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Kaminsky & Associates, Inc.

Summary of Key Changes and Additions in the Final Employer-Shared Responsibility/Play or Pay Regulations

The final employer-shared responsibility/play or pay regulations are very similar to the proposed regulations in terms of the basic requirements. However, many details have been added or clarified. The most relevant changes are listed below. The portion of the Counting Employees piece that addresses this issue is in brackets.

1) Transition rule that allows many employers with 50 to 99 employees to wait until 2016 to comply, including those that are not currently offering coverage. Those employers with 50 to 99 that do not meet the “maintenance” requirements will be subject to the requirements/penalties in 2015. [Introduction, Q&A 28, and Q&A 107]

2) Adds real estate agents and “direct sellers” to list of workers who are not covered by this requirement. Partners, 2% shareholders, certain leased employees, independent contractors, and sole proprietors continue to be excluded. [Q&A 3]

3) Provides that in situations in which the employer receiving the worker’s services is the common-law employer, an offer of coverage made by the temporary staffing firm "on behalf of" the employer will be considered to be an offer of coverage by the employer. For an offer of coverage to be "on behalf of" the employer, the employer must pay a higher fee to the temporary staffing firm for those employees who enroll in the temporary staffing firm's plan. [Q&A5]

4) States that workers with H-2A and H-2B visas must be considered. [Q&A 7]

5) Clarifies that hours worked by students generally must be counted. Work-study hours are excluded. Internship hours must be considered if the employee is paid. [Q&A 8 and Q&A 9]

6) Provides that hours worked by a “bona-fide volunteer” may be excluded. [Q&A 14]

7) Provides a safe harbor of 2.25 hours for each hour of classroom time plus one hour for each hour of non-classroom work for adjunct faculty. [Q&A 20]

8) Provides that if an employee works for more than one employer in a controlled group, the employer for whom the employee worked the most hours during the month is responsible for covering that employee. [Q&A 21]

9) Provides guidelines for handling on-call or waiting pay. [Q&A 22]

10) Clarifies that rounding the number of full-time equivalent employees is to the nearest one-hundredth. [Q&A 27]

11) Confirms that employers may just count employee hours for six (or more) consecutive months in 2014, rather than for the whole calendar year, when determining if the employer is “large” for 2015. The IRS says that it does not plan to allow a similar transition rule for 2016. [Q&A 28]

12) Provides that if an employer becomes “large” for the first time, it will have until April 1 of its first year subject to play or pay requirements to offer coverage. [Q&A 30]

13) For 2015, a large employer only needs to offer minimum essential coverage to 70% of its full-time employees to avoid the $2,000/”no offer” penalty. [Section 4 preface and Q&A 40]

14) For 2015, employers that must pay the “no offer” penalty may exclude 80 employees from the penalty; these “free employees” continue to be shared pro rata among the controlled group. [Section 4 preface, Q&A 44, and Q&A 53]

15) Includes a reminder that the $2,000 and $3,000 penalties are subject to annual cost-of-living increases. [Q&A 38]

16) States that because the guaranteed issue requirements apply in the large group market, participation requirements should not be an issue for large employers. Small employers that cannot meet participation must be offered open enrollment each fall. [Q&A 45]

17) Coverage does not have to be offered to dependent children until 2016. [Q&A 46]

18) Provides that coverage does not need to be offered to stepchildren or foster children. [Q&A 46]

19) Clarifies that adult children must be covered until the end of the calendar year in which they reach age 26. [Q&A 46]

20) Provides some details around what constitutes an offer of coverage. [Q&A 50]

21) Allows the rate of pay method of determining affordability to be used with hourly employees whose rate of pay decreases. [Q&A 59]

22) Allows employers that use the federal poverty level (FPL) method of determining affordability to use the FPL published within the prior six months. [Q&A 60]

23) Provides additional details on how employers may use the current monthly hours method, rather than the look-back measurement and stability periods, to determine whether an employee is full-time. Clarifies that the employer may use the monthly method for some specified groups of employees and the look-back for others. [Section 6 and Q&A 106]

24) Provides that while educational institutions must generally treat breaks in service of up to 26 weeks as continuous employment, all other types of employers only need to treat breaks in service of up to 13 weeks as continuous employment. [Q&A 82-84 and Q&A 99-101]

25) Clarifies that the administrative period cannot exceed exactly 90 days – three months will not be allowed. [Q&A 89]

26) Provides additional factors to consider when deciding whether a new worker is a variable hours employee, and confirms that going forward the likelihood that an employee may only work for a short-time cannot be considered. [Q&A 92]

27) Defines a "seasonal employee" as an employee who is hired for a position for which the customary annual employment is six months or less. Typically, the period for when work is available must be about the same time each year. (This definition applies for purposes of the ability to apply an extended initial measurement period to determine full-time employee status, not for deciding if the employer is "large." When deciding if the employer is "large," the measure is 120 days per year by a "seasonal worker.") [Q&A 93. Also see Q&A 29]

28) Provides some factors for temporary staffing forms to consider when deciding if a new worker can be treated as a variable hours employee. [Q&A 94]

29) Provides that under the look-back method, if an employee who is in a stability period in which he is classified as full-time moves to a new, part-time position, the employer may begin treating the employee as part-time after three months in the new part-time position. [Q&A 98]

30) Provides that non-calendar year plans may wait until the start of the 2015 plan year to offer coverage, or pay penalties, if they meet several transition requirements. Employers that are large enough for play or pay to apply in 2015, and that cannot meet the transition requirements, must comply as of January 1, 2015. The IRS has said that it does not intend to provide a similar delay for non-calendar year plans that must first comply in 2016. [Q&A 108]

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