Helpful Information Regarding Pay or Play Mandate

Determination of full-time employee status: Clients have asked how to determine whether an employee is a "full-time" employee under the ACA, and specifically how this determination is made with regard to seasonal employees. The IRS has issued guidance on these issues and proposed regulations were issued on January 2, 2013.

Under the ACA "pay or play" mandate, "applicable large employers" may be subject to a penalty if they do not offer health coverage to their employees or if such coverage is not affordable or does not provide certain essential health benefits. This penalty is based on the number of full-time employees employed by the employer. Internal Revenue Code § 4980H(c)(2) defines an "applicable large employer" as an employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year.

() Seasonal employee exclusion: Under Section 4980H(c)(2)(B), the employer will not be deemed to employ more than 50 full-time employees if (a) the employer's workforce exceeds 50 full-time employees for 120 days or fewer during the calendar year, and (b) the employees in excess of 50 employed during this 120-day period were seasonal workers. The term "seasonal workers" is defined in § 4980H(c)(2)(B)(ii) as a worker who performs labor or services on a seasonal basis as defined by the Secretary of Labor, including workers whose employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. Such full-time seasonal workers must be counted in the determination of whether the employer has more than 50 full-time employees, but they are excluded under this statute. In such a circumstance, the employer would not be an "applicable large employer" subject to penalty.

() Full-time Employee Status: Code § 4980H(4)(A) defines "full-time employee" as an employee, with respect to any month, who is employed on average at least 30 hours of service per week. The proposed regulations treat 130 hours of service in a calendar month as the monthly equivalent of 30 hours of service per week. Additionally, Code § 4980H(2)(E) provides that solely for purposes of determining whether an employer is an "applicable large employer", full-time equivalents are treated as full-time employees. Full-time equivalents are determined by dividing the aggregate number of hours of service of all employees who are not full-time employees for the month by 120. The resulting number is the number of full-time equivalents for the calendar month. Each full-time equivalent counts as one full-time employee.

An alternative to this month-by-month determination of full-time employee status is the look-back

method set forth in the proposed regulations under Code § 4980H. Under this method, an employer has the option to determine each ongoing employee's full-time status by "looking back" at a "standard measurement period" (a defined period of not less than three but no more than twelve consecutive months, as chosen by the employer). An "ongoing employee" is defined as an employee who has been employed by an employer for a least one standard measurement period. An employer may also include an "administrative period" of up to 90 days between the measurement period and the stability period to determine which ongoing employees are eligible for coverage and notify and enroll employees. The proposed regulations also provide that an employer may use different measurement periods, stability periods and administrative periods for the following categories of employees: (1) each group of collectively bargained employees covered by a separate bargaining agreement, (2) collectively bargained and non-collectively bargained employees, (3) salaried employees and hourly employees, and (4) employees whose primary places of employment are in different states.

(a) *Ongoing employee works at least 30 hours during the standard measurement period:* If the employer determines that an employee was employed on average at least 30 hours of service per week during the standard measurement period, then the employer treats the employee as a full-time employee during a subsequent "stability period", regardless of the employee's number of hours of service during the stability period (so long as the employee remains employed). A "stability period" is the period that immediately follows a standard measurement period, the duration of which is at least the greater of six consecutive calendar months or the length of the standard measurement period.

(b) *Ongoing employee does not work at least 30 hours during the standard measurement period:* If, on the other hand, the employer determines that such employee did not work "full-time" during the standard measurement period, the employer would be permitted to treat the employee as not employed full-time during the immediately following stability period. In such a case, the stability period may not be longer than the associated standard measurement period.

The proposed regulations also provide rules for new employees, including new seasonal and variable employees.

(a) *New employees reasonably expected to work full-time:* If a new employee is reasonably expected at his or her start date to be employed on average 30 hours of service per week, then the employer that offers group health plan coverage to the employee at or before the conclusion of the employee's initial three calendar months of employment will not be subject to a penalty for failure to offer coverage to the employee for up to the initial three calendar months of employment.

(b) *Look-back method for variable hour employees and seasonal employees:* The proposed regulations provide that if an employer uses the look-back method for its ongoing employees, it may also use an optional method for determining full-time status of its new variable hour and seasonal employees.

(i) *Variable hour employees:* A "variable hour employee" is an employee, that based on the facts and circumstances existing at the employee's start date, it cannot be determined whether the employee is reasonably expected to work on average at least 30 hours per week. Additionally, a new employee who is expected to be employed initially at least 30 hours per week may be a variable hour employee if, based on the facts and circumstances at the start date, employment of more than 30 hours per week is reasonably expected to be of a limited duration and it cannot be determined that the employee is reasonably expected to be employed on average at least 30 hours per week over the initial measurement period.

(ii) *Seasonal employees:* The proposed regulations reserve the definition of "seasonal employee" and provide that employers are permitted to use a good-faith interpretation of the term "seasonal employee" through at least 2014.

(iii) *Look-back method:* An employer may use an "initial measurement period" of between three and twelve months (just as with ongoing employee) and an administrative period of up to 90 days for variable hour and seasonal employees. However, the initial measurement period and the administrative period combined may not extend beyond the last day of the first calendar month beginning on or after the one-year anniversary of the employee's start date (totaling at most 13 months and a fraction of a month). During the initial measurement period, the employer measures the hours of service for the employee and determine whether he or she was employed on average of 30 hours of service per week or more during such period.

If the employee is determined to be a full-time employee during the initial measurement period, the employer may treat such employee as a full-time employee for the duration of the stability period. Such stability period must be the same as that used for ongoing employees, must be the greater of six consecutive calendar months or the initial measurement period, and must begin immediately after the initial measurement period (and any administrative period if elected by the employer).

If the employee is determined to not be a full-time employee during the initial measurement period, the employer is permitted to treat the employee as not a full-time employee during the stability period. The stability period with regard to such an employee must not be more than one month longer than the initial measurement period and must not exceed the remainder of the standard measurement period used for ongoing employees (plus an associated administrative period) in which the initial measurement period ends.

There are also provisions in the proposed regulations for treatment of variable hour and seasonal employees who have a change in employment status during the initial measurement period, and employees rehired after termination of employment or returning to work after an absence. The proposed regulations did not address treatment of new short-term employees who are hired for a limited amount of time exceeding three months or employees hired into high-turnover positions.

The proposed regulations dealing with full-time employees and the determination of "large employer" status are lengthy and sometimes complicated. I have attempted to give you a detailed summary of these rules. If you have any questions, please feel free to contact Al Holifield or Tina Haley to discuss these issues further.