



Since last August when we issued our last *Update* regarding the Affordable Care Act, a number of new regulations have been issued and deadlines extended. We discuss several of the more significant developments in this issue.

I. The Employer Mandate

Introduction

The Affordable Care Act's requirements regarding employer-sponsored coverage are referred to as "Employer Shared Responsibility" or the "Employer Mandate".

In the Massachusetts municipal sector, the impact of the Employer Mandate is likely to be limited as the state law dealing with health coverage for municipal employees (M.G.L. Chapter 32B) already contains more comprehensive coverage requirements than those required by the Employer Mandate. Nevertheless, the Federal Act may require some Massachusetts municipal employers to offer coverage to certain temporary employees (particularly some substitute teachers) to whom they do not currently offer health coverage. As a result of delays in enforcement of the Employer Mandate (detailed, below), most Massachusetts municipalities will not be impacted by its requirements until on or after July 1, 2015. This Update will focus upon the impact that the Employer Mandate will thereafter have upon the eligibility for health coverage of municipal "temporary" employees. The ACA defines a full-time employee as an employee who averages at least 30 hours per week.

Definitions

The Affordable Care Act (ACA) requires employers with at least 50 full-time employees (or 50 full-time equivalents (FTEs)) to provide to all full-time employees health coverage that (1) meets minimum value standards and (2) is "affordable" to employees. Failure to provide that coverage to full-time employees will expose a covered employer to substantial penalties.

1) Minimum Value Standard –

In order to satisfy this standard, a health plan must cover at least 60% of total health care costs. If out-of-pocket costs such as co-pays, deductibles and coinsurance represent more than 40% of total health costs under the plan, the plan does not satisfy this standard. We understand that most, if not all, health plans offered by Massachusetts governmental units satisfy this standard.

2) Affordability –

Coverage is affordable for an employee if the employee's share of the premium expense for the lowest cost individual coverage offered by the employer does not exceed 9.5% of the employee's household income. The affordability of coverage is determined on an employee-by-employee basis.

Delays In Enforcement

The Affordable Care Act Employer Mandate had an original effective date of January 1, 2014. However, in July 2013, the effective date was pushed back to January 1, 2015.

In February 2014, the Treasury Department promulgated final regulations dealing with the enforcement of the Employer Mandate. Those regulations included transitional rules for the phasing-in of the Mandate. The transitional rules provided:

- 1.) The effective date for employers with at least 50 full-time employees (or 50 full-time equivalents) but less than 100 employees (or 100 FTEs) is delayed until January 1, 2016 provided that:
 - a.) between February 9, 2014 and December 31, 2014 the employer does not reduce the size of its workforce or the overall hours of service of its employees for the purpose of becoming eligible for this delay in enforcement, and
 - b.) during the above period, the employer does not eliminate or materially reduce the health coverage, if any, that it offered as of February 9, 2014.

- 2.) The Mandate will not apply to employers with non-calendar year plans until the first day of the applicable plan year provided the employer maintained a non-calendar year plan as of December 27, 2012 and the plan year was not modified after that date to begin at a later calendar date.

Thus, for Massachusetts governmental units with 100 or more employees that have July 1 - June 30 plan years, the Mandate will generally not apply until July 1, 2015, while for employers with that plan year and with between 50 and 100 employees, the Mandate will generally not apply until July 1, 2016.

Penalties For Non-Compliance

If an Employer fails to meet the Affordability requirement, that is, to provide health coverage to at least 95% of its eligible full-time employees, it will be subject to a penalty of \$166.67 per month (\$2,000. per year) for each of its eligible full-time employees, but not including its first 30 employees.

Transitional Relief - For each month during its plan year that commences in 2015, an Employer will not be subject to the above penalty if it offers coverage to at least 70% of its eligible full-time employees. Also during its plan year that commences in 2015, in calculating the penalty applicable to an Employer that offers coverage to less than 70% of its eligible full-time employees, the first 80 employees will be excluded.

If an Employer fails to offer an eligible full-time employee coverage that meets the Minimum Value Standard and/or if the coverage offered is not affordable for the employee (employee's share of premium cost for lowest priced Individual coverage offered by the Employer exceeds 9.5% of employee's household income), and if the employee enrolls in subsidized coverage offered by an Exchange (in Massachusetts, the Massachusetts Connector), the Employer will be assessed a penalty (assessable payment) of \$250.00 per month (\$3,000 per year) for each such full-time employee who obtains subsidized coverage through the Exchange.

Recognizing that Employers will generally not know an employee's "household income" the regulations set forth three separate safe harbors under which an employer can determine affordability based on information that is readily available to the employer. These three safe harbors are:

1.) The Form W-2 wages safe harbor

Under this safe harbor, the employer may calculate affordability based solely on the wages paid to the employee as found at Box 1 of the employee's Form W-2. The employee's coverage will be treated as affordable if the employee's share of the premium cost for the lowest-cost individual coverage offered by the employer does not exceed 9.5% of the employee's wages from Box 1 of the employee's Form W-2.

2.) The rate of pay safe harbor

Under this safe harbor, an employee's coverage will be treated as affordable for a calendar month if the employee's share of the required premium cost does not exceed 9.5% of an amount equal to 130 hours multiplied by the lower of the employee's hourly rate of pay as of the first day of the coverage (generally the first day of the plan year) or the employee's lowest hourly rate of pay during the calendar month.

3.) The Federal poverty line safe harbor

Under this safe harbor, an employee's coverage for a calendar month will be treated as affordable if the employee's share of the required premium cost does not exceed 9.5% of the federal poverty line for a single individual for the applicable calendar year, divided by 12.

If an employer meets the requirements of the safe harbor for an employee, the employer will not be subject to an assessable payment for that employee, even if the employee ultimately obtains subsidized coverage from the exchange (Massachusetts Connector).

Expected Impact on Massachusetts Public Employers

Health coverage for public employees in Massachusetts is controlled by Chapter 32B of the Massachusetts General Laws.

Section 2(d) of that Chapter provides that an employee will be eligible for coverage if her/his duties require "not less than 20 hours, regularly, in the service of the governmental unit during the regular work week of permanent or temporary employment; provided further, that no seasonal employee or emergency employees shall be included." (emphasis supplied)

To the extent that eligibility for coverage under the ACA is predicated on an employee averaging at least 30 hours of service per week, an employee who is eligible for coverage under the ACA will, in nearly all cases, have already been eligible for coverage under Chapter 32B.

The sole exceptions may involve temporary employees (particularly substitute teachers), variable hour employees, and seasonal employees. The remainder of this Update will deal with the eligibility of those types of employees under the ACA.

It is clear from the quoted excerpt from Chapter 32B, section 2(d) that an employee is not rendered ineligible for coverage because her/his employment is temporary and not permanent. However, Chapter 32B does not include any durational limit for determining which temporary employees are eligible for coverage. While it would not seem reasonable to require an employer to provide coverage to an employee who is hired for a two-week project, what of a long-term substitute who is hired in August to work the entire school year in place of a permanent teacher who is on child-rearing leave?

Probably due to the lack of a fixed durational requirement for eligibility in Chapter 32B, cities, towns, and districts have used differing standards for determining the eligibility of substitute teachers and other non-permanent employees.

The ACA, on the other hand, provides a durational standard. If, at the time of hiring, an Employer reasonably knows that a new employee will average at least 30 hours per week, the employee must be offered coverage no later than the first day of the fourth full calendar month of employment.

Often, an Employer will not be sure whether existing employees or new hires will actually average 30 hours per week. The ACA terms these employees “variable hour employees” and provides the Employer with two (2) options for determining whether such employees are eligible:

- 1.) the monthly measurement method, and
- 2.) the look back period method

Under the monthly measurement option, the Employer determines on a monthly basis whether an employee is eligible for coverage. As the employee may average 30 hours per week for one month but not the next and, again, average 30 hours for a third month, this measurement method will not prove practical for many Employers.

Thus, most Employers will likely adopt the look-back method.

Under the look-back method, an Employer adopts a measurement period for determining an employee’s eligibility (whether the employee averages at least 30 hours per week). Following the measurement period, the Employer may adopt an administrative period during which it may calculate the employee’s eligibility and take steps to enroll the employee in coverage (if the employee is eligible). This is followed by a stability period. For the duration of the stability period the employee will be eligible for coverage (if s/he averages 30 hours per week during the measurement period), or ineligible for coverage (if s/he did not average 30 hours per week during that measurement period) regardless of how many hours the employee actually works during the stability period. The stability period will, itself, serve as the measurement period for the succeeding stability period.

The look-back rules are slightly different for ongoing employees and for new employees:

1. Ongoing Variable Hour Employees

STANDARD MEASUREMENT PERIOD

- Employer adopts standard measurement period of 3 to 12 months
- At the conclusion of the period, Employer determines whether employee has averaged 30 hours per week N.B. In determining whether the employee has averaged 30 hours per week, paid leave is counted as hours worked. Unpaid leave is generally not included. However, unpaid leave for
 - a.) the FMLA,
 - b.) USERRA (military leave), or
 - c.) jury duty

must be excluded from the calculation. For example, if an Employer elects a 12 month standard measurement period, an employee who is on unpaid FMLA leave for 8 weeks will have her/his annual hours divided by 44 (rather than 52) when determining whether s/he averaged 30 hours per week over that 12 month period.

School Employees –

Summer school break must be excluded from the calculation

e.g. If Employer elects a standard measurement period of 12 months, substitute teacher who is off for 12 weeks during the Summer will have her/his annual hours divided by 40 (rather than 52) in determining whether s/he averaged 30 hours per week over that 12 month period.

STANDARD ADMINISTRATIVE PERIOD

At the end of the Standard Measurement Period the Employer has the option to utilize a Standard Administrative Period of up to 90 days' duration.

STANDARD STABILITY PERIOD

- Follows the Standard Measurement Period or Standard Administrative Period .
- The employee will either be eligible or ineligible for coverage during this stability period – depending on average hours during Measurement Period

Duration of Stability Period –

- 6 months or the same length as the Measurement Period, whichever is greater (except that for employees found not to be full-time, the length of the stability period cannot exceed the length of the measurement period)

2. New Variable Hour Employees

If the Employer reasonably knows at time of hire that the employee will average 30 hours per week for at least 3 months, it must provide coverage no later than the first day of the fourth full calendar month of employment – no measurement period applies.

INITIAL MEASUREMENT PERIOD

Begins on employee's start date or any date up to and including the 1st day of the succeeding month and lasts for a minimum of 3 months and a maximum of 12 months (Employer Choice)

INITIAL ADMINISTRATIVE PERIOD

Up to 90 days except that the Initial Measurement Period and the Initial Administrative Period combined may not extend beyond the last day of the first calendar month that begins on or after the employee's first anniversary date of employment

INITIAL STABILITY PERIOD

Must be the same length as the stability period for ongoing employees. The stability period for employees who are determined to be full-time (30+ hours) must be a period of at least 6 consecutive months and must be no shorter than the Initial Measurement Period. The stability period for employees who are determined not to be full-time employees must not be more than one month longer than the Initial Measurement Period.

If, during the Initial Measurement Period, an employee's job status changes to a full-time (30+ hours) status, the employee must be offered coverage no later than the first day of the fourth full calendar month after the change.

The regulations allow Employers to transition new employees onto the Standard Measurement/ Administrative/Stability Period cycle once a determination regarding eligibility has been made under the initial process

3. Seasonal Employees

Seasonal Employees are excluded from eligibility for coverage under Chapter 32B but that term is never defined in that statute.

The regulations promulgated under the ACA, however, define that term. Those regulations define a seasonal employee as: an employee who is hired into a position for which the customary annual employment is six months or less.

Substitute teachers are not seasonal employees for purposes of the ACA as a teaching position has customary annual employment of longer than 6 months.

If an employee is hired into a full-time position for which the customary annual employment is six months or less, s/he will not be eligible for coverage after 90 days, despite the fact that the Employer reasonably knows that her/his employment will average at least 30 hours per week and will extend for longer than 3 months (but less than six months).

However, the eligibility for coverage of a seasonal employee must be determined under the look-back measurement method in the same way that the eligibility of a variable hour employee would be determined. For that and other reasons, an Employer will generally want to adopt a 12-month measurement period.

II. Does My Town Employ 50 Full-Time Equivalents (FTEs)

Trust members that employ fewer than 50 full-time employees or 50 “full-time equivalents” will not be subject to the ACA’s Employer Mandate and will not be required to issue or file Forms 1095-C and 1095-B.

This leaves the question of how “full-time equivalents” are determined.

First, an employer must determine how many of its employees averaged at least 30 hours per week. These are the Employer’s full-time employees. Once that determination is made the Employer must calculate the total of all of the hours worked by its other employees during that month and divide that total by 120.

EXAMPLE: The Town of Somewhere has 60 employees. Of those employees, 15 average 40 hours per week, 15 average 35 hours per week and the remaining 30 employees average less than 30 hours per week. The 15 employees who average 40 hours per week and the 15 employees who average 35 hours per week are full-time employees. The hours worked by the remaining 30 employees during a month must be totaled and then divided by 120. The number is then added to the 30 full-time employees to determine the Employer’s full-time equivalents for that month.

The calculation must be performed for each of the 12 months of the calendar year. The numbers of FTEs for each of the 12 months are then added together and divided by 12. If the resulting number is 50 or more, the Employer is subject to the Employer Mandate for the succeeding calendar year.

III. Out of Pocket Maximums

The ACA requires that, for plan years commencing on or after January 1, 2014, health plans provide an annual limit on out-of-pocket costs. For plan years that begin in 2014, the limit may be no higher than \$6,350 for individual coverage and \$12,700 for family coverage. For plan years after 2014, the ceiling will be increased by an inflation factor.

For plan years that begin in 2014, the regulations allow a health plan that has a separate pharmacy provider to apply a separate out-of-pocket maximum to pharmacy expenses. For all plan years that begin after 2014, however, a single out-of-pocket maximum will apply to pharmacy as well as medical out-of-pocket expenses that relate to “essential health benefits” as that term is defined by the ACA regulations.

While allowed by the ACA to impose higher out-of-pocket maximums, the MIIA Health Benefits Trust has decided to apply ceilings of \$2,500 for individual coverage and \$5,000 for family coverage to the health plans that it offers. All out-of-pocket costs (deductibles, co-pays, etc.) that relate to essential health benefits will be included in the calculation.

IV. Updated COBRA Notices

The availability of health coverage through the new Health Insurance Marketplaces (in Massachusetts, the Health Connector) has caused the U.S. Department of Labor to recently (May 2, 2014) update its Model COBRA notices. The new model general notice and model election notice are available at the DOL website at www.dol.gov/ebsa/cobra/html. A new model notice under the Children’s Health Insurance Program Reauthorization Act of 2009 (CHIPRA) is available at www.dol.gov/ebsa/complianceassistance.html.

V. Conclusion

We hope that you have found these insights helpful. We will continue to update you as further developments under the ACA occur.