations include the following:

- **“Substantially All.”** As indicated above, the rules clarify that an applicable large employer must offer coverage to “substantially all” full-time employees and their dependents in order to avoid potential pay-or-play penalties. “Substantially all” means that an employer offers coverage to at least 95% of its full-time employees. Therefore, there is now a 5% cushion built in to the rule.
- **Spouses and Dependents.** Employers must offer coverage to full-time employees and dependent children up to age 26 in order to avoid penalties. However, there is no requirement that the employer offer coverage to an employee’s spouse, and the dependent coverage does not have to be “affordable”.

Also, there is a transition rule for employers that currently do not offer dependent coverage. Employers that take steps during the 2014 plan year to offer dependent coverage will not be subject to the pay-or-play penalty solely for failing to satisfy this requirement.

- **Controlled Groups.** The rules clarify that the shared responsibility requirements are generally applied separately to each member of a controlled group (generally a group of companies with 80% common ownership). Although all members of a controlled group are used to determine whether any member of the group is an applicable large employer subject to the employer shared responsibility provisions (*i.e.*, the controlled group is used to determine whether there are 50 full-time and/or full-time equivalent employees), each member is treated

separately for purposes of determining liability for, and the amount and payment of, any shared responsibility penalty. Therefore, if a controlled group is determined to be an applicable large employer, but only one member of the group does not offer health insurance to its employees, only that member (and not the entire controlled group) is responsible for paying the penalty based only on that member's number of full-time employees.

- **Making Employer Shared Responsibility Payment.** The rules clarify that the IRS will contact employers to inform them of their potential liability for a shared responsibility payment and provide them an opportunity to respond before any liability is assessed. Employers are not required to include the payment on any tax return.
- **Affordability Safe Harbors.** Safe harbors for determining whether the employer's health coverage is affordable have been expanded. The following safe harbors are available:
  - **W-2 Wages:** An employer's health coverage is affordable if the employee contribution for the lowest employee-only coverage option does not exceed 9.5% of the employee's Form W-2 wages for the calendar year.
  - **Rate of Pay:** If an employee's required monthly contribution for self-only coverage does not exceed 9.5% of his or her monthly wages, employer coverage is affordable. For an hourly employee, his or her monthly wage is his or her hourly rate of pay times 130 hours per month.
  - **Federal Poverty Line:** If the employee monthly contribution for self-only coverage does not exceed 9.5% of the monthly amount of the federal poverty line for a single individual (for 2013, \$1,061.15, or \$11,170 multiplied by 9.5%), the employer coverage is deemed affordable for all employees. In other words, the employee monthly contribution could not exceed \$88.43 based on the current poverty line.

**Contact Information.** For more information from Mazursky Constantine, please contact Amy Heppner (404.888.8825) or Carl Lammers (404.888.8872). For more information from VCG Consultants, please contact Leslie Schneider (770.863.3617).

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