

PAY OR PLAY – TIME TO ACT

Bob Blum

Hanson Bridgett LLP

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Talk To Your Lawyer

- This presentation is a general discussion of the pay or play rules based on proposed regs
- It is not legal advice
- Each agency's situation will differ and the facts for each agency will determine your situation
- Talk to your lawyer about your situation
- Do it soon.

For Discussion

- What is Pay or Play
- Strategy – first actions to take
- Pay or Play boundaries
- Compare your program to boundaries
- Particular issues
- IRS
- Time line

The Congress expects IRS to get
\$13 Billion from “Pay” in
FY 2013-2014

PEMHCA

- PEMHCA does not let you off the hook
- PERS does not have all the information needed for you to comply with pay or play
- Each agency must have its own records about each of its employees
- Each agency must report to the IRS and be ready to answer the exchange

Basic Information Needed

- Are you are “large” so are subject to pay or play
- Who is “full time”
- The actual hours worked for each employee
- How you will measure average hours worked
- How you will deal with new hires in determining full time status
- What coverage is offered to each full time employee
- The value of that coverage
- The cost of the coverage to each employee compared to his/her earnings
- Whether you are subject to either of 2 tax penalties
- Whether you are better off paying penalties
- How you will report the required information to the IRS and others

WHAT IS “PAY”

Are You Subject To P or P?

- Every large employer – public, private, nonprofit
- Large
 - Average 50 FTE in prior year
 - Full time = average 30 hours/week or 130/month
- May be hard to avoid

Avoid Being “Large”?

- Hard to avoid by “workforce management”
 - Hold all to less than 30 hours?
 - Scheduled? Actual?
 - Increased your workforce?
 - All hours counted, divided by 120 = FTEs/month
 - Special rules for seasonal, etc.
- Are you part of a “controlled group”?
- For today, assume all are large and subject to pay or play

Pay

- Must offer coverage to 95% of your full-time (FT) employees (and kids under 26) or pay penalties
- Two possible penalties (not both)
 - A - \$2,000/year for every FT employee (minus 30) whether or not you offer coverage to any
 - B - \$3,000/year for every FT employee not offered affordable, minimum value coverage, if they receive a federal subsidy through an exchange

A or B Penalty

- A - Offer minimum coverage to 95% of FTs or pay
 - To employee and kids under 26
 - Minimum Essential Coverage (MEC) required
 - No limit on premium charged
 - “Pay” = \$2,000/yr for every FT (minus 30)
- B - Offer “affordable”, “minimum value” or pay
 - Affordable premium = 9.5% of income
 - Minimum value = 60% of costs
 - “Pay” = \$3,000/yr for every FT not offered this who gets a federal subsidy through an exchange

Examples

- The A penalty
 - 200 full time employees (determined per regs)
 - You pay for coverage for 180 employees & kids
 - $\$2,000 \times (200-30) = \underline{\$340,000}$ penalty due to IRS
- The B penalty
 - 200 full time employees
 - Coverage is offered to 192 employees & kids
 - Coverage for 30 of the 192 is not “affordable”; 38 receive exchange subsidy
 - Penalty is $\$3,000 \times 38 = \underline{\$114,000}$ penalty due to IRS

Overriding Rule Re “Pay”

- If none of your employees gets a subsidy from an exchange, no penalties are due
 - If one employee gets a subsidy – proper or not – the IRS will contact you
 - Be prepared for the IRS
 - Whatever your circumstances
 - There will be errors by the exchange and IRS
 - Records are your best defense

Who Can Get Subsidy

- Subsidy available if you have income less than 4X the federal poverty line
- 2 person family – income up to \$62,040 (2013)
- 4 person family – income up to \$94,200
- 6 person family – income up to \$126,360

Enforced By IRS

- Annual report by each employer to IRS
 - Includes: substantial information including name, address, SSN of every full time employee with coverage and months of coverage
- Annual information to each FT employee
- Information by Exchange to IRS
 - IRS will use as basis for penalties
 - Employer can challenge; will need records for this

Urgency for Action - Records

- Effective 1/1/2014 for calendar year plans
 - Special rule for fiscal year plans
- **2013 employee status** drives 2014 obligation
- Need to decide 2014 strategy ASAP
- Whatever the strategy, **you need 2013 records** to support it (and to deal with IRS)
 - 2013 records require programming
 - Often, not easy and takes time

HOW DO YOU KNOW IF YOU CAN PLAY

FIGURE OUT YOUR CURRENT SITUATION

- You provide health benefits now to “benefited” employees
- You do not want to both provide benefits AND pay the A penalty
- Maybe you are OK paying the B penalty
- What do you need to do?

Actions

- Figure out your plan year and effective date
- Take stock of coverage
- Compare to “boundaries” in ACA
- Decide on plan/HR changes to make
- Decide how you will demonstrate compliance to the IRS
- Decide on IT/payroll changes to make
- Set timeline for actions

Determine Your Plan Year

- Do you have a calendar year plan or fiscal year plan?
- If you have a fiscal year plan, 1/1/2014 may not be the effective date and you have more time

Fiscal Year Plan

- Plan in effect on December 27, 2012
- No penalties due for periods before first day of 2014 plan year for employees eligible for coverage as of the first day of the fiscal year under the terms of the plan on 12/27/12

Take Stock of Your Current Program

- What employees have coverage?
- What employees do not have coverage?
- What coverage is offered?
- When do employees get coverage?
- When do they lose coverage?
- What do they pay for it?
- What children are offered coverage and at what cost?

Taking Stock

- Be careful and precise re who is “benefited”
- Based on job position?
- Based on “schedule” or “actual”
 - Hours? Days? Months?
 - How measured?
 - What if actual greater than scheduled?
- What happens with change in status? When determined?
- What errors have occurred – when and why?

Taking Stock (2)

Coverage and Tracking of ---

- Part time
- Temporary
- Seasonal
- Short service
- High turnover
- On call and fill in
- Contractors
- Staffing agency employees
- Former employees who return

Taking Stock (3)

Kids

- What coverage is offered to children under 26?
 - Natural children
 - Adopted children
 - Step children
 - Foster children

Taking Stock (4)

MOUs

- What do your MOUs provide for coverage, premiums, etc.?
- There are no special rules for represented employees and collective bargaining agreements
 - There is no delayed effective date
 - There is no exception to the penalties

Taking Stock (5) Records

- How do you determine who is benefited and who is not
- What records are used?
 - Payroll hours; pension service; position filled?
- If hours/service
 - How are these counted?
 - How timely is the data?

PAY OR PLAY BOUNDARIES --
AVOIDING “B” AND
AFFORDABLE COVERAGE

Affordable Coverage

- Self-only (employee only) is no more than 9.5% of income
 - No cap on cost for kids
- Probably cannot set the premium at 9.5%
 - Instead, a set premium capped at 9.5%

HSAs and HRAs

- Do employer contributions to HSAs and HRAs count for “affordability”?
- HSAs – contributions do not count because they may not be used to pay premiums
- HRAs – contributions that may be used only to reimburse medical expenses other than cost of coverage do not count. (Id.)
 - Fits with rules for HRA and prohibition on annual and lifetime limits
 - “Stand alone” HRAs may be dead

125 Plan

- No specific guidance yet
- If HRA will not work then perhaps 125 plan will not work either
- Calls into question the PEMHCA strategy of providing lowest possible employer contribution + 125 plan for actives

**PAY OR PLAY BOUNDARIES --
AVOIDING “B” AND
MINIMUM VALUE COVERAGE**

Minimum Value Coverage

- Covers 60% of costs
- HHS plans to provide an MV calculator, and is considering some additional other safe harbors
- Carriers should certify minimum value
 - Will PEMHCA, etc. certify?
 - Can you rely on them?
 - What if your plan is unique?
- More guidance in the works

OFFER TO FULL TIME EMPLOYEES (and kids but not spouses)

Pay or Plan Based on FT Employees

- Pay or Play based on FT employees
- Full-time is based on hours of service, generally averaged over time
- How does your program fit with the boundaries?
- What changes are needed & can be made with the least disruption?

What is Full-Time

- Average of 30 hours/wk or 130 hours/month
- You choose the period over which averaged
 - One month
 - Longer (3 – 12 months)
- If you choose one month, employees can flip in and out of full-time & coverage
- The longer the period to average the longer the subsequent coverage period

Counting Hours

- FT is an average of 30 hours/week or 130 hours/month over the MP
- Hours are counted similar to but not the same as ERISA
- Hourly: count hours
- Non-hourly – count hours, or 8 hrs/day, or 40 hrs/wk

Hours – Specifics -1

- Generally Include: vacation, illness, incapacity, layoff, LOA
- Special treatment: maternity/paternity leave; military leave; FMLA, jury duty – may exclude when averaging or credit at prior average rate
- Unclear: hours for periods of no service when not based on units of time; back pay; faculty

Hours – Specifics - 2

- Equivalencies only available for non-hourly
- All ERISA equivalencies not available and 4980H equivalencies not same as ERISA
 - E.g., not 10 hrs/day but 8 hrs/day
 - Not 45 hrs/wk but 40 hrs/wk
 - Not able to use monthly or other ERISA equivalencies

MEASURING “AVERAGE” HOURS FOR FULL TIME

Basics For Determining FT

- Average over the period you choose
 - One month
 - Longer (“lookback” period)
- What is the effect of measuring over a period longer than one month
- How does measurement period fit with open enrollment
- What do you measure

Measurement & Stability Periods

- If you measure FT over 3-12 months, the period chosen is a “measurement period” or MP
- Each MP has a corresponding “stability period or “SP” for offering coverage
 - *Even if the employee is not FT in the SP, coverage must be offered in that SP*
- MPs 6 months or less must have SPs of 6 months
- MPs longer than 6 months must have equal SPs

Simple MP and SP examples

- The MP is 3 months so the following SP is 6 months
- The MP is 5 months so the SP is 6 months
- The MP is 9 months so the SP is 9 months
- The MP is 12 months so the SP is 12 months

Measurement and Administration

- If the period of coverage immediately followed the MP, there would be no time to
 - Notify the employee of coverage availability
 - Let the employee make health care elections
 - Implement payroll changes for premium deductions
- An “administrative period” or “AP” is available before coverage must be offered
 - Up to 90 days after the end of the MP
 - Can fit with open enrollment

Example – 12 Month MP

- You choose 12 months for administrative simplicity
 - Fits with one open enrollment per year
 - If 6 months, could need 2 open enrollments/year
- MP (measure) Oct 15 – Oct 14
- AP (admin) Oct 15 – Dec 31
- SP (offer of coverage) Jan 1 – Dec 31

12 Month MP Effects

- One period to measure
- One open enrollment for ongoing employees
- Any employee who is FT as of Oct 15 (based on prior MP) is FT for the next Jan 1- Dec 31 regardless of any change in status
 - Note: you might be able to increase the premium cost to an employee who changes, e.g., to part time subject to possible B penalty

Payroll Periods

- The rules work in “months”
- Yet you can use payroll periods to measure hours
 - Figure out the MP using months
 - Then start with the first payroll period that ends in the MP and end w/ the last payroll period that ends in the MP
 - Or, use the first that starts in the MP and ends after the MP
- Only for these payroll periods: one week, two weeks, semi-monthly

Example – Payroll Periods

- MP is Oct 1 – Sept 30
- Option 1 – use the first payroll period that ends after Oct 1 and ends before Sept 30
- Option 2 – use payroll period that starts after Oct 1 and the payroll period that includes Sept 30

Special Transition Rules

- MP for 2013- may use 12 month SP and 6 month MP but must start by 7/1/13
- Do not have to cover kids for 2014; only “take steps” in 2014 to establish coverage
- In 2014 only, may take into account expectation that new employee will work for short time
- But even after 2014 may treat “seasonal” as working for short time

SPECIFIC ISSUES - MEASUREMENT

Re-Hires

- A re-hire may be treated as a new employee if
 - There are 26 consecutive wks of no hours/svce, or
 - A break in svce is at least 4 wks long and is longer than the immediately preceding period of service (e.g., 6 wks of service, 7 wks of break)
- If not “new”, then the individual’s MP and SP periods pre-break continue to apply as if there was no break

New Hires and FT

- If “reasonably expect” that new hire will be 30 hours/wk then must offer coverage within 90 days
- If not “reasonably expect” will be FT, then variable employee rules apply
- Facts that show “reasonably expect”?
 - Position description
 - Experience in same or similar job
 - Recruiting material
 - Offer letter/agreement
 - Actual work

New Hire - Not FT

- Need to determine if average 30 hours/wk
- Use new hire MP, not the “standard” MP
 - Choose MP (at least 3 mos; not more than 12)
 - Start MP no later than first of month after hire
 - Establish SP, no less than 6 mos
 - May use AP after MP
 - Shift to standard MP, SP after one full standard MP has passed

Example – New Hire Not FT

- Hired 2/15/14; new hire MP is 6 months; MP begins 3/1/14; new hire SP is 6 months
 - Averages fewer than 30 hours/wk – not FT so not counted for A or B penalty for SP of 9/1/14 – 2/28/15
 - Averages 30 hours/wk – is FT; counted for A and B penalty for SP of 9/1/14-2/28/15
- Note: prop'd regs are unclear on key issues re MP and SP for variable new hires

Independent Contractors or Employees?

- There is more at stake now re “contractors”
- The common law test is used to determine “employee” in pay or play
- A close scrutiny of status could trigger the A or the B penalty
 - For B – get indemnification? And for A?
 - Use of a staffing agency may not help
 - The “leased employee” rule may not help

3 Month Exemption

- No coverage must be offered for 3 months from employment hire date, even for FT
 - No penalties during first 3 months of employment
 - Months are not calendar months but determined based on first date of service

DO YOU STILL WANT TO PLAY?

What If You Do Not Play?

- No tax-free coverage for employees
- Still must keep records
- Still must report to IRS every year
- Could affect recruit and retain
- Employees could demand more cash

COMPARE THE RULES TO
YOUR PROGRAM AND
DECIDE ON CHANGES (IF ANY)

FOR “A” PENALTY

Compare Coverage Offered to Boundaries – A Penalty

- Are all of your employees benefited?
 - Not a single exception?
 - Coverage offered w/in 90 days?
 - Coverage for kids to 26 also?
 - Then, no A penalty

Who Is Benefited?

- What is your requirement for benefited?
 - 20 hours scheduled? 25? 30? More?
 - Minimum # of cumulative hours worked?
 - Position filled
- Your risk of missing the 95% requirement depends on the standard for benefited
 - Is it easy to go over the ACA FT rule?
 - Does your definition fit at all with the ACA rule?

Program vs. Boundaries (1)

- Do you have any non-benefited employees?
 - Who are they?
 - How many, month by month for the past 12 months?
 - Do they ever work over 30 hours/week (130 hours/month)?
 - How do you know – how do you keep track?
- Is it possible that more than 5% of your FT are not benefited?
 - If not, what could change and how fast?

Program vs. Boundaries (2)

Do you ever hire:

- Regular part time who work more than scheduled [how do you keep track?]
- For a short time project that goes longer than expected [who keeps track?]
- On call/fill in who ever work 30+ hours/week
- Contractors who are not really “independent”

Program vs. Boundaries (3)

- Do you ever have a waiting period of more than 3 months from first day on payroll?
 - E.g., hire, leaves after a month, comes back after a month? What is the waiting period?
- Do you offer coverage to every child (w/in the ACA definition) younger than 26?

Program vs. Boundaries (4)

- Based on your current records and data, what can you prove to the IRS re FT status of each employee for each month for the past 12+ months?

Program vs. Boundaries (5)

- If you are completely sure that none of these potential outliers exist, or they are well short of 5% of total FTs, then no change is needed for the A penalty
- If not completely sure, then you may wish to consider some changes to avoid the A penalty

Possible Strategies for Change – A Penalty

- Offer to more employees
 - Does not have to be the same as to benefited, only has to be minimum essential coverage
 - Do not have to pay anything toward cost; can be totally employee paid
 - Can be targeted
 - Upside – avoid A penalty; downside – adverse selection
 - Be sure you cover kids
 - Watch out for special issues (discussed later)

COMPARE THE RULES TO
YOUR PROGRAM AND
DECIDE ON CHANGES (IF ANY)

FOR “B” PENALTY

Program vs. Boundaries

- For those who have coverage
 - Is it affordable?
 - Does it provide minimum value?
- If either answer is “no”, then B penalty applies
 - Note can avoid A penalty by not offering to 5% but B penalty can be owed for that same 5%

B Penalty Strategy

- Depending on cost and HR goals, an appropriate strategy may be to
 - Avoid A penalty by expanding offering at full cost
 - Pay B penalty instead of subsidizing coverage
- For example
 - Currently you may pay non-benefited more cash and that may be best for employer and employee
 - While adjustments may be needed with the B penalty, still it may be less costly than providing subsidized coverage

Plan Document

- Often there is no plan document, but only an SPD and contract with carriers
- A plan document can be very useful if you Play
 - Guide for administration/ programing
 - Guide for responding to employees and regulators
 - Maybe could help in correction of errors?

RECORDS – IRS – EXCHANGE PROCESS FOR PENALTIES

IRS Process - Generally

- Employee gets exchange coverage
 - Exchange determines if credit applies
- IRS contacts employer
 - After employee's individual tax returns are due
 - After the employer files its information return
- At that time, employer needs to show that neither A nor B apply

IRS Records Will Be Inaccurate

- HHS acknowledges that the information exchanges will have for providing credits will not be accurate
- There will be some attempt – how much is not clear- to do timely checks with employers
- Clearly, though, wrong information will be passed on to the IRS
- This will bring IRS questions to employers

Records For The IRS

- The only way to counter an IRS claim is to have the needed records
 - Who is FT
 - Who was offered coverage and when
 - What was the coverage; the cost to the employee; why was it “affordable”
- If “pay” was the decision, employer still needs to be able to show the number of FT every month
- Records are needed whether pay or play

**OTHER MATTERS --
NON-DISCRIMINATION,
CADILLAC TAX**

POTENTIAL 2013 TIME LINE

Key Tasks

- Take stock of your current program
- Compare to boundaries
- Determine risk, if any, for A or B penalties
- Decide basic strategy for program
 - E.g., Play/ pay? Risk level? Risk reduction?
- Evaluate current records vs. records needed
- Implement record keeping changes
- Prepare for next open enrollment

Possible Benchmark Dates - 2013

6 Month MP and 12 Month SP

- Create team: Finance, HR, IT, Legal – Jan/Feb
- Take stock and compare to boundaries – Feb
- Determine basic strategy - March
- Program recordkeeping - ASAP
- Measure FT – April 15 - Oct 14
- Determine FT eligible – Oct 15 - Oct 31
- Open Enrollment – Nov 1 – Nov 30
- First Stability Period – Jan 1 - Dec 31, 2014

Key Message

START WORK NOW

Questions?

Email payorplay@hansonbridgett.com