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MEMORANDUM

To: All Clients

From: Donald W. Anderson
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Subject: **DETERMINING FULL-TIME EMPLOYEES UNDER THE ACA**

Date: October 15, 2012

INTRODUCTION

In late August of this year, the U.S. Departments of Labor, Treasury, and Health & Human Services issued new guidance to employers regarding their "shared responsibility" requirements under the Patient Protection and Affordable Care Act (the "ACA"), commonly known as "Obamacare."[1] IRS Notice 2012-58 and IRS Notice 2012-59 are particularly important in terms of the assessments and choices employers must make in determining which employees are considered to be full-time employees under the ACA. While the guidance provided by these notices is not considered to be final, in that the Departments were still seeking input from the public through September 30, 2012, it is important for employers, especially those employing part-time and seasonal employees, to become familiar with the rules and choices so that they will be prepared for the expected implementation date of January 1, 2014.

[1] During the Presidential Debate of Wednesday, October 3, President Obama stated that he liked the name, officially dispelling any concern that it might be deemed pejorative.

DETERMINING WHETHER AN EMPLOYER IS A "LARGE EMPLOYER"

Under the ACA, "large employers" are liable for "assessable payments" for full-time employees who are not covered by insurance, or are covered by insurance that does not meet minimum standards or is unaffordable. A large employer is defined as one that has 50 or more full-time-equivalent ("FTE") employees. Thus, an employer with 40 full-time employees and 20 part-time employees working an average of half-time will qualify as a large employer for ACA purposes.

Generally, a position is considered full-time for purposes of the ACA if it normally calls for an employee to work at least 30 hours per week (130 hours per month), or 1,560 hours per year. Part-time positions should be measured as fractional parts of this full-time measurement. For example, a permanent, part-time employee who regularly works a schedule of 20 hours per week is considered 0.67 FTE for the purpose of counting the number of employees engaged by an employer.

In determining large employer status, a special rule exists for seasonal employees. If the employer's workforce exceeds 50 for 120 days or less during a calendar year, and the employees in excess of 50 for that period were seasonal employees, then the employer is not considered to be a large employer. Otherwise, seasonal employees count in determining large employer status.

LIABILITY FOR ASSESSABLE PAYMENTS

If an employer is a large employer, and the employer provides no insurance coverage on or after January 1, 2014, the employer must make assessable payments in

lieu of insurance. As the law now stands, assessable payments are $166.67 per month times the number of full-time employees, excluding the first 30.[2] Thus, if the employer has 70 full-time employees for which no insurance coverage is provided, the assessability payments owed by the employer are $166.67 per month multiplied by 40 employees, or $6,666.80 per month.

If a large employer provides insurance coverage, but that coverage is not "minimum value" or is "unaffordable", the assessable payment is $250 per month times the number of full-time employees who qualify for and receive premium tax credits or cost-sharing reductions from a health insurance exchange. That number is capped, however, by the amount that would be charged if the employer provided no coverage. The cap is for the purpose of ensuring that no employer must pay more for inadequate or unaffordable coverage than if it had no insurance coverage at all.

"Minimum value" coverage is defined as coverage that pays for at least 60% of all plan benefits, irrespective of co-pays, deductibles, co-insurance, and employee premium contributions. "Unaffordable" coverage exists when the employee's share of the premium exceeds 9.5% of box 1 of the employee's W-2 form.

DETERMINING FULL-TIME EMPLOYEE STATUS

Generally, an employee is considered full-time for purposes of the ACA for any month in which he is employed for at least 30 hours per week (130 hours per month).

[2] Please note the shift here from counting FTE to actual full-time employees, who are counted on the basis described earlier (*i.e.*, those employees who work at least 30 hours per week, or 130 hours per month).

Initial guidance suggested that full-time employee status had to be determined on a month-by-month basis. But, of course, insurance contracts are not issued on a month-by-month basis; normally, such contracts are annual. So the latest guidance from the Departments provides certain "safe harbors" by which an employer can determine full-time employee status retrospectively.

Existing Employees

The first of these safe harbors is for ongoing employees – existing employees of the employer as of January 1, 2014. This safe harbor is called the "Look-Back/Stability Period" Safe Harbor. According to this determination method, an "ongoing employee" is one who has been employed by the employer for at least one standard measurement period. A "standard measurement period" is a period determined by the employer that is at least three months and no more than 12 consecutive months in duration and that is applied on a uniform basis for all employees in the same category. Lawful employee classifications include: i) salaried vs. hourly employees; ii) union (collectively bargained terms of employment) vs. non-union employees; iii) employees of different entities (each entity forming its own category); and iv) employees in different states (separate categories for each state in which an employer has facilities or employee units).

The "Look-Back/Stability Period" Safe Harbor is applied by looking back over the standard measurement period (*e.g.,* 12 months) to determine if the employee's working time averaged 30 hours a week (130 hours per month) or more. If the

employee's average work time met that threshold standard, then the employee must be treated as a full-time employee for the "stability period" going forward that is equal in duration to the standard measurement period (*e.g.*, the next 12 months). If the employee's work time over the standard measurement period was less than an average of 30 hours per week, then the employer is entitled to treat the employee as not being full-time for the duration of the stability period.

In order to give the employer time to implement its findings, an employer is entitled to establish an "administrative period", not to exceed 90 days, between the end of the standard measurement period and the beginning of the stability period. For example, assume that an employer establishes a standard measurement period of 12 months, lasting from December 1, 2012 through November 30, 2013. The employer then uses the administrative period option beginning on December 1, 2013 and lasting through December 31, 2013, to evaluate results and offer enrollment in the employer's insurance plan to employees determined to be full-time employees. Employees determined to be eligible for enrollment in the insurance plan then must be permitted to enroll in the plan within 90 days after having been determined to be eligible.

Newly-Hired and Variable Hour Employees

Under the Departments' guidance, a new employee is a "variable hour" employee if it cannot be determined when the employee is hired whether the employee will work 30 hours or more per week. The guidance uses the example of a part-time employee hired by a retail store for the holiday season. The employee initially will

work more than 30 hours per week during the holiday season, but is likely to work less than 30 hours per week after the season has ended. Because the mix of hours over time has not been determined, it cannot be determined at the time of hire whether the employee will be considered to be a full-time employee under ACA.

For newly-hired and variable hour employees, the guidance establishes a second safe harbor, also termed a "Look-Back/Stability Period" Safe Harbor. This second safe harbor utilizes an "initial measurement period" of three to 12 months, as selected by the employer. If the employee ends up having worked 30 hours or more per week during the initial measurement period, then the employee is a full-time employee for the "stability period". The stability period under this safe harbor is a period, equal in duration to a period not to exceed one month longer than the initial measurement period, during which the employee is treated either as a full-time employee or not, depending upon the determination made based upon hours worked during the initial measurement period.

Transition to Ongoing Employee Status

Once a newly-hired employee has been employed for a time equal to the initial measurement period, the test for full-time status after that period is based on the same test that is used for ongoing employees in the same category. If the status changes (*i.e.*, if the employee is found to be full-time during the preceding measurement period but not during the standard measurement period that follows), the employee must be

treated as being full-time during the first stability period, with any change to be effective with the second stability period.

WHY EMPLOYERS NEED TO KNOW THESE RULES NOW

Employers who are likely to be categorized as large employers and who use part-time employees have several options for how to comply with the ACA: 1) extend insurance coverage to all part-time employees; 2) monitor hours of part-time employees to make sure that none ever average more than 130 in a month; or 3) add and subtract employees from insurance rolls (insurance contracts permitting) on a month-by-month basis; and 4) begin preparation for compliance now.

Even though the coverage requirements of the ACA are not effective until January 1, 2014, the retrospective approach to full-time employee status adopted by the safe harbors means that employers who wish to use the safe harbors should begin preparations even before the end of 2012. Especially for those employers who use seasonal employees, longer standard measurement periods are likely to be better than shorter periods, simply because the longer the time period that the employer has at its disposal as a measurement period, the smaller the impact of the longer seasonal hours on the total hours worked during the period. Employers who wish to add an administrative period at the end of the standard measurement period have to allow for that time as well. The employer, therefore, who wants to use a standard measurement period of 12 months and an administrative period of 30 days would have to start the

measurement period on December 1, 2012 in order to have everything in place by January 1, 2014.

Park districts, municipalities and other units of local government also have to consider the fact that ordinances, resolutions, and/or personnel policy manual changes may be necessary in order to implement compliance measures in a timely fashion. Ancel, Glink clients are encouraged to contact Don Anderson or any of the partners in order to implement their chosen compliance approaches.

CONCLUSION

The ACA is a complex statute, and the guidance given to employers to enable them to comply is also complex, perhaps unnecessarily so. In all probability, even the guidance issued to this point will change as 2014 approaches. Nevertheless, the prudent employer will begin preparing now, based on the best information available, for the administrative actions that it will need to take well before January 1, 2014.