

September, 2014

Re: ACA Transition Rules for Fiscal Year Plans

Dear Friend of Key Benefit Administrators

We have been asked to flesh out the Affordable Care Act (“ACA”) rules to address when, and to what members of an employer’s work force, non-compliance penalties apply starting in 2015 for benefit plans that renew on a date later than January 1, 2015. The following addresses the “Transition” rules in full detail. We will emphasize certain critical provisions.

The ACA created new Internal Revenue Code Section 4980H (“Employer Shared Responsibility”), which imposes excise taxes on “applicable large employers” who fail to offer qualifying coverage for a month to a full-time employee (as defined by the Employer Shared Responsibility Rules). For 2015 purposes employers of 100 or more full time and full time equivalent employees are “applicable large employers.” Unless you qualify for a 1 year delay, the excise taxes imposed under the Employer Shared Responsibility requirements generally go into effect January 1, 2015.<sup>1</sup> The January effective date can create administrative problems for employers who maintain plans that operate on a non-calendar year basis (“Fiscal Year Plan”) because it generally means that you will only avoid excise taxes beginning in January 2015 with respect to a full-time employee if you have made an offer of affordable, minimum value coverage to such employee for the months that precede the beginning of your Fiscal Year Plan year.<sup>2</sup> If you haven’t already offered such employees coverage that is both affordable and provides minimum value, you will generally need to extend an enrollment opportunity to such employees mid-plan year. Fortunately, there is transition relief available to certain employers that could, if you are eligible, delay the application of potential excise taxes with respect to certain full-time employees in months preceding the start of your Fiscal Year Plan year if certain conditions are met.

To determine whether the transition relief applies to a particular employee, two critical questions must be answered:

1. Is the employer eligible for the transition relief?
2. Does the relief apply to the full-time employee?

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<sup>1</sup> Applicable large employers who employed between 50 and 99 full-time equivalents and who meet certain other requirements are subject to a 1 year delay in the excise taxes until 2016. Contact your legal counsel to discuss whether you qualify for the delay.

<sup>2</sup> You are treated as having made an “offer” of coverage for any month during the year if you offer them the opportunity to enroll at least once per plan year. Thus, if you offered employees qualifying coverage prior to the start of your fiscal year plan beginning in 2014, then you would not have to offer it again until the start of the plan year.

We discuss the transition relief, and help you answer these questions, below.

Which employers will be eligible for transition relief as a threshold matter?

The relief from the excise taxes only applies to certain employees of employers who are, as a threshold matter, eligible for the transition relief. In order to be eligible for the transition relief, an employer must satisfy two conditions:

1. The employer must have maintained a Fiscal Year Plan on December 27, 2012 and
2. The employer must not have made a change to the plan year after that date.

If you satisfy this requirement with respect to your group health plan (s), then you are eligible. The next step is to identify to which employees the relief applies.

NOTE: **This relief applies on an employee by employee basis.** It is possible that the relief will apply to some of your employees who are eligible for the Fiscal Year Plan and not to others. Employers are permitted to ignore employees to whom the relief applies when determining excise tax liability, if any, for months preceding the start of the Fiscal Year Plan in 2015, even if such employees qualify as full-time during one or more of those months and they receive a subsidy in the Exchange. Eligible employers may not, however, ignore employees who do not qualify for the relief when calculating excise tax liability during the months preceding the start of the Fiscal Year Plan year in 2015. Unless such employees are offered qualifying coverage for such months, they will trigger an excise tax for the employer if they qualify as full-time during such month and receive a subsidy in the exchange.

Does the transition relief apply to the employee?

If you are eligible for the transition relief, then relief is applied only with respect to an employee during the months preceding the start of the Fiscal Year Plan year if four conditions are satisfied:

1. The employee was not eligible for a calendar year plan maintained by the plan sponsor;
2. The employee fits into one of two qualification “buckets” described below;
3. The employer offers to the employee coverage that is both affordable and provides minimum value by the first day of the Fiscal Year Plan year in 2015; and
4. The employer satisfies the “substantially all” test for the month in 2015 in which the Fiscal Year Plan year begins.

NOTE: An eligible employer who maintains more than one Fiscal Year Plan will conduct this analysis with respect to employees eligible for each plan with a different non-calendar plan year.

*Was the employee eligible for a calendar year plan?*

The analysis stops before it begins if the employee was eligible for a calendar year plan maintained by the employer on 2/9/14. But if the employee was not eligible for a calendar year plan, then the next step is determine if they fit into one of the two qualification buckets.

*Does the employee fit into one of the two qualification buckets?*

There are two qualification buckets into which an employee must fit: the first bucket is limited to full-time employees who satisfy the terms of eligibility that were in effect under the Fiscal Year Plan. The second bucket applies to all others if the employer satisfies certain coverage or eligibility tests.

Each of these buckets is described below.

*A. Employees who satisfy the terms of eligibility on 2/9/14*

An employee who qualifies as a full-time employee in any month preceding the start of your plan year in 2015 will fit into this “bucket” if they satisfy the terms of eligibility in effect under the Fiscal Year Plan on 2/9/14. Employers can ask a simple question to determine if the employee fits into this bucket: If this employee was employed on 2/9/14, would the employee be eligible for coverage under the plan? If yes, the employee fits. If no, the employee does not fit in *this* bucket. For example, if the Fiscal Year Plan’s terms of eligibility on 2/9/14 indicated that only employees scheduled to work 32 hours or more per week were eligible for the plan, then any employee who works 32 hours or more per week in one or more of the months preceding the start of your plan year fits into a qualification bucket.

*B. All other employees*

If the employee does not fit into the first bucket (i.e. the employee was not in an eligible class on 2/9/14), the employee still fits into a qualification bucket if one of the following eligibility or coverage tests is satisfied: the all employee test or the all “full-time” employee test. Each of these is described in more detail below.

NOTE: Reminder—the 4980H rules are applied to each applicable large employer member (i.e. each member of the controlled group of corporations). Consequently, these tests are conducted on an applicable large employer member basis.

*All Employee Test*

This test is satisfied if (i) the employer offered coverage under the Fiscal Year Plan (or all plans with the same plan year) to at least 33% of ALL it employees (full-time and part-time) during the enrollment period preceding February 9, 2014, OR (ii) on any day between February 10, 2013 and February 9, 2014, 25% of All employees were covered under the plan.

*All Full-Time Employee Test*

This test is similar to the All Employee Test except that it applies only to those employees who would qualify as a full-time employee under the 4980H rules (i.e. an average of 30 hours of service or more per week in a month) and the percentages are higher. More specifically, this test is satisfied if (i) the employer offered coverage under the Fiscal Year Plan (or all plans with the same plan year) to at least 50% of ALL it full-time employees (as defined by the 4980H rules)

during the enrollment period preceding February 9, 2014, OR (ii) on any day between February 10, 2013 and February 9, 2014, 33% of the employer's full-time employees were covered under the plan.

If the employee fits into one of these qualification buckets, the next step is to determine whether qualifying coverage was offered by the start of the Fiscal Year Plan year in 2015.

*Does the employer offer affordable and minimum value coverage by the first day of the Fiscal Year Plan year in 2015?*

Not only must the employee fit into one of the qualification buckets, but the employer must offer coverage that is both affordable and provides minimum value by the first day of the Fiscal Year Plan year in 2015. Offering coverage that is affordable but does not provide minimum value, or provides minimum value but is not affordable will not suffice; the coverage offered must be BOTH affordable and provide minimum value.

NOTE: If the employer fails to satisfy this requirement with respect to an employee who otherwise fits into the qualification buckets described above, then the employer is not treated as offering any coverage to the employee for months preceding the start of the Fiscal Year Plan Year (assuming the employee was also employed) and if the employee qualified as a full-time in employee during any of those months, the employee could trigger an excise tax if the employee received a subsidy in the Exchange.

*Does the employer satisfy the substantially all test for the month that the Fiscal Year Plan year begins in 2015?*

Even if an employee otherwise fits into a qualification bucket and was offered qualifying coverage by the first day of the Fiscal Year Plan year in 2015, no transition relief applies to such employee if the employer does not satisfy the "substantially all" test with respect to all employees who qualify as full-time during the month in which the Fiscal Year Plan year begins. An employer satisfies the "substantially all" test for a month in 2015 if the employer offers minimum essential coverage to at least 70% (95% beginning in 2016) of *all* its employees who qualify as a full-time employee (30 or more hours per week) during that month (other than those that are in a limited non-assessment period defined in the rules).

What reporting is required for employees to whom the transition relief applies?

Even if you have employees to whom the transition relief applies, the employer must still satisfy the Code Section 6056 reporting obligations for such employee (if employed) for months prior to the start of the Fiscal Year Plan in 2015. For such months, the employer will use an indicator code indicating that coverage was not offered BUT the transition relief applied to the employee. More on Code Section 6056 and Section 6065 reporting in later memos as the regulators hone the requirements and forms that will have to be used.

As with much under the ACA, this can be an interesting calculation. Just remember that the relief from excise taxes is figured on an employee by employee basis.

Coming up in our series of updates on the requirements of the ACA will be information on the Health Plan Identifier filing requirement and a Pay or Play handbook.

Sincerely yours,

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General Counsel