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## IRS Releases Final Regulations on “Pay or Play”

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*On February 10, 2014, the Internal Revenue Service (“IRS”) published long-awaited regulations (the “Final Regulations”) on the employer shared responsibility provisions – or “Pay or Play” – under the Patient Protection and Affordable Care Act. The Final Regulations provide two particularly important pieces of transitional relief to employers: (1) Pay or Play is delayed for many employers with 50-99 employees until 2016, and (2) large employers subject to Pay or Play in 2015 need only offer coverage to 70% of full-time employees to avoid assessments. The Final Regulations also include the final rules for complying with Pay or Play. These will allow employers to now move forward with implementing a strategy to comply with Pay or Play.*

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### **Pay or Play**

Under the Affordable Care Act, “large employers” with at least 50 full-time employees (including full-time equivalents) are subject to Pay or Play. Pay or Play requires large employers to either offer affordable coverage of minimum value to 95% of its full-time employees and their dependents or pay a substantial assessment. The assessment can take two forms. If a large employer does not offer coverage during the calendar year to at least 95% of its full time employees and their dependents, it will owe an amount equal to the number of full-time employees employed for the year (minus 30), multiplied by \$2,000, if at least one full-time employee obtains coverage under a state health insurance marketplace and receives a premium tax credit. If an employer offers coverage to at least 95% of its full-time employees, but that coverage does not meet certain affordability or minimum value standards, and the employer has one or more full-time employees who obtain coverage under a state health insurance marketplace, the employer will owe an amount equal to the number of full-time employees who receive a premium tax credit for their coverage from the marketplace, multiplied by \$3,000.

## Transition Relief

The Final Regulations provide two particularly important pieces of transitional relief for large employers:

**Pay-or-Play Delayed for Many Employers with 50-99 Employees.** Pay or Play is delayed for employers with 50-99 full-time employees (including full-time equivalents) for all of 2015 and, in the case of any non-calendar plan year that begins in 2015, the portion of the 2015 plan year that falls in 2016.

To qualify for this transition relief, an employer must satisfy the following requirements:

- **Maintain a Full-Time Workforce of 50-99 Employees in 2014.** The employer employs on average at least 50 full-time employees (including full-time equivalents) but fewer than 100 full-time employees (including full-time equivalents) on business days during 2014. The number of full-time employees (including full-time equivalents) is determined using the rules otherwise applicable for determining “large employer” status.
- **Maintain its Workforce and Aggregate Hours of Service.** From February 9, 2014 through December 31, 2014, an employer may not reduce the size of its workforce or the overall hours of service of its employees if there is no bona fide business reason for doing so.
- **Maintain Previously Offered Health Coverage.** During the “coverage maintenance period,” the employer may not eliminate or materially reduce any health coverage offered as of February 9, 2014. The “coverage maintenance period” is the period from February 9, 2014 through December 31, 2014. For a non-calendar year plan, the period begins on February 9, 2014 and ends on the last day of the plan year that begins in 2015.
- **Certify its Eligibility for Transition Relief.** The employer must certify that it meets the above eligibility requirements for the transitional relief. This certification must be filed with the IRS as part of the health insurance coverage information reporting that the employer will be required to do under Internal Revenue Code section 6056.

Employers in this group must still comply with the reporting requirements for health-insurance information under the Affordable Care Act for 2015. The IRS indicates that it will issue final regulations shortly on the reporting requirements.

### **No Penalties for Large Employers in 2015 that Offer Coverage to 70% of Full-Time Employees.**

Large employers that continue to be subject to the Pay or Play mandate in 2015 need to offer coverage to only 70% of their full-time employees (and their dependents, if applicable) during 2015 (and, for non-calendar year plans, any calendar month during the 2015 plan year that falls in 2016) to avoid penalties. This is a reduction from the 95% offer-of-coverage requirement that will apply in later years.

- **Calculation of Penalties.** If the employer fails to offer affordable health coverage of minimum value to at least 70% of its full-time employees in 2015, it will owe an amount equal to the number of full-time employees employed for the year (minus 80), multiplied by \$2,000, if at least one full-time employee receives the premium tax credit. The reduction in the number of employees in the employer’s workforce by 80, rather than 30 as provided in the Affordable Care Act, is additional transitional relief that applies only for the 2015 plan year.

### Other Transition Guidance

Other transition relief included in the proposed regulations on the Pay or Play mandate that were issued in December 28, 2012 (the “Proposed Regulations”) has been extended in the Final Regulations:

- **Fiscal Year Plans.** The Proposed Regulations included complex transitional rules aimed at providing relief to employers that, as of December 27, 2012, maintain health plan that operate on a fiscal year. The Final Rules extend and expand the transition relief for fiscal year plans.
- **Offers of Coverage to Dependent Children.** The requirement to offer coverage to dependent children in 2015 is delayed for employers that take steps toward offering such coverage to begin in 2016.
- **Determining “Large Employer” Status and Full-Time Employees in 2015.** Employers can use shorter measurement periods of 6 months in 2014 to determine whether they have at least 100 full-time employees (including full-time equivalents) so as to be a large employer subject to the Pay or Play mandate in 2015, and to make an initial determination of their full-time employees for 2015.

### Clarifications and Additional Guidance in the Final Regulations

The Final Regulations also provide additional clarifications and new guidance – much of which is based on comments on the Proposed Regulations – for determining whether an entity is a “large employer” subject to the Pay or Play mandate, identifying which employees are full-time and must be offered coverage, affordability of coverage safe harbors, and calculating any penalty payments that may be due. The Final Regulations address the following issues, among many others:

- **New Employers.** For determining an employer’s status as a “large employer,” the Final Regulations provide rules for employers not in existence in the preceding year.
- **Newly Large Employers.** The Final Regulations provide transitional relief for offering coverage to employees who were not offered coverage at any point in a prior calendar year when an employer first becomes a “large employer” in the subsequent plan year. Such an employer can avoid shared responsibility assessments during the first quarter of the first calendar year for which they are a “large employer” so long as it offers minimum value coverage by April 1 of that year.
- **Various Employee Categories.** The Final Regulations address whether employees in certain occupations are considered full-time employees, including volunteers, seasonal employees, students participating in work-study programs, employees of temporary staffing firms, employees with foreign source income and educational employees including adjunct faculty.
- **Dependent Children.** The definition of dependent children in the Final Regulations excludes stepchildren and eligible foster children.
- **Temporary Staffing Firms.** The Final Regulations provide additional rules for determining whether employees of temporary staffing firms are variable hour employees or full-time employees. Additionally, the Final Regulations provide a new rule for employers who hire workers through staffing firms. Coverage provided by a staffing firm to an individual who performs services for a client employer that is the individual’s common law employer will be treated as being provided on behalf of the client employer only if the fee the client employer pays to the staffing firm for an employee enrolled in health coverage is higher than the fee the client employer would pay to the staffing firm if the same employee was not enrolled in coverage.

No later than July 1, 2014, each employer needs to have controls in place to identify whether it is a “large employer” and, if it is a “large employer,” consider how to implement the new rules under the Final Regulations and capture the necessary data to identify its full-time employees. Pillsbury’s benefits advisers can help an employer properly implement the rules under the Final Regulations that apply to its unique circumstances.

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