Ready or Not, Here it Comes! The Employer Mandate is Finally Applicable

By Kelly E. Dempsey, Esq.

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The Employer Shared Responsibility provision of the Patient Protection and Affordable Care Act ("ACA") went into effect for certain applicable large employers on January 1, 2015.[1] The Employer Shared Responsibility provision is often referred to as Pay or Play, the Employer Mandate, or 4980H subsections (a) and (b). The applicability date of the Employer Shared Responsibility provision ("Employer Mandate") depends on an employer's size, as well as, whether or not the plan is a non-calendar year plan and meets the non-calendar year plan transition relief (provided by the final regulations issue on February 12, 2014).[2] As of January 1, 2015, the Employer Mandate is applicable to employers with one hundred or more full-time employees including full-time equivalents. Transition relief for certain smaller employers expires for 2016. Therefore, as of January 1, 2016, the Employer Mandate is applicable to employers with 50 or more-full time employees including full-time equivalents. It's important to note that the size of the employer is based on actual employees, and not based on the number of employees enrolled in the employer's health plan. The Employer Mandate is in effect for applicable large employers regardless of whether or not the employer's plan is grandfathered or non-grandfathered.

In the context of the regulations, the Employer Mandate is not a plan requirement and the regulations do not specifically demand modifications to plan language. The Employer Mandate is an employer requirement and employers must carefully contemplate their decision to "pay or play" as penalties are not automatic. The imposition of penalties occurs when an employee goes to the Exchange and receives a subsidy. Employers that are subject to the Employer Mandate and wish to comply (and avoid penalties) are required to measure employees either via the look-back measurement method or the monthly measurement method and subsequently offer coverage which is affordable and meets minimum value to all full-time employees, as defined by the ACA, and their dependent children.

While employers often rely on Third Party Administrators (TPAs) to assist with ACA related issues, ultimately employers are responsible for the determination of whether or not the Employer Mandate is applicable (i.e., the employer is an applicable large employer) and TPAs generally cannot assist with this determination. Certain payroll companies have developed products to assist employers with Employer Mandate associated determinations, so employers may wish to speak with their payroll company as a starting place for assistance with counting to determine if the employer is an applicable large employer and subsequently measuring employees to determine employee full-time status should the employer be subject to the Employer Mandate.

Employers subject to the Employer Mandate should have a detailed policy that captures the measurement method (or methods) selected for each class of employees (as permitted by the ACA) and provides details of the employer's process. As this policy is associated with eligibility for plan coverage, the eligibility provisions, including termination and rehire and any applicable definitions, of the plan document may be affected depending on the measurement method selected and plan language may need to be modified to align with the employer's process. As plan documents are necessarily a unique reflection of a plan sponsor's underlying coverage, the ongoing implementation of the ACA, including the Employer Mandate, has forced many plan sponsors to take a look at their plan document and consider what amendments may be required. Plans that do not currently address rehires or an annual open enrollment period should review and revise their plans accordingly. The extent of changes to the

definitions, eligibility, termination, and rehire provisions will depend on the language that is currently contained in the plan document.

With the monthly measurement method, the changes to the plan document are generally minimal. The plan language, however, should be reviewed to ensure that employee is defined appropriately and that rehire provisions are compliant.

Employers utilizing the look-back measurement method may need to consider additional changes to the plan document to ensure the plan language aligns with the process the employer has selected. The look-back measurement method creates a unique issue for employers who need to ensure their plan language adequately addresses when coverage is available for employees determined to be full-time – coverage must generally be offered throughout the stability period provided an employee continues to be employed. Absent an exception, once an employee is determined to be full-time, they are locked in as full-time employees until the end of the stability period, even if their hours of service drop below the 30 hours. This creates a potential gap in coverage with respect to stop loss policies and plan document language. A gap could be found if the eligibility provision provides only that employees must average 30 hours of work per week to be eligible, but employees who are locked in reduce hours in service below the 30 hours per week threshold. Will the stop loss policy cover these employees who aren't technically meeting the eligibility requirements? In order to close this gap, plans may need to modify their eligibility language and/or definitions of full-time employee, and possibly add other definitions associated with the employer's process into the plan document. While the Employer Mandate does not require modifications to plan document language, this potential gap is another reason why employers should analyze their processes and plan documents. The level of detail the employer includes in the plan document is at the discretion of the employer, but the employer may also consider discussing the Employer Mandate with their stop loss carrier.

If the Employer Mandate is applicable to an individual employer, plan documents should be reviewed and modified on a case by case basis as there are many variables in these counting methods and the appropriate changes that need to be made to ensure compliance and eliminate the potential for gaps in coverage. Employers should provide timely notification to stop loss carriers regarding any changes made to plan language (as required by the stop loss policy, if applicable). Communication between all entities, including the plan, the employer, and the stop loss carrier, is critical to ensure all parties are on the same page – especially as additional challenges continue to arise.

The ACA has undergone many challenges since it was signed into law on March 23, 2010. Among the challenges include the case of King v. Burwell[3] which challenges the usage of subsides for coverage obtained on a federally facilitated exchange. The Plaintiffs in this case argue that the ACA, as written, only allows subsidies to be utilized for state-run exchanges. The ACA generally intended to have each state run its own exchange; however, at this time there are more federally-run exchanges than state-run exchanges. According to data collected by The Henry J. Kaiser Family Foundation, there are only 14 state-run exchanges – the remainder of the exchanges are structured as follows: 3 federally-supported exchanges, 7 state-partnership exchanges, and 27 federally-run exchanges.[4] The Supreme Court of the United States heard oral arguments on March 5, 2015 and a decision is expected in June 2015. Should the decision be rendered in favor of the Plaintiffs, the impact will be felt by millions of individuals who have received subsidies and obtained coverage through a federally-run exchange. Additionally, a decision indicating that subsidies cannot be utilized on a federally-run exchange would take the teeth out of the Employer Mandate. If individuals cannot obtain subsidies for federally-run exchange,

employers subsequently won't be issued penalties in these states because Employer Mandate penalties are contingent on individuals obtaining subsidies in addition to exchange coverage.

Regardless of the Supreme Court decision in King v. Burwell, the Employer Mandate will continue to be applicable absent additional regulations or guidance and it's likely that regulators will implement additional modifications to ensure the Employer Mandate penalties will continue to be in play. Subsidy "fixes" are already in the works should the decision by the Supreme Court determine that individuals cannot utilize subsidies with coverage obtain on a federally-run exchange. Employers should continue to proceed with determining Employer Mandate applicability and implementing a process to measure employees, along with modifying plan language as necessary.

In summary, the selection of measurement methods is highly dependent on each employer's employee population (i.e., does the employer have hourly employees, salaried employees, collectively bargained employees, part-time employees, variable hour employees, seasonal or

Kelly E. Dempsey is an attorney with The Phia Group. She is one of The Phia Group's consulting attorneys, specializing in plan document drafting and review, as well as a myriad of compliance matters, notably including those related to the Affordable Care Act. Kelly is admitted to the Bar of the State of Ohio and the United States District Court, Northern District of Ohio.

[1] 26 U.S. Code § 4980H

[2] Shared Responsibility for Employers Regarding Health Coverage, 26 CFR Parts 1, 54, and 301, 79 Fed. Reg. 8543, 8551 (Feb. 12, 2014).

[3] 759 F.3d 358 (4th Cir. 2014), cert. granted, 83 U.S.L.W. 3102 (U.S. Nov. 7, 2014) (No. 14-114).

[4] See State Health Insurance Marketplace Types, 2015, http://kff.org/health-reform/state-indicator/state-health-insurance-marketplace-types/ (as visited on June 5, 2015)