No Need to Delay: Learn COBRA Implications for ACA’s Full-time Employee Rules

By Rich Glass

When the employer shared responsibility regulations under the Affordable Care Act were issued earlier this year, the primary focus was on the safe harbor rules for full-time employee status. As a result, it might be easy to overlook the COBRA implications. The purpose of this column is to avoid that error.

Please note that with the recent announcement (in IRS Notice 2013-45) of a one-year delay in ACA reporting and employer penalty taxes, some of these implications similarly will be delayed. But the advantage now is that you get more time to evaluate these issues and adjust your benefit design strategies in a less hurried manner.

There are at least four COBRA-related issues with employer shared responsibility and full-time employee status (that is, 30 hours per week or 130 hours per month): (1) employees without coverage due to failure to pay; (2) the W-2 safe harbor (3) change of status during the stability period; and (4) implications for rehired employees.

Employees Without Coverage Due to Failure to Pay

The name of the game in 2015 and beyond will be avoiding the penalty taxes related to group health coverage. Two penalty taxes (actually called assessable payments) are possible. The first will be issued for failing to offer minimum essential coverage to substantially all full-time employees and their dependents. The second will be issued for failing to offer health coverage that is affordable and offers minimum value.

Here is a potentially unfair scenario: An employer offers minimum essential coverage to a full-time employee, but the employee does not pay the appropriate share of the premium and later obtains subsidized health coverage through the exchange, also known as the Health Insurance Marketplace. This could arise in any number of situations:

- An unpaid leave of absence
- Fluctuating hours where the employee’s net pay cannot cover the premium amount
- Certain tipped employees

Will the employer potentially have to pay the penalty tax for a delinquent employee? The IRS looked to a reliable resource for the fair answer, which is no: the COBRA treasury regulations. Employers must apply the COBRA 30-day grace period rules to determine if payment is timely. This includes the insignificant premium underpayment procedure in Treas. Reg. §54.4980B-8, Q/A-5(d).

The W-2 Safe Harbor

Most employers will offer minimum essential coverage. Most employers will provide coverage with minimum value (the so-called bronze level, 60-percent coverage). For many, the true test will be whether the health coverage is affordable (9.5 percent of household income). Because employers cannot know an employee’s household income, the shared responsibility regulations (again, note that these rules won’t be triggered until beginning in 2015) provide three safe harbors for determining the affordability of health coverage:

- Federal poverty line
- Rate of pay
- Form W-2 wages

In a majority of cases, the W-2 safe harbor probably will provide the highest premium that employers can charge employees while remaining affordable. The math is a straightforward fraction. The top part of the fraction (the numerator) is the amount of health premium an employee must pay for the lowest cost, self-only coverage during the year. The bottom part of the fraction (the
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denominator) consists of the employee’s box 1 W-2 wages for the same year.

What if the employee has COBRA coverage because of a reduction of hours? In that case, the employee is paying 102 percent of the full cost of coverage (both the employer and employee premiums) instead of the employee premium. Thankfully, the shared responsibility regulations state that you only look at the active employee rate, disregarding any premium for COBRA or other continuation coverage that some employees might actually pay.

Change of Status During the Stability Period

Under the shared responsibility regulations, full-time/part-time status is locked in during the stability period that follows the measurement and administrative periods. This is the case even if an employee’s hours drop below 30 hours per week during the stability period.

Example. An employer’s standard measurement period is Oct. 15 to Oct. 14. Its administrative period is Oct. 15 to Dec. 31. During this time, the employer runs the numbers and conducts open enrollment. Its stability period is Jan. 1 to Dec. 31, coinciding with the calendar plan year. It repeats this process every year. Let’s take an employee who is determined to be full-time during the 2015 stability period. Also, in 2015, the employee’s hours drop well below 30 hours per week.

At some point, a reduction of hours will cause a loss of coverage. COBRA clearly must be offered. Two questions are less clear.

When exactly does the employee lose coverage? When do you offer COBRA?

Here is the answer to the first question. The loss of coverage does not occur when the hours drop below 30. As stated before, health coverage is locked in during the stability period. The loss of coverage date would be the last day of the stability period, in this case Dec. 31, 2015.

The answer to the second question is a little more complicated. If this person is a variable hour employee, it is difficult to determine when the reduction of hours really occurred. The logical answer is to designate the end of the standard measurement period, in this case Oct. 14, 2015. But you could have a scenario where the date is more easily determined. For example, on July 1, 2015, the employer reduces the employee’s work days from four to three days per week with a standard eight-hour work day. In that case, you would have a more definite qualifying event date.

Let’s add another layer of complexity. One could argue that there are two alternatives to the logical answer that Oct. 14, 2015, the end of the standard measurement period, is the qualifying event date. First, you could argue that the qualifying event actually occurs when you determine that the person dropped to part-time status. This would be sometime during the administrative period. Second, you could argue that the qualifying event simply occurred at the end of the stability period because everything is locked in during that time.

Let’s assume the first qualifying event date of Oct. 14, 2015. Determining when you offer COBRA depends on whether you measure COBRA from the qualifying event date or the loss-of-coverage date. If you measure COBRA from the qualifying event date, the election notice time frame maximum coverage period would start from the qualifying event date (July 1, 2015, or Oct. 14, 2015, given the respective examples above), indicating that coverage would be lost on Dec. 31, 2015. If you measure COBRA from the loss-of-coverage date, the election notice time frame and maximum coverage period would start from the loss of coverage date (Dec. 31, 2015). Measuring COBRA from the loss-of-coverage date seems to be a cleaner approach. See the chart on p. 11).

To add a further wrinkle, the next standard measurement period could show a return to full-time status. COBRA would end when the next stability period begins, assuming the employee again enrolled in the employer’s health coverage at the active employee rates.

Implications for Rehired Employees

Assume that a full-time employee’s employment is terminated for reasons other than gross misconduct. This familiar COBRA song has been played so many times you probably know it by heart. You offer COBRA, COBRA is elected and paid for, and COBRA continues until the maximum coverage period expires or a terminating event occurs. One of the six terminating events is coverage under another group health plan that does not impose a pre-existing condition exclusion.

The ACA adds a couple of new verses to the COBRA song. First, for plan years starting in 2015, pre-existing condition exclusions are prohibited. Therefore, if the qualified beneficiary gains other group coverage where the 2015 plan year has already started, it is a terminating event, plain and simple. [Editor’s Note: See ¶1263 for general issues to consider when making such determinations, however.]

The second point is more involved. If the new employer is the old employer, the qualified beneficiary naturally will want to jump the COBRA coverage ship and board the active employee coverage ship. Employers must allow this unless there is a break in service. If

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there is no break in service, the employee must resume the status (full- or part-time) that was in place before the employment termination. If they were full time before, they must resume the coverage on day 1 or as soon as administratively practicable.

What is a break in service? It is at least 26 consecutive weeks where no work is performed. Alternatively, an employer could choose a period of four to 25 consecutive weeks if the number of weeks of the break in service exceeds the number of weeks of that employee’s period of employment immediately before employment termination.

Example. A full-time employee has 10 years of service when he terminates on April 1, 2015. After electing COBRA, he is rehired 22 weeks later on Sept. 2, 2015. Upon rehire, the employer must immediately put him on active employee health coverage. However, if the full-time employee only had 10 weeks of service instead of 10 years, the outcome would be different because the break in service (22 weeks) exceeds the initial employment term (10 weeks). Of course, if he is reasonably expected to work full-time, the employer must have a waiting period of 90 days or less, during which time he could continue his COBRA.

Additional rules apply for determining how to count hours for the rehired employee during the next measurement period. You must take into account leaves of absence for the Family and Medical Leave Act, the Uniformed Services Employment and Reemployment Rights Act and jury duty, and a special rule applies to educational organizations. But that is an article for another day.

The ACA has made a lot of benefits administration obligations more complicated. COBRA is no exception. coverage offered to workers; and (2) the play-or-pay mandate, which will require employers that employs 50 or more workers to offer health insurance to workers or pay a penalty. During this period the government will reassess the reporting program. However, the notice stated that sometime this summer, proposed rules to flesh out the reporting program will be issued by IRS. Afterward, the government will collect attestations of coverage from employers on a voluntary basis through the remainder of 2014. Such voluntary reporting will not trigger no-coverage or inadequate-coverage penalties, IRS noted.

**The Information Reporting**

Section 6055 of the health care reform law requires annual information reporting by health insurers, self-insuring employers, government agencies and other providers of health coverage. Section 6056 requires annual information reporting by applicable large employers about the health coverage that they offer (or do not offer) to their full-time employees. This reporting will help determine whether an employer (that employs 50 or more workers) is liable for penalties under reform’s shared responsibility penalty provisions in Section 4980H of the law.

Section 6056 information reporting is important for the play-or-pay mandate because without it, an employer typically will not know whether a full-time employee received a premium tax credit.

On April 26, 2012, the U.S. Department of the Treasury and IRS issued Notices 2012-32 and 2012-33, asking the public to help develop guidance on the information reporting from insurers and large employers about health insurance coverage.

In announcements on the White House and U.S. Treasury Department websites, the government let it be known that it would delay collecting these reports for one year; therefore, it is suspending shared-responsibility payments in 2014.

Now, Notice 2013-45 builds on this with the following additional details.

- The delay will allow the government to spend time for dialogue with employers and other stakeholders in order to simplify the reporting requirements.
- No penalties will be applied for failing to report the information in 2014.