COVID-19 – What Are Some of the Important Health Care Plan and Affordable Care Act Implications (Part 1)

March 23, 2020

A large portion of the business world has come to a screeching halt in the last week as a result of the COVID-19 pandemic. While the future and how long the world has to cope with COVID-19 is unknown, it is clear, unfortunately, that many employers will have to layoff and/or reduce the hours of service of a certain segment of their workforce. We have been inundated with questions regarding the crisis and the impact it may have on an employer's workforce as it relates to the Affordable Care Act (ACA). The purpose of this article is to address some of the frequent questions we have received that we envision many employers will encounter in the weeks and months to come. However, before we start examining the COVID-19 ACA questions, it is important for every employer to review and determine what its health plan document says regarding eligibility.

What does the plan document say regarding eligibility?

Perhaps the most important element for every employer to examine when trying to determine how COVID-19 might impact its workforce is what the employer's health plan eligibility document says. To be eligible for a health plan an employee must meet the health plan's eligibility conditions. A health plan's eligibility conditions can be found in the health plan document or the wrap document. Additionally, the Federal law known as ERISA (Employee Retirement Income Security Act of 1974) mandates a health plan's eligibility

conditions be included in the plan's summary plan description (SPD) (see 29 CFR 2520.102.3(j)(2)). The health plan's eligibility document will be what the health plan uses to determine if an employee is eligible to continue to participate in the health plan throughout the year.

The ACA provides an applicable large employer (ALE) the option to offer its full-time employees health coverage or alternatively risk being exposed to the employer mandate penalties (the penalties enforced under Internal Revenue Code (IRC) section 4980H(a) and (b)). The ACA regulations provide an employer with two options for determining who counts as a full-time employee. The first, default method, known as the monthly measurement method treats an employee as full-time if the employee accumulates 130 or more hours of service per month. The monthly method presents many risks for ALEs and for that reason many employers elected to use the alternative, the look back measurement method.

The look back measurement method allows an employer to measure certain employees' hours of service over a period of up to 12 months before the employee needs to be offered health coverage. The employee's coverage status is then maintained for the entire subsequent stability period so long as the employee remains employed with the employer. To utilize the look back measurement method an employer must adopt a policy explaining the length of the periods and the specific dates selected. A document explaining

the look back measurement method is critical to successfully implement the look back measurement method. As we have previously written about, if an employer has selected to utilize the look back measurement method, which many have, it is imperative that the health plan's eligibility conditions mirror the employer's look back measurement method. If an employer has not mirrored its health plan eligibility conditions with its look back measurement method, the COVID-19 crisis is about to create a big problem for the employer.

Consider the following example to illustrate how the COVID-19 pandemic could create a real issue for some employers. Suppose an employer's health plan eligibility conditions require an employee to be working 30 hours per week to be eligible for the plan. However, the employer also adopted a look back measurement method with a 12 month standard measurement period and standard stability period. McGee has worked at the employer for a long time as an hourly employee. During the 2019 standard measurement period McGee accumulated 2,000 hours of service for the employer. Consequently, under the ACA he will be considered a full-time employee for the entire 2020 standard stability period, January 1, 2020 to December 31, 2020, so long as he remains employed.

Unfortunately, as a result of the COVID-19 crisis, McGee's hours have to be reduced so he is only accumulating 15 hours of service per week with the employer. In this scenario, McGee would no longer be eligible to participate in the employer's health care plan as he won't

meet the eligibility conditions of working 30 hours per week. However, under the ACA he will be considered a full-time employee for the entire 2020 calendar year and need to be offered coverage or the employer will risk paying a penalty under IRC section 4980H with respect to McGee for certain calendar months in 2020.

The insurer will likely kick McGee off the plan as he fails to meet the plan's eligibility conditions particularly if McGee accumulates large expenses on the plan. If McGee is kicked off the plan, the employer will not be offering McGee, a full-time employee under the ACA, coverage under the plan after his hours are reduced. As a result, the employer may be in a position where it has to code certain months in 2020 on the Form 1095-C with 1H on line 14 and line 16 left blank. This will leave the employer exposed to potential employer mandate penalties under the ACA for certain months with regard to McGee. In the worst-case scenario, this will occur to enough employees that the employer will fail to be offering 95 percent of its full-time employees coverage for certain months of the year. For those months, the employer would have exposure under IRC section 4980H(a).

We adopted the look back measurement method and have an employee accumulating less than 30 hours of service per week. Do we still need to offer him/her coverage?

The answer solely depends on what the employer's health plan document says. If the employer adopted the look back measurement method and incorporated its look back

measurement method into its health plan eligibility conditions, as it should have, then an employee who has his/her hours of service drop below 30 will not be impacted by a reduction in hours in the middle of a stability period. Instead, the employee with reduced hours of service may have his/her health care eligibility status impacted for the next stability period.

Let's examine a simple example to illustrate the point. Assume an employer has adopted the look back measurement method and incorporated it into its health plan eligibility conditions. The employer offers health coverage to all employees who accumulate an average of 30 hours of service per week during the initial measurement period or the standard measurement period. The employer elected to use a standard measurement period for ongoing employees that begins on November 1, 2018 and ends on October 31, 2019. The employer has a 61 day administrative period that begins on November 1, 2019 and ends on December 31, 2019. The corresponding stability period runs from January 1, 2020 until December 31, 2020.

Holly has been employed by the employer since July 27, 2010. From November 1, 2018 through October 31, 2019 Holly accumulated 1,809 hours of service with the employer (an average of 34.79 hours of service per week during the standard measurement period). Therefore, Holly would be considered a full-time employee for the entire corresponding

stability period, January 1, 2020 through December 31, 2020, so long as she remains employed.

Should Holly see her hours of service reduced to 10 hours a week as a result of COVID-19, she would still be eligible for her health plan. However, if, as a result of her reduction in hours, she accumulates less than 30 hours of service per week during her current standard measurement period, November 1, 2019 through October 31, 2020, she would not be eligible for the employer's health plan or be counted as a full-time employee for the subsequent stability period, January 1, 2021 through December 31, 2021.

There is one nuanced exception an employer can utilize for a limited number of employees. We hesitate to even mention it, as the conditions needed to satisfy it will rarely apply, but, for thoroughness, we mention it here. An employer using the look back measurement method and wishing to use all of the bells and whistles presented by the final regulations can determine an employee's status using the monthly measurement method on the first day of the fourth calendar month following the change in employment status with regard to that employee so long as the following three conditions are satisfied:

1. If the employee had started in this position, the employee would have been classified as part-time;

2. The employee was offered minimum value coverage by the first day of the fourth calendar month following the employee's start date with the employer and is continuously offered coverage through the calendar month in which the change of employment takes place; and
3. The employee does not accumulate 130 or more hours of service in any of the three calendar months before the employer begins using the monthly measurement method (so for three calendar months after the change in employment the employee would have to accumulate less than 130 hours of service).

For the three months the employer is determining if it can transfer an employee to the monthly measurement method, the employee should continue to be treated as a full-time time employee under the stability period. Few employers have utilized this option up to this point and there are still a number of unanswered questions related to the regulations,

particularly in light of COVID-19. We urge an employer wishing to look into using this option to contact an attorney to assist them. We remain skeptical many employers will be able to benefit from this provision, but if you would like to see a more in-depth analysis you can review our previous article on the subject.

We now have less than 50 full-time plus full-time equivalent employees. Are we still an applicable large employer (ALE)?

There appears to be a lot of confusion with regard to how an employer determines its ALE status. An employer's ALE status is based on the previous year's hours of service. Therefore, a significant reduction in hours of an employer's workforce in the middle of 2020 will not impact whether the employer is an ALE for 2020. However, a significant reduction of hours of service in the middle of 2020 may impact whether the employer is an ALE in 2021.

The final regulations go into great detail about how an employer determines its ALE status. A simpler approach for employers involves two simple rules:

1. sum up the hours of service accumulated by an employer's workforce for the calendar month; and
2. never include more than 120 hours of service in any calendar month for an employee.

Apply the two rules and divide the number by 120 to get an employer's ALE number for a calendar month. After an employer does this for all 12 calendar months in a calendar year sum up the total and divide by 12. If an employer's number is 50 or more, it is an ALE

unless the seasonal worker exception applies. For a complete analysis on how to determine if an employer will be an ALE in 2021, please review our in-depth article on the subject.

Conclusion

COVID-19 is impacting almost every employer in the country. There are several important items that are ACA related that every employer should review. Most importantly, every single employer should be looking at its health plan documents eligibility conditions. If an employer's health plan's eligibility condition does not mirror its look back measurement method, the employer should contact an attorney to try to mitigate any damage. In the future, an employer's health plan's eligibility conditions must mirror the look back measurement method it adopted. Later this week we plan on releasing part 2 of our COVID-19 series examining breaks in service and how the Families First Coronavirus Response Act will interact with certain ACA provisions. Should you have any questions or need assistance with Forms 1094-C and 1095-C reporting, please contact us.

About the author – Ryan Moulder serves as General Counsel at Accord Systems, LLC, provides Legal Counsel to Healthcare Compliance Inc. and is a Partner at Health Care Attorney's P.C. Ryan received his LL.M. from Georgetown University Law Center and his J.D. from Saint Louis University School of Law. He has distinguished himself as a leader in the Affordable Care Act arena and has written and spoken on a variety of ACA topics as it relates to compliance for companies.