Chalkboard

An Education Newsletter from the Attorneys of Rosenstein, Fist & Ringold 2013 Issue 1

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Patient Protection and Affordable Care Act: Coverage Considerations for School Districts

by Jerry L. Zimmerman

The Patient Protection and Affordable Care Act (the "Act"), which was enacted on March 23, 2010, has been the subject of litigation concerning its constitutionality, has received an exceptional amount of publicity, and is extraordinarily complex. One of the fundamental goals of the Act, to enable a substantially larger percentage of Americans to receive health insurance coverage that is affordable and that offers minimum benefits, is intended to be accomplished by requiring "large employers" to offer affordable health insurance to their full-time employees. The failure by large employers to (a) offer any employer-sponsored coverage, or (b) offer employer-sponsored health coverage that is "affordable" or "adequate," could result in the imposition of penalties against the large employers. School districts that are large employers must offer affordable and adequate coverage to at least 95% of their full-time employees and their respective dependents to avoid the imposition of penalties.

School districts with more than 200 full-time employees that provide a health benefit plan must automatically enroll new employees in one of the plans which it offers, continue the enrollment of current employees, and provide notice to employees giving them the opportunity to opt out of coverage. The Department of Labor has taken the position that employers are not required to comply with the notice provision until it issues regulations on the subject and that it intends to complete its rulemaking by 2014.

School districts must give employees notice (a) of coverage options that are available through the open marketplace known as the "exchange," (b) that if the coverage offered by the school district's plan is not adequate, then the employee might be eligible for a tax credit to assist with the payments of the premiums for insurance obtained from the exchange, and (c) if the employee purchases health insurance through the exchange, then the employee might lose a tax-free health insurance premium payment made by the school district.

The notice should be provided to current employees, without charge, by October 1, 2013. It must be provided to newly hired employees within 14 days after their respective

start dates. The Department of Labor has issued a model form of the notice. The model form is available on the Department of Labor's website: http://www.dol.gov/ebsa/healthreform/. On May 8, 2013, the Department of Labor issued Technical Release 2013-02 that provides additional guidance concerning the delivery of the notice. Technical Release 2013-02 is available on the above-referenced website.

Certain critical concepts include:

- school districts as "large employers,"
- classifying existing employees as full-time employees ("FTEs"),
- determining whether future employees are FTEs, and
- providing coverage that is "affordable" and "adequate."

Large Employers. A large employer is an employer that employed an average of at least 50 full-time employees (including full-time equivalent employees) during the preceding calendar year. In determining whether a school district is a large employer during 2014, it is necessary for the school district to review its employee records for 2013. In many instances, a review of the school district's employment records for 2013 will be unnecessary to determine whether the school district is a large employer because the applicable school district might have a number of FTEs that is substantially in excess of 50. However, the employee data should still be reviewed to determine the identities of all FTEs and to be assured that the ongoing FTEs are offered the opportunity to obtain health coverage that is affordable and adequate.

On July 2, 1013, President Obama's Administration, through the Internal Revenue Service, announced that the Penalty Provision would not be enforced for years prior to 2015.

FTEs. An FTE is an employee who is employed an average of at least 30 hours per week. In this regard, 130 hours of service in a calendar month is treated as the equivalent of 30 hours per week. If there are employees who individually do not average 30 hours of service per week, but whose hours, when combined with the hours of other employees working less than 30 hours per week, average at least 30 hours per week, those aggregated employees are treated as "full-time equivalent employees" to be considered in determining whether the school district is a large employer. Full-time equivalent employees are not entitled to participate in coverage because they are not FTEs.

School districts are unique because their employees might work in excess of 30 hours per week during the academic year, but on an annual basis might work less than 30 hours per week. Additionally, educators might devote less than 30 hours per week in the classroom but devote a substantial amount of time in preparing the course materials that are necessary for effective education in the classroom. The IRS has issued proposed regulations on both of these issues. The IRS had a concern that an employee's average hours of service for a 12-month measurement period would be distorted and would result in the employee being inappropriately treated as a part-time employee. To avoid the distortion, the IRS requires, for purposes of determining whether the employees are FTEs, that those employees should be credited with hours of service during the traditional breaks in the academic year, such as winter and summer breaks. The IRS has also stated that employers must use a reasonable method of calculating hours of service, and that it is unreasonable for school districts to take into account only the hours that an educator is in the classroom. Although the IRS does not specify the number of weekly hours which a school district must allocate to educators as classroom preparatory time, it requires a reasonable estimate of time and has determined that an exclusion of all preparatory time would be unreasonable.

The Coverage Must be Affordable and Must be Adequate. Coverage must be available to FTEs and their dependents. A dependent is a child of an FTE who has not attained the age of 26 years. If the school district does not have knowledge to the contrary, it may rely on its employee's representation concerning the employee's children and the ages of those children. A spouse of an FTE is *not* a dependent. Not only must a large employer offer health coverage to at least 95% of its FTEs and their respective dependents, but the coverage must also be affordable and adequate. Affordable coverage is coverage which requires the payment of a premium that does not exceed 9.5% of the employee's "household income" for the year. The definition of "household income" is complicated and would also consider the income of the employee's spouse and dependents. The school district will generally not be in a position to be able to accurately calculate an employee's household income because the calculation may include the use of data which is unavailable to the school district. The IRS has issued guidance providing a safe harbor for determining whether the premiums are affordable. That safe harbor provides that coverage is affordable if the employee's portion of the "self-only" premium does not exceed 9.5% of the employee's W-2 wages as specified in box 1 of the employee's W-2 statement.

Coverage is "adequate" if the total allowed costs of benefits that the plan is expected to pay is at least 60%. A web-based calculator is available from the Department of Health and Human Services and design-based safe harbors in the form of checklists are anticipated to be issued to enable employers to perform the requisite calculations. Although the Act imposes mandates on large employees to provide their FTEs with the opportunity to obtain health insurance coverage, school districts must also be assured that they comply with any lesser coverage requirements as set forth in their plans. For example, if a school district has a plan which allows coverage for its employees who work less than an average of 30 hours per week, then those employees must also be afforded the opportunity to obtain coverage.

Ongoing Employees. To determine whether an ongoing employee is an FTE, that employee's hours of service for a prior measuring period must be reviewed to determine whether that employee is, on a current basis, an FTE. The IRS has issued a safe harbor method of determining whether an employee is an FTE. To fall within the safe harbor, the school district should "look back" to a prior measuring period which is referred to as the "standard measurement period." Generally, with limited exceptions, the standard measurement period must be the same period for all employees. The school district may choose the duration of the standard measurement period as long as it is at least three months, but not longer than 12 consecutive calendar months. If the school district determines that an employee averaged at least 30 hours per week during the standard measurement period, then the school district must treat that employee as an FTE during the current period which is referred to as the "stability period" regardless of the employee's number of hours during the stability period. For example, if an employee averaged 40 hours per week during the standard measurement period, that employee must be considered to be an FTE during the subsequent stability period, even if that employee is averaging less than 30 hours per week during the stability period. There are certain rules which must be applied in determining the length of the stability period, as follows:

- If an individual is determined to be an FTE during the standard measurement period, then the stability period must be of a duration that is at least six consecutive calendar months and must not be shorter than the duration of the standard measurement period.
- If the employee is determined not to be an FTE during the standard measurement period, then the school district is allowed to treat that employee as a part-time employee during the stability period, but the stability period must not be longer than the standard measurement period.

- School districts are allowed to use different measurement periods for collectively bargained employees as opposed to non-collectively bargained employees, and salaried employees as opposed to hourly employees.

The use of the standard measurement period and stability period is an ongoing and continuous process. Commencing in 2014, an employee will likely be within a standard measurement period and a stability period at the same time. For example, if a school district is using a calendar year as a standard measurement period, then 2013 would be used as the standard measurement period to determine whether employees are FTEs for the stability period of 2014. In this example, 2014 would be the stability period. Additionally, 2014 would be the standard measurement period for determining whether employees would be FTEs for the stability period of 2015.

School districts might need time between the standard measurement period and its associated stability period to determine which ongoing employees are FTEs, and to notify and enroll those employees. The IRS has provided that an administrative period of not more than 90 days may be used by the school district to complete that process. The administrative period should not reduce or lengthen the standard measurement period or the ensuing stability period.

New Employees. If a school district reasonably expects a newly hired employee to be an FTE, then the school district must offer coverage to that employee within the employee's initial three calendar months of employment.

If the school district does not know whether the newly hired employee will have sufficient hours to be classified as an FTE, the school district should use an initial measurement period for the newly hired employee that is of the same duration as the standard measurement period that it uses for its ongoing employees. If the newly hired employee is determined to be an FTE based on his hours of service during the initial measurement period, then that newly hired employee would be entitled to obtain affordable and adequate coverage during a subsequent stability period. The stability period for the newly hired employee must be the same length as the stability period for ongoing employees. The IRS has set forth a process by which the initial measurement period for a newly hired employee is converted into the standard measurement period for ongoing employees, however, the process is very complicated, beyond the scope of this article, and one which requires a case-by-case analysis.

Penalties for Noncompliance. The Act requires employers with at least 50 full time employees to either provide to its FTEs by January 1, 2014, the opportunity to obtain employer-sponsored coverage that is affordable and adequate, or pay a penalty for its failure to do so (the "Penalty Provision"). On July 2, 2013, President Obama's administration, through the Internal Revenue Service, announced that the Penalty Provision would not be enforced for years prior to 2015.

If a school district with at least 50 FTEs receives a certification that any FTE is enrolled in health insurance coverage purchased through an exchange and that FTE is receiving a premium tax credit or cost-sharing reduction, then the school district is potentially subject to a penalty if:

(a) it fails to offer to at least 95% of its FTEs and their dependents an opportunity to enroll in a health insurance plan providing essential coverage, or
(b) if it offers coverage to its FTEs and their dependants but the coverage which is offered by the school district is not affordable or is not adequate.

The school district will not be liable for penalties under both penalty provisions; it can have liability under only one of the provisions.

From: www.rfrlaw.com

Legislative Section
- Final bills and RFR Red Banner Updates

RFR Associate, Kelsey K. Bardwell, has been accepted into the 50th class of Leadership Tulsa

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PPACA (from page 4)

The amount of the monthly penalty for the failure by the school district to provide to at least 95% of its FTEs the opportunity to obtain coverage equals $166.67 x (the number of FTEs – 30). After 2014, that figure will be adjusted for inflation.

If the school district provides its FTEs with the opportunity to obtain coverage, but the coverage is not affordable or is not adequate, then the monthly penalty is the lesser of (i) $166.67 x (the number of FTEs – 30), or (ii) $250 x (the number of FTEs who receive credits for obtaining health insurance coverage through the health insurance exchange).

2013 Policies Available

The work of the Oklahoma legislature has concluded (RFR Red Banner Updates are still posted at www.rfrlaw.com) and the 2013 policy updates are now available for K12 schools and technology centers. Your regular school attorney or paralegal Michelle Siegfried (msiegfried@rfrlaw.com) can provide your district with:

- a copy of the client advisory outlining all the changes required for 2013
- 2013 policy updates
- a full RFR standard manual

Key concerns for policy reviews this year include issues associated with the delay in the full implementation of TLE and the additional requirements associated with bullying prevention and investigation.

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We welcome your comments, criticisms and suggestions. Correspondence should be directed to: Rosenstein, Fist & Ringold, 525 South Main, Seventh Floor, Tulsa, Oklahoma 74103-4508, or call (918) 585-9211 or 1-800-767-5291. Our FAX number is (918) 583-5617. Help us make *Chalkboard* an asset to you.

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