September 19, 2012

Affordable Care Act Guidance Regarding Full-Time Employee Status

The Internal Revenue Service ("IRS") recently issued Notices 2012-58 and 2012-59 (Notice 2012-59 was issued in conjunction with the U.S. Departments of Labor and Health and Human Services), which collectively implement requirements under the Patient Protection and Affordable Care Act (the "Affordable Care Act"). The Notices provide guidance regarding how to determine the full-time status of employees for purposes of the employer shared responsibility rules and the 90-day waiting period requirement. **What Should Employers Know?**

- With limited exceptions, for newly hired employees expected to work full-time, the employer must offer coverage under its health plan within 90 days of their start date. Employers should review their plan eligibility requirements to determine whether they are consistent with Notices 2012-58 and 2012-59.
- If the employer does not know whether newly hired employees will work full-time, the employer can apply the same look-back measurement and stability period rules that are used for existing employees.
- If a plan conditions eligibility on working a minimum number of hours, the plan can take a reasonable amount of time to determine whether an employee actually meets the eligibility requirements.
- For purposes of the 90-day waiting period requirement, the term "waiting period" is defined as the time between when an employee becomes eligible to enroll and the date coverage begins.
- Employers can implement a 90-day administrative period between the look-back measurement and stability periods to determine which employees are eligible to enroll in the health plan and to notify and enroll such employees. However, implementation of this administrative period cannot be used to extend or shorten the stability period.

Background Beginning in 2014, the Affordable Care Act provides that if an employer with more than 50 full-time employees or 50 full-time equivalents (i) fails to offer full-time employees the opportunity to enroll in a health plan providing minimum essential coverage, or (ii) offers enrollment under a health plan that is either unaffordable or does not provide minimum value, then the employer will be subject to tax if any of its full-time employees are eligible for a government subsidy to purchase health coverage. In addition, employer-sponsored group health plans cannot provide a waiting period in excess of 90 days for an employee or his or her eligible dependents to enroll under the plan. The IRS had previously issued several notices addressing the determination of full-time status for purposes of this 50-employee threshold. Notice 2012-58 revises the approach for determining the full-time status of newly hired employees first laid out in Notice 2012-17, and provides additional guidance on the safe harbor in Notice 2011-36, which permitted employers to use predefined measurement periods for determining an employee's full-time status. The prior notices as well as the significant provisions of Notice 2012-58 are summarized below. Notice 2012-59 provides guidance on the Affordable Care Act's requirement that group health plans cannot provide a waiting period in excess of 90 days for an employee or his or her dependents to enroll under the plan. Care should be taken in distinguishing between eligibility and enrollment. Generally, if eligibility is conditioned solely on the lapse of time, it cannot exceed 90 days. However, other eligibility requirements may be imposed, provided they are not designed to avoid compliance with the 90-day waiting period limitation (e.g., eligible job classification or achieving job-related licensure requirements). Notice 2012-59 also provides that with respect to variable-hour employees, if a group health plan conditions eligibility on an employee regularly working a specified number of hours per period (e.g., 25 hours per week or working full-time), and the employer cannot determine whether such employee is reasonably expected to regularly work the requisite hours, then the plan may take a reasonable period of time to determine whether the employee actually meets the plan's eligibility requirements. This period includes using a defined measurement period that is consistent with the timeframe

permitted under the rules set forth in Notice 2012-58 (described below); however, coverage must be offered no later than 13 months from the employee's start date. **IRS Prior Notices Regarding the Employer Shared Responsibility Provisions** The IRS issued Notice 2011-36 in May 2011, which described a possible voluntary look-back/stability period safe harbor for ongoing employees to determine whether these individuals are full-time employees for purposes of the tax assessed for failing to provide coverage or failing to provide affordable and/or basic coverage. The safe harbor described in Notice 2011-36 would allow employers to use a defined period of three to twelve months (the look-back measurement period) to determine whether an employee was full-time (i.e., whether an employee averaged 30 hours of service per week). If an employee was determined to be a full-time employee during the look-back measurement period, then an employer was required to treat the employee as a full-time employee for a subsequent stability period, regardless of whether the employee averaged 30 hours of service per week during the stability period. The stability period was required to be at least six consecutive months in length but could not be shorter than the look-back measurement period. Similarly, if an employee was determined not to be a full-time employee during the look-back measurement period, then an employer did not have to treat the employee as a full-time employee during the stability period, provided the stability period used by the employer was not longer than the look-back measurement period. The IRS then issued Notice 2011-73, which included a safe harbor under which an employer would not be subject to the employer mandate penalty if the coverage provided under its group health plan was deemed to be affordable. Although Notice 2011-36 offered a voluntary approach for determining the full-time status of existing employees, it did not address how employers would determine the status for newly hired employees. In order to address newly hired employees, the IRS issued Notice 2012-17 in which it described and requested comments on a potential approach for determining the full-time status of newly hired employees. Notice 2012-58 now revises the potential approach for newly hired employees in Notice 2012-17 and provides additional guidance on the look-back/stability period safe harbor in Notice 2011-36. Employers can rely on the guidance in the Notice until at least the end of 2014. The major provisions of Notice 2012-58 are summarized below. **Safe Harbor for Ongoing Employees and Use of Administrative Period** Notice 2012-58 provides that for ongoing employees, employers can continue to use the look-back/stability period safe harbor in Notice 2011-36 as described above. In addition, Notice 2012-58 provides that because employers may need time between the look-back measurement and stability periods to determine which employees are eligible for coverage and to notify and enroll employees, employers can use an administrative period in between the measurement and stability periods, provided the administrative period does not exceed 90 days. It is important to note that the use of an administrative period cannot reduce or lengthen the measurement or stability periods. **Safe Harbor for New Employees** If a newly hired employee is reasonably expected at his or her start date to work full-time, then an employer will not be subject to the employer mandate penalty if the employer offers coverage under its group health plan to the newly hired employee within three calendar months of his or her start date. For a newly hired employee who is a "variable-hour employee" or "seasonal employee," the employer may use the same safe harbor as is allowed for ongoing employees (i.e., a measurement period of three to twelve months followed by a stability period of at least six consecutive months but not shorter than the measurement period), including the use of an administrative period. However, the measurement period and the administrative period combined cannot extend past the last day of the first calendar month that begins on or after the one-year anniversary of the employee's start date. For example, if an employee's start date is September 15, 2012, then the combined measurement and administrative periods cannot extend past October 31, 2013. Notice 2012-58 provides that a newly hired employee is a variable-hour employee if, based on the facts and circumstances at his or her start date, it cannot be determined whether the employee is reasonably expected to work on average at least 30 hours per week. Notice 2012-58 also provides that although the term "seasonal employee" is not defined for purposes of determining the amount of the employer mandate penalty under Code 4980H, employers are permitted to use a reasonable, good faith interpretation through at least 2014.