Mid-Size Employers: Transition Relief and Community Rating

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The employer shared responsibility (i.e., "play or pay") requirements went into effect in 2015 for large employers only (those with 100 or more full-time or full-time-equivalent employees). Even though they generally will not be liable for penalties until 2016, mid-size employers (employers with 50 to 99 full-time or full-time-equivalent employees) will need to report on the coverage they offered for 2015, so long as they meet the maintenance requirements for transition relief. To avoid penalties—beginning in 2015 for large employers, and in 2016 for eligible mid-size employers—employers must offer health benefits to employees who work an average of 30 or more hours per week, or 130 hours per month. After January 1, 2016, employers with 50 or more employees will be referred to as "large employers."

If a large employer has a non-calendar-year plan and can meet certain transitional rules, it can delay offering health benefits until the start date of its 2015 plan year. Similarly, a mid-size employer (including those with non-calendar-year plans) that meets another set of rules can delay offering benefits until the start of its 2016 plan year. Finally, an unrelated set of transitional rules related to community rating under the ACA has created questions regarding the total effect when a plan year changes its effective dates.

Mid-Size Employer Transition Relief (Maintenance Requirements)

For a mid-size employer to qualify for transitional relief (i.e., delay offering health benefits until January 2016 or the start of its 2016 plan for non-calendar year plans), it must meet a set of maintenance requirements. The maintenance requirements are that the employer be able to certify (on IRS reporting form 1094-C) that during the period beginning on February 9, 2014, and ending on the last day of the plan year that begins in 2015, the employer:

- Has not modified the plan year of its plan after February 9, 2014, to begin on a later calendar date;
- Has not reduced the size of its workforce or the overall hours of service of its employees so that it could qualify for this delay, and
- Has not eliminated or materially reduced any coverage it had in effect on February 9, 2014. A material reduction means that:
  - The employer's contribution is either less than 95 percent of the dollar amount of its contribution for single-only coverage on February 9, 2014, **or** is a smaller percentage than the employer was paying on February 9, 2014;

  - A change was made to the benefits in place on February 9, 2014, that caused the plan to fall below minimum value; or
  - The class of employees or dependents eligible for coverage on February 9, 2014, has been reduced.

Employers with 50 to 99 employees that are newly offering coverage to some employees, or that only offer coverage to a few employees, are eligible for the delayed effective date as long as they do not make changes that would violate the maintenance requirements. Employers with 50 to 99 employees that have not previously offered any coverage have until January 1, 2016, to offer coverage without risking penalties.

An employer with 50 to 99 employees that does not meet the maintenance requirements will be subject to the play or pay requirements and penalties as of January 1, 2015.

Non-Calendar Year Transition Relief

Employers subject to play or pay with non-calendar-year plans do not need to comply until the start of their 2015 plan year if they meet the plan year transition rules. Under the plan year transition rules, the play or pay requirements do not apply until the start of the 2015 plan year if:

- The employer had a non-calendar-year plan in place on December 27, 2012;
- The employer has not moved the plan year to a later date since December 27, 2012 (e.g., did not move from a July 1 to a December 1 plan year);
- Any of these four criteria are met:
  - Actually covered one-fourth of **all** employees (full-time and part-time) on any day between February 10, 2013, and February 9, 2014;
  - Actually covered one-third of **full-time** employees (30+ hours/week) on any day between February 10, 2013, and February 9, 2014;
  - Offered coverage to one-third of **all** employees during the last open enrollment; or
  - Offered coverage to half of **full-time** employees during the last open enrollment; and
- Affordable, minimum value coverage is offered to applicable employees as of the start of the 2015 plan year.

This piece of transition relief is for all applicable large employers with a non-calendar year plan.

Mid-Size Employers: Which Piece Applies? How Long Do Employers Have?

The following chart provides the date a plan should begin complying with play or pay requirements, depending on which transition relief requirements it did or did not meet.

Employers with 50 to 99 employees	Did it meet Maintenance Requirement	Did it meet Non-Calendar Year Transition Relief	Must Comply with Play or Pay By
Calendar Year Plan	No	No (By default, does not have a non-calendar year plan)	January 1, 2015
	Yes	No (By default, does not have a non-calendar year plan)	January 1, 2016
Non-Calendar Year Plan	No	No	January 1, 2015
	No	Yes	First day of 2015 plan year
	Yes	Yes	First day of 2016 plan year (essentially picking the later of the 2 possible dates)
	Yes	No	First day of 2016 plan year
No plan previously offered	N/A	N/A	January 1, 2016

Community Rating

The ACA originally provided that, for plan years beginning on or after January 1, 2014, personal factors used by an insurer to determine premium rates for insured individuals and group health plans is more limited in scope. Further guidance from the Department of Health and Human Services (HHS) provided instruction on age curves, geographical rating, and state reporting. As a result, carriers began terminating coverage that was not compliant with some of these market reforms. In response, the Centers for Medicare & Medicaid Services (CMS), a division of HHS, issued a letter outlining a transitional policy for non-grandfathered coverage in the small group and individual markets. The policy was then extended for two years to include policy years beginning on or before October 1, 2016. Carriers generally view remaining in transition relief as positive.

Where Transition Relief Policies Clash

As 2016 draws near, some employers are working with carriers that are pushing to change the dates of their non-calendar-year plans. One thing is clear: if a carrier/employer moved the date of an applicable mid-size employer's (an employer that meets the requirements of transitional relief) non-calendar-year plan later in the year (e.g., from June 1, 2015, to October 1, 2015), that group would no longer meet either set of transition relief and would be obligated to meet the requirements of play or pay on January 1, 2015.

The more complex question is what happens if a mid-size employer, currently meeting all requirements of transitional relief, moves its plan year to earlier in the year (e.g., from December 1, 2015, to October 1, 2015) in order to avoid community-rating requirements for another year? The answer is unclear, although it is likely acceptable, provided caution is taken to maintain all the requirements for the transition relief that is applicable to them.

There are two schools of thought in the compliance community. One interpretation is that the transition relief requirements expressly prohibit moving a plan year to a later date, but are silent on moving it forward, effectively permitting the change.

Others interpret the move to an earlier date as a potential material elimination or reduction in coverage under the maintenance requirements. This more conservative approach relies on the language that an employer cannot "eliminate or materially reduce the health coverage, if any, it offered as of February 9, 2014," for the coverage maintenance period. The coverage maintenance period is: (1) for an employer with a calendar year plan, the period beginning on February 9, 2014, and ending on December 31, 2015, and (2) for an employer with a non-calendar-year plan, the period beginning on February 9, 2014, and ending on the last day of the plan year that begins in 2015. Furthermore, if the act of changing the date did not in and of itself trigger a material reduction, any tweaks to the plan design could inadvertently do so (i.e., deductible restarting prior to the normal 12-month period). By failing to meet these requirements, a mid-size employer could have been subject to play or pay beginning on *January 1, 2015, or at the latest, the first day of its 2015 plan year.*

The IRS provides the following guidance on elimination or material reduction in health coverage:

> [I]n no event will an employer be treated as eliminating or materially reducing health coverage if
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> (i) it continues to offer each employee who is eligible for coverage during the coverage maintenance period an employer contribution toward the cost of employee-only coverage that either (A) is at least 95 percent of the dollar amount of the contribution toward such coverage that the employer was offering on February 9, 2014, or (B) is the same (or a higher) percentage of the cost of coverage that the employer was offering to contribute toward coverage on February 9, 2014;
> (ii) in the event there is a change in benefits under the employee-only coverage offered, that coverage provides minimum value after the change; and
> (iii) the employer does not alter the terms of its group health plans to narrow or reduce the class or classes of employees (or the employees' dependents) to whom coverage under those plans was offered on February 9, 2014.

ERISA Considerations

ERISA regulations only allow an employer to change a plan year for a legitimate business purpose. Employers should seek their own legal counsel as to what reasons would constitute a "legitimate business purpose." Finally, changing a plan year requires amending your summary plan description (SPD) or preparing a summary of material modification (SMM) to distribute.

For modifications to the SPD that constitute a material reduction in covered services or benefits, notice is required within 60 days of adoption of the material reduction in group health plan services or benefits. As a best practice, an employer should give advance notice of the change.

If a plan makes a material modification in any of the plan terms that would affect the content of the SBC (that is not reflected in the most recently provided SBC), then notice must be provided no later than 60 days prior to the date on which the modification will become effective.

Conclusion
If a mid-size employer chooses to move its plan to an earlier date in the year, it should be cautious. Employers with further questions should engage outside counsel to review their specific set of facts and circumstances.

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