



This article presents general guidelines for Georgia nonprofit organizations as of the date written and should not be construed as legal advice. Always consult an attorney to address your particular situation.

Pay or Play: Determining Which Employers Are Subject to the Penalties Under Health Care Reform

By Anne Tyler Hamby, Hamby Benefits Law LLC

Beginning January 1, 2015, the Patient Protection and Affordable Care Act ("ACA") requires Applicable Large Employers (defined below) with 100 or more Full-Time Employees or Full-Time Equivalents to provide health coverage or pay a penalty for failure to do so (the "Pay or Play Rules"). The Pay or Play Rules apply to Applicable Large Employers with at least 50 but less than 100 Full-Time Employees or Full-Time Equivalents beginning with the 2016 plan year. This summary provides guidance on which entities are subject to the penalty tax, how the tax is calculated, and strategies to consider with respect to complying with the Pay or Play Rules. For purposes of this article, defined terms are capitalized or italicized.

Defining Applicable Large Employer.

An Applicable Large Employer is defined as an employer (and any other employer within the same controlled group) who, with respect to a calendar year, employed at least 50 employees for more than 120 business days during the preceding calendar year. For purposes of this calculation, an employer should include both Full-Time Employees and Full-Time Equivalents. A Full-Time Employee is defined as an employee who is employed on average at least 30 hours per week. An employer's Full-Time Equivalents are determined by dividing the aggregate number of hours of service of employees who are not Full-Time Employees for the month by 120.

Include Employees in Controlled Group

All employees of a controlled group under Internal Revenue Code Sections 414(b) or 414(c) (generally this includes employees of parent companies, subsidiaries, and brother-sister companies) are considered when determining whether an employer is an Applicable Large Employer.

For New Employers, Determine Expected Number of Employees

The employer's size is generally determined based on the number of Full-Time Employees and Full-Time Equivalents in the prior calendar year. However, the Pay or

Dated: 4/28/2014

www.pbpatl.org

© 2014 Pro Bono Partnership of Atlanta, Inc. All rights reserved.

Play Rule states that an employer can still be an Applicable Large Employer that is subject to the Pay or Play Rule if the employer "reasonably expects" to employ an average of at least 50 Full-Time Employees and Full-Time Equivalents during the current calendar year.

Consider the Predecessor Employer

A predecessor employer must also be considered when determining whether an employer is subject to the Pay or Play Rule. Generally, the predecessor rule is intended to prevent an employer from making a minor change in corporate form and claiming it is a new employer.

Determine the Average Number of Full-Time Equivalents

If an employer has less than 50 Full-Time Employees, the employer must calculate the number of Full-Time Equivalents it had during the prior calendar year in order to determine whether it is an Applicable Large Employer. Below are some of the circumstances in which an employer can be subject to the Pay or Play Rules even if it does not currently employ 50 Full-Time Employees:

- The employer is part of a controlled group and the total Full-Time Employees or Full-Time Equivalents of the controlled group equals at least 50;
- The employer is a new employer and expects to employ an average of at least 50 Full-Time Employees and Full-Time Equivalents in the current calendar year;
- The employer is deemed to be an Applicable Large Employer due to a predecessor employer; or
- The employer has enough Full-Time Equivalents to cause the employer to be treated as an Applicable Large Employer.

Determining Pay or Play Penalty.

Applicable Large Employer Does Not Offer Health Coverage to All Full-Time Employees

If an Applicable Large Employer does not offer health coverage that meets the basic requirements set forth below to *substantially all* (70 percent during the 2015 plan year for employers with 100 or more Full-Time Employees or Full-Time Equivalents; 95 percent beginning in 2016 for all Applicable Large Employers) Full-Time Employees (and their dependents), the employer must pay a penalty with respect to each Full-Time Employee who enrolls in and receives a subsidy for the state health insurance exchange (the "Exchange"). The health insurance must be minimum essential coverage that is affordable and provides minimum value. Generally, group health plan coverage offered by an employer that complies with applicable health insurance reforms will qualify as *minimum essential coverage*. An employer offers *affordable* health coverage if the employee's share of cost of coverage is less than or equal to 9.5% of employee's

Dated: 4/28/2014

www.pbpatl.org

© 2014 Pro Bono Partnership of Atlanta, Inc. All rights reserved.

household income (based upon self-only coverage and the cost of health coverage provided on the Form W-2, Box 1 wages). An employer provides *minimum value* health coverage if the plan pays at least 60% of actuarially projected cost of covered services. While the coverage must be offered to the dependents of employees, it does not have to be offered to spouses. Unlike coverage to Full-Time Employees, dependent coverage is not required to be *affordable*. A dependent child includes biological and adopted children. Employers may, but are not required to, extend health coverage to foster children and stepchildren.

The penalty is determined on a monthly basis and is the product of the total number of Full-Time Employees of the employer for that month (including those that did not receive a subsidy for the Exchange) and 1/12 of \$2000. The first 30 employees are disregarded for purposes of calculating the penalty. The example below describes the penalty applicable to a company that does not provide health coverage to employees.

Example: ABC Company does not offer health coverage and has 101 employees in 2016. For 2016, ABC Company will be subject to the following penalty:

$$1/12 \times 2,000 \times 71 \text{ (number of Full-Time Employees minus the first 30)} = \\ \$11,833.33/\text{month or } \$142,000/\text{year}$$

Practice Pointer: During the 2015 plan year, an Applicable Large Employer with at least 50 but less than 100 Full-Time Employees or Full-Time Equivalents is generally exempt from the Pay or Play Rules if it satisfies certain requirements. If an Applicable Large Employer with at least 100 Full-Time Employees and Full-Time Equivalents does not offer coverage to at least 70 percent of its Full-Time Employees, it owes a penalty equal to the number of Full-Time Employees the employer employed for the month (minus 80) multiplied by 1/12 of \$2,000, provided that at least one full-time employee receives a premium tax credit for that month.

Applicable Large Employer Offers Unaffordable Health Coverage to Full-Time Employees

If an employer does offer health coverage to all full-time employees (and their dependents) but it is not *affordable* (defined above) or it does not provide *minimum value* (defined above) and at least one Full-Time Employee obtains federally-subsidized coverage through the Exchange, the employer must pay an annual tax equal to the lesser of: (i) \$3,000 per subsidized Full-Time Employee, or (ii) \$2,000 for each Full-Time Employee (excluding the first 30).

Dated: 4/28/2014

www.pbpatl.org

© 2014 Pro Bono Partnership of Atlanta, Inc. All rights reserved.

Example: Suppose instead of offering no health coverage, ABC Company offers health coverage that is affordable and provides minimum value to substantially all employees but 4 of its 101 employees enroll in subsidized health insurance exchange coverage in 2016. For 2016, ABC Company will be subject to the following annual penalty:

$$\$3,000 \times 51 = \$153,000/\text{year}$$

Note that the penalty is capped at the amount ABC Company would have paid if it had offered no health coverage (\$142,000/year)

Practice Pointer: During the 2015 plan year, for an employer with at least 100 Full-Time Employees or Full-Time Equivalents that offers health coverage to at least 70 percent of its Full-Time Employees but has one or more Full-Time Employees who receive a premium tax credit (because health coverage was either unaffordable or did not provide minimum value), the amount of the payment is capped at the number of the employer's Full-Time Employees (minus up to 80) multiplied by 1/12 of \$2,000.

Strategic Considerations For Employers.

Employers will need to consider some of the following factors when determining potential strategies and plan design revisions to comply with the new Pay or Play Rules:

Estimate Potential Penalties

An employer should review the pay or play penalties to determine whether it will be subject to penalties. An employer subject to the penalty may want to consider restructuring its workforce or modifying health plan coverage design to ensure that it provides minimum essential coverage and is affordable.

Evaluate Financial Impact

Employers should consider impact of penalties on their bottom line if they no longer sponsor a health plan.

Additional Compensation Considerations

If an employer decides to discontinue providing health plan benefits, it should consider how to adequately compensate employees to offset the loss of health coverage.

Dated: 4/28/2014

www.pbpatl.org

© 2014 Pro Bono Partnership of Atlanta, Inc. All rights reserved.