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Certain Mid-Sized Employers May Have Even MORE Time to Comply with the ACA's Play-or-Pay Rules

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Thanks to a special transition rule, employers with 50 to 99 full-time employees (including full-time equivalents) are generally shielded from the Affordable Care Act's "play-or-pay" penalties until January 1, 2016. Moreover, in a wrinkle that is easily overlooked, any such "mid-sized" employer that already sponsors a health plan operating on a non-calendar-year basis has even *more* time to comply with these rules.

Multiple Transition Rules for Non-Calendar-Year Plans

As explained in our February 19, 2014, article, this transition rule for mid-sized employers was announced in connection with the final play-or-pay regulations. Those regulations included a number of *other* transition rules for employers sponsoring non-calendar-year plans (regardless of the employer's size), but *those* transition rules came with a number of stringent conditions. For instance, unless those non-calendar-year plans were offered to a sufficient percentage of an employer's workforce, that transition relief applied only to employees who were eligible to participate in the plan. Moreover, it applied only to plans under which the plan year had not been changed since December 27, 2012.

Those conditions do *not* apply to this special transition rule for mid-sized employers. Instead, this rule applies to a mid-sized employer's *entire workforce*, without regard to the percentage of employees who were offered coverage under the non-calendar-year plan. And the only date that matters is February 9, *2014* – i.e., the date the final regulations were issued. The plan year must not have been changed – to a date *later* in the calendar year – after that date.

Example: Consider an employer with 75 full-time employees and a health plan covering only five of those employees. The plan is fully insured, under a policy that renews each December 1st. Assuming this employer satisfies the four conditions listed below (none of which is particularly daunting), it will not be subject to the play-or-pay rules until December 1, 2016.

Identifying the Relevant Plan Year

Many mid-sized employers may now be asking themselves , "So what *is* my health plan's plan year?" Ordinarily, this question would be answered by looking at a plan's Annual Report (Form 5500). But most mid-sized employers have fully insured plans, and because their plans would cover fewer than 100 employees, no Annual Report would be required. The ACA regulations shed no light on this question. However, ERISA defines the "plan year" as "the calendar, *policy*, or fiscal year on which the plan's records are maintained." So an employer in this situation is probably safe in treating the policy year as the plan year.

That's an important conclusion in this context. As a way of deferring the date by which they would have to comply with a number of *other* ACA mandates that took effect as of the first day of the 2014 plan year, many sponsors of insured health plans engaged in an "early renewal" process during late 2013. This means that a number of mid-sized employers now sponsor health plans with a plan year that begins fairly late in the calendar year. And because those renewals took place before the magic date of February 9, 2014, those employers may now rely on this special transition rule for non-calendar-year plans.

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Conditions for Reliance on Special Rule

To rely on this special transition rule, an employer must satisfy each of the following four conditions:

- The employer had an average of 50 to 99 full-time employees (including full-time equivalents) during 2014. Under yet *another* transition rule, this determination may be based on any consecutive six-month period during 2014.
- During the period from February 9, 2014, through December 31, 2014, the employer did not reduce either the size of its workforce or the overall hours of service of its employees *in order to satisfy the immediately preceding condition.*Reductions for "bona fide business reasons" would still be permissible.
- The employer does not eliminate or materially reduce the health coverage, if any, offered to its employees as of February 9, 2014. Even if the employer *does* reduce this coverage, the transition relief will still apply until that date.
- The employer certifies that it met the preceding three conditions. This certification is to be made by entering the proper code on the form that the employer files with the IRS to report the number of its full-time employees. (Note that *none* of the transition rules excuse a mid-sized employer's compliance with these *reporting* rules as of *January 1, 2015*.)

Next Steps for Mid-Sized Employers

Any mid-sized employer that does not sponsor a health plan – or that sponsors only a calendar-year plan – will become subject to the play-or-pay rules as of January 1, 2016. If they have not already done so, they should be working with an insurance agent or broker to determine whether purchasing an ACA-compliant policy is feasible – particularly when compared to the penalties that might be assessed if no coverage is offered to at least 95% of the employer's full-time employees.

Employers falling within the mid-sized category and sponsoring a health plan that operates *other* than on the calendar year will have some additional time to comply with these rules. They may want to take advantage of this time to develop a more nuanced strategy. At a minimum, these employers should be sure to report their entitlement to this extended compliance deadline when completing the ACA reporting forms – not only for calendar-year 2015, but also for those months during 2016 that fall within the 2015 plan year.

Members of Spencer Fane's Employee Benefits Team stand ready to assist employers and their advisors in navigating these troubled ACA waters.