The Internal Revenue Service (IRS) recently issued final regulations on the employer-shared responsibility provisions of the Affordable Care Act, most commonly referred to as "Pay or Play". These rules impact employers with 50 or more full-time equivalent employees. While the rules mirror the proposed regulations in many ways, the final regulations contain some surprises. Changes in the final regulations include relaxing or delaying the implementation of the Pay or Play penalties, issuing guidance on counting hours for certain full-time employees whose hours are difficult to count, defining seasonal employees and clarifying affordability safe harbors.

Transitional Relief

The largest changes come in transitional relief for implementation of the employer mandate:

- For employers with 50-99 employees, one of the most important elements of the recently issued guidance is new transitional relief which delays compliance until 2016 as long as the employer:
    - Has not reduced the size of its workforce or overall hours of services of its employees to qualify for the delay
    - Has not eliminated or materially reduced any coverage in effect on February 9, 2014
- For employers with 100 or more employees, the mandate will take effect on January 1, 2015, but transitional relief will apply to employers with non-calendar year plans as long as:
    - The employer had a non-calendar year plan in place on December 27, 2012
    - The plan year has not changed since December 27, 2012
    - Affordable, minimum value coverage is offered to most of its employees (70% in 2015 and 95% in 2016) at the start of the 2015 plan year and most employees were eligible under the rules in place on February 9, 2014
    - Affordable, minimum value coverage is offered to most of its employees (70% in 2015 and 95% in 2016) at the start of the 2015 plan year and although most employees were not eligible under the rules in place on February 9, 2014, on at least one day during the period from February 10, 2013 through February 9, 2014, either:
        - 25% of its total employees or one-third of its full-time employees were covered by a group health plan sponsored by the employer, or
        - Coverage was offered to at least one-third of its total employees or one-half of its full-time employees during the open enrollment period that ended most recently before February 9, 2014.

Affordability Safe Harbors

Under the employer mandate, a large employer must offer coverage or pay a penalty of $2,000 per full-time employee (30 or more hours per week) if one employee receives a premium tax credit through the public exchange. If an employer offers coverage, it must be both “affordable” and “minimum value” (60% benefit value) or employers must pay a penalty of $3,000 per year for each full-time employee who receives a premium tax credit. An employer that provides minimum essential coverage to most of its employees avoids the $2,000 per employee penalty for failure to offer coverage, but could still have

to pay the $3,000 penalty on an employee who is either in a group that is not offered coverage or who is offered coverage that is not both affordable and minimum value if an employee receives a premium tax credit. (Note: In 2015, large employers who choose to pay the $2,000 penalty and not offer coverage may exempt the first 80 employees from the penalty calculation. This will revert back to 30 in 2016.)

Coverage is affordable if the cost of single coverage for the least expensive plan option that provides minimum value does not exceed 9.5% of the employee's income or Federal Poverty Level (FPL). Single coverage is always the measure of affordability. The three safe harbors remain the same, but include some clarification:

- Employee Box 1 W-2 income for the current year
- Employee rate of pay on the first day of the plan year, multiplied by 130 for hourly employees (this safe harbor is available even if the rate of pay reduces during the year)
- The most recently published FPL for a single person (may use the guidelines in effect six months before the start of the plan year)

Additionally, employers may choose to use one or more of the safe harbors for all of its employees or for any reasonable category of employee, provided it does so on a uniform and consistent basis for all employees in that category.

Seasonal Employee Definition

The proposed rules did not define a seasonal employee. The rules allowed employers to make a "good faith" interpretation of the term. The final regulations define a seasonal employee as an employee who is hired into a position for which the customary annual employment is six months or less. This is significant for large employers because seasonal employees may be measured for a period of at least 3 months and no more than 12 months in determining whether or not an employee is a full-time employee and must be offered coverage. Please note this definition does not apply to small employers who must count seasonal employees for purposes of determining large employer status. Small employers must still make a "good faith" determination of a seasonal employee.

Special Clarifications

The final rules provide additional guidance on certain provisions including industry specific concerns. Those rules include:

- **Adjunct Faculty** – The previous rules required employers to use a reasonable method for crediting hours of service that included all hours of service. The final rules provide a safe harbor that allows employers to either credit 2 ¼ hours of service per week for each hour of teaching and an hour of service per week for each additional hour outside of the classroom the faculty member spends preforming required duties such as office hours or faculty meetings.
- **Student Employees** – Student hours must be counted for purposes of the employer mandate, however, hours worked under a federal work-study program may be excluded.
- **Volunteers** – Employers are not required to count the hours of volunteers, which includes volunteer firefighters and volunteers of nonprofit organizations, as long as any payment is nominal such as payment to cover expenses.

- **Rehire Provisions** – The proposed rules allowed employers to treat employees with breaks in service as new hires only if the break in service was at least 26 consecutive weeks. This rule continues to apply for educational organizations, but is reduced to 13 weeks for all other employers.
- **Definition of Dependent** – Final regulations clarify that a dependent does not include stepchildren or foster children or a child who is not a US citizen or national unless the child is resident of a country contiguous to the US or is an adopted child. Additionally, a child is a dependent for the entire calendar month during which he or she reaches age 26.
- **On-Call Hours –** The proposed rules did not address on-call hours. Employers must use a reasonable method for determining hours of service for employees who are directed to remain available for work. Employers should include the following as hours of service: payment is made by the employer, an employee has to remain on the employer's premises or the employee's activities while on-call are so restricted that the employee is prevented from using the time effectively for his or her own purposes.
- **Staffing Firms –** Proposed regulations did not address whether an offer of coverage by a temporary staffing firm would be considered an offer of coverage by the client-employer itself. The final rule does give employers some clarity in that an offer of coverage made on behalf of an employer (such as a Taft-Hartley plan) is counted as an offer of coverage by the employer by applying this same reasoning to staffing firms, with some limitations. In cases where the employee is not a common-law employee of the staffing firm, the offer would be treated as made by the client-employer, but only if the fee charged to the client-employer is higher than the fee that would be charged if that employee did not enroll in health coverage under the plan

<u>Employer Action Items</u>

Employers should determine their employer size as well as conclude if and when the Pay or Play mandate will apply to their organization in the following year. In making this determination it is important for employers to count all employees, including employees of any related employers within a controlled group. While an employer may use a six month representative period in 2014, employers should be prepared to track employees and hours for all of 2015 for purposes of both employer size and employees who must be offered coverage.

Employers should also define the look-back/measurement and stability periods they intend to use to count employees' hours. Employers with 100 or more employees and calendar year plans will need to begin tracking hours no later than July 1, 2014, and will need to begin sooner to accommodate any administrative period. As a reminder, employers may choose measurement periods of no less than 3 and up to 12 months in length and an administrative period of up to 90 days. The measurement period should correspond with a stability period (offer of coverage) that is at least six months in length and equal to the measurement period.

HORAN will continue to provide additional guidance, recommendations and resources as the regulations evolve.