

Patient Protection Affordable Care Act
Employer Cost Shared Health Benefit Responsibility
Statute NOT Delayed

Treasury Department requested that the IRS Penalty IS Delayed until Jan 2015
No Finalization of Rules and debate continues amongst House and Senate members

*Transition Relief for 2014 Under §§ 6055 (\$ 6055 Information Reporting), 6056 (\$ 6056 Information Reporting) and
4980H (Employer Shared Responsibility Provisions)
NOT-129718-13*

I. Background Information

A. Employer Cost Share Health Benefit Responsibility/Play or Pay Rule impacts Employers with 50 or more Employees.

1. Employer Play or Pay defined as: Employer provides benefits that meet the minimum value and affordability standards defined as:

a. Minimum Value Test defined as: Covered Individual will not pay more than 40% of out of pocket costs for eligible benefits; 2013 Maximum out of pocket is \$6,250 for single coverage and \$12,500 for family; 2014 Maximum Out of Pocket is in discussion for \$6,350 for single coverage and \$12,700

i. *Penalty of \$3,000 if FTE employee accesses insurance marketplace and receive premium assistance from the federal government*

b. Health Plan Affordability defined as: Covered Individual will not pay more than 9.5% of income noted in Box 1 of W-2 Form

i. *Penalty of \$3,000 if FTE employee accesses insurance marketplace and receive premium assistance from the federal government*

2. Employer Chooses not to provide Health Benefits/Play or Pay

a. *Penalty of \$2,000 per total number of FTE employees (minus a 30 employee deductible) if at least one employee accesses the insurance marketplace and receives premium assistance from the federal government*

3. Full Time Equivalent Employees offered Healthcare Benefits defined as: Covered Individual who works 30 hours a week, 130 hours a month or 120 seasonal days a year

a. 12/6/3 month measurement period conducted in 2013

b. Stabilize coverage for at least 6 months and at least as long as the initial measurement period

c. 95% accuracy must be maintained in implementing the full time equivalent definition

- II. Outstanding Discussion Items/House and Senate Hearings
 - A. Merger/Acquisition: Employer Cost Share liability responsibility during mergers and acquisitions
 - B. Quantifiable definition regarding seasonal employees
 - C. Due to employer waiver of IRS penalty will there be an equal waiver of IRS penalty of employee mandated benefits
 - 1. Discussion revolves around impact to:
 - a. Tax Implications
 - i. Device Tax
 - ii. Prescription Tax
 - b. Fees
 - i. Patient Centered Outcome Research Institute (PCORI) Fee: \$1.00 per participant per year
 - ii. Transitional Reinsurance Fund Fee: \$63.00 per participant per year
 - iii. Annual Insurance Provider Fee: Cost is in discussion
 - c. Merger/Acquisitions/Union Benefit Plans
 - i. Which benefit provider will be liable for plan compliance
 - » Affordability
 - » Minimum Essential Benefit Equivalency
 - » Full Time Equivalency
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- III. Sen. Jerry Moran is also planning to offer an [amendment](#) to an appropriations bill tomorrow that would block enforcement of the employer mandate. POLITICO [learned yesterday](#), July 9, 2013, that he would be offering an amendment blocking the enforcement of the individual mandate.

Play or Pay Presentation | Frequently Asked Questions

May 22, 2013

Answers reflect the most recent guidance issued to date

Federal Agencies implementing the Patient Protection and Affordable Care Act: Department of Health and Human Services, Department of Labor, and Treasury Department

Q: What about out of pocket expenses that are for ineligible charges? i.e.: over reasonable and customary charges.

A: Over reasonable and customary applies to out of network charges. Out of network expenses are not counted for purposes of the out of pocket maximum requirements.

Q: If the city only has 7 full time employees and 2 part time employees, do we comply with the full time employee (FTE) requirements?

A: The Play or Pay penalty defining full time employees applies to employers with 50 or more employees.

Q: To clarify, for seasonal workers, the employees don't need to work consecutive days...just 120 total?

A: The 120 days do not need to be consecutive with respect to seasonal workers. This matters for determining whether an employer with a significant seasonal workforce is a large employer subject to the Play or Pay penalty. The IRS has not yet provided guidance on the definition of "seasonal employee". TML IEBP and Dickstein and Shapiro will include the question on the PPACA tracking list. See tracking list.

Q: We pay 100% of premiums for our current full time employees. Can we charge 50% of premiums for those working the 30 hours or do we have to offer the same 100% benefit?

A: The Patient Protection and Affordable Care Act (PPACA) defines affordable coverage as the premium charge for the lowest cost medical plan option for the employee only rate. In order to be affordable to a particular employee, this lowest cost option should not exceed 9.5% of Box 1 on the W2 form. Currently, the proposed plan does not define how employers offset the cost to the full time employees. The PPACA prohibits discrimination with respect to insured healthcare benefits. Deciding how much to charge employees for healthcare coverage is an employer management decision. Each employer should review the PPACA nondiscrimination regulations prior to making this determination. TML IEBP and Dickstein and Shapiro will identify this question on the PPACA tracking list.

Q: Doesn't TML require 100% enrollment of eligible employees? If an employee chooses to get insurance from the HIX, I'm assuming that would fall under the exemptions already in place. Can they opt out of whatever insurance we offer to get insurance from the HIX at any time with no penalty?

A: TML IEBP Board will review this question. The 100% participation requirement protects the Pool from adverse selection and supports the continued stability of rates the Pool has experienced.

Q: Does the 9.5% rule apply to dependent health costs?

A: No, the determination of affordability does not address dependent health costs. The PPACA defines health plan "affordability" with respect to the premium charge for the lowest cost medical plan option for the employee only rate. If the premium would cost the employee more than 9.5% of the employee's salary identified in Box 1 on the W2 form, the coverage is not considered affordable.

Q: So, for what reason would a city/employer choose a three month measurement period?

A: The proposed regulation offers measurement options for employers. The employer could conduct an assessment of the measurement period for 3 months, 6 months and 12 months to identify the variance of employees that fall within the definition of a FTE. Determining the length of the measurement period is an employer management decision. If an employee accesses the exchange and upon investigation the IRS concludes that the employee met the definition of a full time employee and the employer's plan is either not affordable or sufficiently robust, the IRS may assess the Play or Pay penalty against the employer.

Q: Is the 9.5% rule void if the city pays for the employee's premium?

A: The affordability definition is not a concern for employers that pay 100% of the medical benefit premium. If the employer pays a portion, but the employee premium charge for the lowest cost medical plan option for the employee only rate is not in excess of 9.5% of the employee's salary in Box 1 of the W2 form, the employer should be able to demonstrate compliance with the affordability requirement.

Q: Is there a TML IEBP requirement to provide employees that work 20 hours medical benefits?

A: TML IEBP's definition of an active employee is:
an employee who works at least twenty (20) hours per week or is accessing vacation, sick or paid/unpaid Family Medical Leave Act of 1993 (FMLA) and is receiving the same benefits as all other employees. Persons who are receiving long or short term disability payments or workers' compensation income benefits and are not otherwise on the payroll of the employer and are not active employees.

In order for sick pool leave to be considered as sick leave under this definition, Member's sick pool policy must be (1) in writing, (2) on file with TML IEBP prior to the start of the employer's plan year and (3) available uniformly to all employees. Employees that do not meet the definition of an employee in the benefit book are not eligible for medical benefits.

A Family Medical Leave Act (FMLA) certification shall extend the period of coverage for Benefit eligible employee(s) when the FMLA documentation is provided in writing to TML IEBP within thirty (30) days of the certification and one hundred and twenty (120) days of the beginning date of the FMLA leave.

The above definition is not a required definition for the employer to use for full time employees. It is a required definition for employees to have access to the TML IEBP medical benefits.

Q: Do we need to use these calculated census numbers for the purposes of the PCORI fee that is due to the IRS July 31, 2013?

A: Currently the proposed PCORI regulations state that the PCORI administrative fee will be applied to all employees, dependents, retirees, and continuation of coverage participants who access the employer's medical benefit plan as their primary medical plan. The employer's compliance with the definition of a full time employee may impact the medical benefit census and could increase the PCORI administrative payment.

Q: This only applies to Medical right, not Dental, vacation, or sick leave?

A: The Play or Pay proposed regulations currently apply to medical benefits only.

Q: Is it eight hour days or does any amount of time in a day count as one day?

A: When an employer hires a "variable hour" employee, the employer will not be certain of the employee's full time status. Variable hour and seasonal employees are treated in the same manner by the IRS. An employer that chooses a short measurement period could have a Play or Pay penalty risk for variable hour or seasonal employees. A new variable hour employee is considered full time if the employee's average service hours equal at least 30 hours per week or 130 hours a month. For employees who are not paid on an hourly basis, the employer may count actual hours or may use a "days worked" or "weeks worked" method of crediting hours.

Example: Ted, a new hire, is expected to work 4 hours a day for 120 days during a 12 month Initial Measurement period. Although Ted is not reasonably expected to average 30 hours per week/130 hours per month for the 12 month Initial Measurement Period, if Ted does average 30 hours per week/130 hours per month, he will be considered a full time employee.

Example: Henry, a new hire, works 60 hours per week from November 20 – March 20 2013. Although Henry is not reasonably expected to average 30 hours per week/130 hours per month for the 12 month Initial Measurement Period, if Henry does average 30 hours per week/130 hours per month, he will be considered a full time employee.

Q: Is there a definition from the Federal Government regarding a "seasonal" worker? From my experience, the Federal Government is usually referring to agriculture type jobs when they use the term "seasonal". Do they define any "temporary" job as seasonal?

A: The Federal Government has not yet defined the term "seasonal employee" for Play or Pay purposes. However, the IRS has indicated that the term "seasonal worker" is not limited to agricultural or retail workers and has noted that until further guidance is issued, employers may apply a reasonable, good faith interpretation of the term "seasonal employee".

Q: If our city takes mandatory Dental for our current FTEs, can we just get Medical for the 30 hour FTEs if we choose not to offer a full time benefit package to the 30 hour FTEs?

A: The current proposed regulations only mandate that employers provide medical benefits to FTEs.

Q: Must we have a measurement period in writing if we do not have temporary or part-time employees?

A: If all of your employees have access to coverage under the healthcare benefit plan, the employer does not need to track hours over a measurement period to determine which employees are full time.

Q: Does the 9.5% of W2 compensation apply to all eligible out of pocket costs, not just the insurance premium? If so, how do we as employers know how much our employees are paying for Medical expenses when we do not have access to individual medical records?

A: The proposed regulations address both the "affordability" of the plan and whether the plan satisfies the out of pocket maximum cost sharing requirements:

1. Premium charges should not be in excess of Box 1 on the W2 form for the lowest cost medical plan option for the employee only rate.
2. The maximum out of pocket cost sharing limit includes deductibles, coinsurance and copayment expenses. Contribution/premiums, balance billing, penalties, amounts for non-network providers and spending for non-covered services are excluded from the calculation.

Q: Do days include weekends or just weekdays? We have employees that work 5 days per week, 4 hrs each day, for 52 weeks a year. Does that meet the 120 seasonal days a year? Or is the key word in this example, seasonal?

A: It is unlikely that the IRS will conclude that employees who work throughout the year are "seasonal". At this time, the IRS has indicated that until further guidance is issued, employers may apply a reasonable, good faith interpretation of the term "seasonal employee".

Q: Can employers require employees to be on their offered health insurance plan? Do employers have to allow employees to opt out?

A: The PPACA only requires large employers to offer coverage that is affordable and sufficiently robust to avoid the Play or Pay penalty. Employees are not required to elect the coverage offered. In addition, if the employer required all employees to participate in the health plan, the employer would not be permitted to deduct the employee portion of the premium from wages without obtaining the employee's permission.

Q: Can we consider summer help seasonal employees under the 120 days rule and not have to count their hours?

A: Example: City of Somewhere has 1,000 year-round full time employees. During the summer months, the City hires 200 seasonal employees. In this example, the City needs to identify the measurement period. A 12-month Initial Measurement Period will likely cause the seasonal employees to fail to be considered full time employees. The City may need to be careful with the re-hire of seasonal employees the following year. If a seasonal employee is re-hired, the prior hours "count" unless there has been a 26-week break. After 26 weeks, the employer can treat the former employee as a new hire. The IRS is expected to provide additional guidance to assist employers in determining whether employees constitute seasonal employees.

Q: So are you saying that we have to provide health insurance if an employee works more than 30 hrs in any week or 130 hrs in any month, or more than 120 days in a year? Or is it an average over the year?

A: The employer should define their measurement period and how many hours each variable hour employee works. Upon completion of the Initial Measurement Period, an average calculation of weekly, monthly and annual service hours may be documented. If the average hours for the measurement period meet the full time definition, medical coverage should be offered.

Q: What if the employee has health care insurance through another job or is covered by their spouse at another job?

A: Large employers are required to provide medical coverage to all full time employees. If an employee declines coverage, a medical benefit declination document should be executed and maintained on file.

Q: Will TML be changing forms to offer more choices of ways to decline Medical coverage for those who have other coverage? How will TML know the difference in regular full time employees who get life, AD&D, etc. and those who are just getting Medical due to Healthcare Reform?

A: TML IEBP will update our enrollment, change and termination forms. Declination of benefits will be documented. If an employer chooses to provide supplemental benefits to a subset of their employee population, TML IEBP will assist the employer in reviewing the benefit plan document on voluntary or mandatory benefit provisions. The current "Standard" life benefit requires 100% participation of employees. TML IEBP will be working with supplemental carriers to obtain required definitions for the 100% participation rule.

Q: Since firefighters work shifts different days of the week could we go by the service hours for fire personnel only, and by the 30 hour week for all the other employees? Just as long as they stayed under 130 hours a month we would not have to offer coverage to them right?

A: An employee is considered full time if the employee works an average of 30 hours a week or 130 hours a month. Ensure the hours are documented appropriately during the employer's designated measurement period. For employees who are not paid on an hourly basis, the employer may count actual hours or may use a "days worked" or "weeks worked" method of crediting hours. It is also important to remember that the federal statute ERISA prohibits employers from interfering with an employee's entitlement to benefits. Employers should be cautious with respect to limiting hours of particular employees or categories of employees because the IRS has indicated that the final Play or Pay regulations will contain an anti-abuse rule designed to circumvent employer attempts to evade the Play or Pay penalty.

Q: So if the employer provides a life policy to all employees do we also need to provide it?

A: TML IEBP will be working with all the supplemental benefit vendors to obtain clarification on the 100% participation rule.

Q: So how can they hold us accountable for things they don't even have in order?

A: The PPACA continues to behave like a moving target. Certain areas of the act have been delayed for further review and comment. As I always state: The law continues to evolve and TML IEBP will assist in updating the membership as appropriate. Due to the ongoing changes and delays, the mandatory compliance timelines and benefits continue to be difficult to incorporate into our benefit plans and financial budgets.

Q: Do the deductible maximums of \$2,000/\$4,000 **only apply to fully insured plans? Self funded plans can be anything? I have read that and, it did not appear that your handout said anything about fully insured.**

A: Large insured (generally more than 100 employees) and self-insured employer group health plans need not comply with the \$2,000 limit on annual deductibles for single coverage (\$4,000 for family coverage). Small group plans must comply with the deductible limit beginning in 2014.

Q: Maximum OOP Maximum Benefit Plan Affordability

- A: The **2013** maximum out of pocket for medical plans excluding prescription plans is **\$5,950/\$11,900** for single coverage and \$12,500 for family.
- B. The 2014 **\$6,250/\$12,500** maximum out of pocket has not been released.

TML IEBP Consumer Centered Self Funded Plans Maximum Out of Pocket
(add below deductible and Out of Pocket Costs)

Plan	Benefit % In-Network/Out of Network	In-Network Deductible	In-Network Out of Pocket	Office Visit
P85-20-25-MAC A <i>HRA Eligible</i>	80/50	\$200	\$2,500	\$30
P75-0-30-MAC A <i>HRA Eligible</i>	90 Hospital 70/50	\$0	\$3,000	None
P85-50-20-MAC A <i>HRA Eligible</i>	80/50	\$500	\$2,000	None
P85-50-30-MAC A <i>HRA Eligible</i>	80/50	\$500	\$3,000	None
P85-75-30-MAC A <i>HRA Eligible</i>	80/50	\$750	\$3,000	None
P85-100-30-MAC A <i>HRA Eligible</i>	80/50	\$1,000	\$3,000	None
P85-150-40-MAC A High Deductible Health Plan <i>HSA Eligible</i>	80/50	\$1,500	\$4,000	None
P85-250-30-MAC A High Deductible Health Plan <i>HSA Eligible</i>	80/50	\$2,500	\$3,000	None

Q: Do you think that a substitute teacher could be considered a seasonal worker for nine months since there is no expectation that they will be doing sub work the next school year? Or, are there limitations on the length of a “season”?

- A: The above substitute employee hours should be calculated using the employer’s measurement period and the calculation of average hours will determine if the full time definition is met. The above hours would be averaged over the measurement period. Although the IRS has indicated that employers are permitted to use a reasonable, good faith interpretation of the term “seasonal employee”, the IRS has also made it clear that it is not a reasonable, good faith interpretation of the term “seasonal employee” to treat an employee of an educational organization who works during the active portions of the academic year as a seasonal employee.

Q: Under the Play or Pay Rule, it shows that the FTE definition applies to “Voluntary”. Does this mean that we must include all of our volunteer’s hours in our measurement periods and offer medical insurance if they qualify as an FTE?

- A: The current proposed regulations impact paid employees working more than 30 hours per week, 130 hours per month or 120 days a year.

Q: Is it possible for us to decrease the hours worked for our part-time employees and hire more part-time employees in order to keep them from becoming eligible for Medical insurance? I think I heard the very end of your discussion about this but didn’t hear if this was possible or if it would be detrimental to us.

- A: The employer is permitted to make business decisions regarding the work schedules of their employee population including implementing decisions that would create a status change from full time to part time employment. However, employers should **be cautious because the IRS has indicated that the final Play or Pay regulations will contain an anti-abuse rule designed to circumvent employer attempts to evade the Play or Pay** ~~carefully evaluate the impact of ERISA’s anti-retaliation and anti-discrimination provisions before taking action with respect to an employee’s potential entitlement to benefits penalty.~~

Definitions

1. Hours of service include both hours paid based on performance of duties as well as paid time for vacation, holiday, illness, incapacity (including disability) layoff, jury duty, military duty, or leave of absence.
2. Special rules apply to unpaid leave subject to the FMLA of 1993 and the Uniformed Service Employment and Reemployment Rights Act of 1994 that the averaging method excludes it from calculation so that the employee is not disadvantaged by taking these leaves.

TML IEBP and Dickstein and Shapiro PPACA Tracking List

1. Clarification on 120 seasonal days and if the days must be consecutive.
2. Discrimination Regulations regarding employer's defined contribution and benefit subsidy variances amongst employee population.
 - a. Current Discrimination Regulations are:
 - b. Self funded plans are not subject to Code Section 105(h). Code Section 105(h) limits an employer's ability to discriminate in favor of "highly compensated individuals".
3. Service hour calculations regarding the definition of a full time employee.
4. IRS proposed COBRA regulations for lower and middle –income employees who quit or are laid off, or employees' widowed or divorced spouses who are eligible for COBRA but do not enroll, will be entitled to premium subsidies to buy health insurance in public exchanges that begin operating in 2014. Currently proposed regulations state that the COBRA plan would have to fail the 9.5% affordability test and satisfy the 400% federal poverty level test to access COBRA single-coverage. Comments are being received on this proposed regulation and potential penalty.