



## Eligibility Rules Need To Be In Writing

Insights

2.02.15

Healthcare reform continues to roll on. 2014 saw the implementation of the health insurance exchanges, the Individual Mandate, and a host of new rules relating to employer-provided health coverage. 2015 marks the start of yet another major component of the Affordable Care Act (ACA): the Employer Mandate.

In addition to forcing employers to grapple with potential increases in healthcare costs and tax penalties, the Employer Mandate poses additional risks if you are not careful in how you implement (and document) your compliance strategies.

### Who is a Full-Time Employee?

The Employer Mandate requires “applicable large employers” to offer compliant group health coverage to their “full-time employees” and their dependents or face potentially significant excise tax penalties.

Suppose you are an “applicable large employer” who has never offered health insurance. Or perhaps you offer health insurance only to a small subset of your employees. You fear that offering health insurance to your entire workforce would bankrupt the company but you do not want to face tax penalties under the ACA. Instead, you opt for what the Employer Mandate specifically calls for: you offer health insurance coverage to only your full-time employees. Simple determination, right? Wrong.

Who are your full-time employees? Is an employee who worked 20 hours per week this past December and November, but who worked 45 hours per week in the earlier months of 2014 considered full time? What about seasonal employees who only work in the summers, holidays, and other peak times? What about a new employee who you anticipate will work irregular hours, perhaps meeting the “full-time” definition in some months, but not in others?

The Internal Revenue Service (IRS) allows employers to use up to 12-month “measurement periods” to determine whether certain employees meet full-time status. Specifically, if an employee’s hours in a measurement period average out to 30 or more hours per week or 130 or more hours per month, they should be treated as “full time” for a corresponding “stability period.”

Here’s an example: let’s assume you are subject to the employer mandate this year and are using one-year measurement periods. You will need to look back through all of 2014 (and likely into 2013)

one-year measurement periods. You will need to look back through all of 2014 (and likely into 2013) to measure which of your employees are “full time” and need to be offered health insurance coverage to avoid potential tax penalties for 2015. Additional IRS rules address other eligibility issues as well, such as how to treat temporary and seasonal employees, employees on leaves of absence, employees who change positions, and rehired employees. You’ll need to examine each employee’s status to make a determination under the IRS rules.

### **Make Sure to Put it in Writing**

By now, large employers should have consulted counsel and implemented their compliance strategies for 2015, or should be in the process of doing so for future years in which they may be subject to the Employer Mandate. (If you have not, it is not too late.) If you decide to offer coverage only to your “full-time” employees, simply setting measurement period dates with your human resources department and running payroll reports to determine who is a “full-time” employee will not sufficiently limit the risk of controversy and potential legal liability. You will be much better off to clearly define these eligibility rules *in writing* and make sure any old, conflicting eligibility rules are updated.

### **Update Plan Documents**

The Employee Retirement Income Security Act (ERISA) requires employers to provide a Summary Plan Description (SPD) to plan participants and newly eligible employees. Among other things, SPDs are required to describe plan eligibility provisions and enrollment requirements. Accordingly, if you are modifying your eligibility rules for purposes of the Employer Mandate, you should first update any existing documents (SPDs, employee handbooks, open enrollment handouts, etc.) that contain eligibility language which now explicitly conflicts with the changes.

Even if old SPDs or other documents do not have conflicting language, you still should clearly lay out any new eligibility provisions in writing. In addition to complying with ERISA, clearly laying out these new eligibility provisions should help you reduce potential conflicts with employees and risks of litigation, both from employees and the IRS, over who was offered coverage, and who was not.

For example, employers with fully-insured health plans may have relied in the past solely on documentation received from their insurance carriers or third-party plan administrators and may not have created a separate SPD with clearly defined eligibility provisions. But such plan documents often do not contain specific eligibility language beyond, perhaps, a minimum hours-per-month threshold.

Leaving existing plan documents and other materials (e.g., employee handbooks) to define health insurance eligibility with something vague like “full-time employees are those employees who regularly work 30 or more hours per week,” is only inviting trouble. You will no doubt have employees (with attorneys) who could make plausible arguments that they “regularly” work 30 or more hours a week and can point to your existing written documents as evidence they should have been offered health insurance. Without clearly setting out new eligibility rules, it will be a more difficult battle to defend your eligibility determinations.

On the other hand, if such employees attempt to claim that they were unfairly denied health insurance benefits, you will be on much stronger footing to defend your classifications if you can point to written documentation outlining details such as a) date ranges used for measurement periods, administrative periods, and stability periods; b) waiting periods for new employees and newly-eligible employees; and c) how to treat employees in special circumstances, such as those who are promoted from a part-time position to a full-time position, those on a leave of absence, or those who are rehired after an earlier termination.

### **Don't Procrastinate**

If you have not already updated your plan documents, it is not too late. Even if you are subject to the Employer Mandate in 2015, you can still timely revise your SPDs or perhaps draft stand-alone benefits eligibility documents or other "wrap" documents to fully outline new eligibility rules.

Continue to pay close attention to these developments as additional regulations and agency guidance continue to roll out which may require action in order to stay in compliance with ERISA, the ACA, and other related federal and state health insurance-related laws. 2015 promises to be another busy year for healthcare reform.

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