CHERNOFF DIAMOND

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A REQUEST FOR PUBLIC COMMENTS ON SHARED RESPONSIBILITY FOR EMPLOYERS REGARDING HEALTH COVERAGE (SECTION 4980H)

MAY 2011

IT'S NEVER TOO EARLY TO START THE PLANNING PROCESS. THE TREASURY DEPARTMENT AND INTERNAL REVENUE SERVICE ISSUED NOTICE 2011-36 TO PRIMARILY SEEK PUBLIC COMMENTS REGARDING THE EMPLOYER SHARED RESPONSIBILITY ("PLAY OR PAY") MANDATE SCHEDULED TO TAKE EFFECT IN 2014 UNDER THE AFFORDABLE CARE ACT (ACA).

The Notice includes potential approaches to determine key elements of the 2014 employer mandate and makes clear that these suggestions should not be construed as guidance, but rather are initiating the process for the development of future regulations.

This edition of ***INSIGHTS & IMPLICATIONS*** briefly summarizes the 2014 employer mandate as well as the information contained in Notice 2011-36. We also highlight two key areas of concern (on which you may wish to offer your comments) that may be especially challenging and problematic for employers.

Employers, plan sponsors and other interested parties who wish to comment on the 2014 employer mandate should review the Notice request and submit comments no later than June 17, 2011. Information on how and where to file is found on the IRS website at http://www.irs.ustreas.gov/newsroom/article/0,,id=239023,00.html

Note: Affordable Care Act terms are noted in "*italics*".

THE SHARED RESPONSIBILITY PROVISION

Under the ACA, an "*applicable large employer*" (50 or more full-time employees) will be charged an "*assessable payment*" (penalty) **if at least one full-time employee** is certified by the Exchange to receive a federal subsidy (generally **household income** is less than 400% of the Federal Poverty Level) and either the employer:

- fails to offer full-time employees the opportunity to enroll in "*minimum essential coverage*" (i.e. does not offer coverage), or
- offers full-time employees "*minimum essential coverage*" in which (a) the plan's share of the total allowed costs of benefits provided is less than 60%, or (b) the employer coverage is "unaffordable" whereby an employee's share of the cost exceeds 9.5% of **household income**.

Coverage under an eligible employer-sponsored plan is generally considered to be "*minimum essential coverage*" which term refers to each individual's responsibility to have coverage (individual mandate) beginning in 2014. It is presumed we will see guidance in the future for employer-sponsored plans to better understand the concept of offering a plan of 60% value.

THE ASSESSABLE PAYMENT

The **monthly penalty** for employers that fail to offer "*minimum essential coverage*" to full-time employees is 1/12 x $2,000 for each full-time employee (less the first 30). Employers who offer "*minimum essential coverage*" would be subject to a **monthly penalty** equal to the lesser of the penalty described above or 1/12 x $3,000 for each full-time employee with subsidized coverage on the Exchange. The law specifically exempts small firms that have fewer than 50 full-time equivalent employees.

TWO KEY EMPLOYER CHALLENGES

The law requires full-time employee status be tracked on a monthly basis which can be costly and administratively challenging. In addition, many employers and plan sponsors are expressing concern regarding the concept of **household income** being the basis for determining the unaffordable coverage threshold. Employers are perplexed as to how they may develop a meaningful benefits and contribution strategy when this benchmark is not available to employers and is a key factor in the

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determination of penalty assessments.

IRS NOTICE 2011-36

The IRS Notice offers potential definitions of **Employer**, **Employee** and **Hours of Service** which are critical elements of the 2014 "play or pay" mandate. The IRS suggests that an employee would refer to a worker under the "common-law" test and would exclude leased employees for this purpose. The Notice outlines several possible methods to calculate **Hours of Service** as the law defines a **full-time employee as one who works, on average, 30 hours of service per week**.

Other definitions and examples are provided with regard to the determination of whether an employer is an "*applicable large employer*" subject to the mandate. In this regard, the determination would be based on the employer's workforce in the preceding calendar year and would reflect the sum of the employer's **full-time** and "**full-time-equivalent**" employees (FTE). All employees not considered **full-time** employees for any month in the preceding calendar year would be reflected in the FTE calculation, which may be determined by aggregating the FTE **Hours of Service** in the month (up to 120 hours) and dividing this result by 120. The Notice also offers an approach for the treatment of seasonal employees.

Employers whose workforce is consistently in excess of 50 full-time employees will not need to be concerned with the FTE calculation. However, all employers will need to track their full-time employee population for reporting purposes and to determine any assessable payment.

AN ALTERNATIVE TO THE MONTHLY DETERMINATION OF AN EMPLOYER'S FULL-TIME WORKFORCE

The Treasury Department and IRS recognize that a month-to-month method for determining each employee's full-time status as well as an employer's potential liability may cause practical difficulties and be cumbersome and costly to administer. The agencies offer a safe-harbor alternative and are requesting comments on this possible methodology.

Under the "***look-back/stability period***" safe harbor, an employer would determine each employee's full-time status by "looking back" at a defined period (not less than three or greater than twelve consecutive months) to determine whether the employee averaged 30 hours of service per week under rules that are established. If an employee is determined to be a full-time employee during this "***measurement period***", the employee would then be treated as a full-time employee during a subsequent "***stability period***" (as long as the employee remains in service with the employer). The "***stability period***" would be at least six consecutive calendar months that follow the measurement period.

Notice 2011-36 can be found on the IRS website at http://www.irs.ustreas.gov/pub/irs-drop/n-11-36.pdf

90-DAY WAITING PERIOD

The agencies are also seeking input on the 90-day waiting period restriction and offer several examples and circumstances in which they are seeking comment.

IMPLICATIONS

Much of the employer community will be impacted by the Affordable Care Act shared responsibility requirements in 2014. The requirements will undoubtedly require a dedication of resources to understand and comply with the rules and regulations. This is an excellent opportunity for all stakeholders to raise concerns, offer suggestions and actively participate in the regulatory process.

ADDITIONAL INFORMATION

For specific questions concerning information contained in this ***INSIGHTS & IMPLICATIONS***, please contact your Chernoff Diamond consultant.

Information contained in this ***INSIGHTS & IMPLICATIONS*** is not intended to render tax or legal advice. Employers should consult with qualified legal and/or tax counsel for guidance in respect of matters of law, tax and related regulation.

Chernoff Diamond provides comprehensive consulting and administrative services with respect to all forms of employee benefits, risk management and qualified and non-qualified retirement plans.

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