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INSURANCE BRIEF

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Corporate Headquarters

One Kaiser Plaza, Suite 1101
Oakland, CA 94612
Toll Free: 800.733.3131
Tel: 510.452.0458
Fax: 510.452.1378

Santa Rosa Office

Fountaingrove Center
3554 Round Barn Blvd., Suite 309
Santa Rosa, CA 95403
Toll Free: 800.733.3131
Tel: 707.577.8300
Fax: 707.577.0609

Visit us on the web
www.smlinc.com

CA Insurance License #0D04053

Medicare Part D Notice Reminder

It's that time of year again!! The Centers for Medicare and Medicaid Services (CMS) requires entities to provide an annual notice to Part D eligible individuals before October 15, 2011 indicating whether its plan's coverage is creditable or non-creditable. The Disclosure Notice requirement applies to Part D eligible individuals who are *active or retired* employees, as well as those who are covered as spouses or dependents under active or retiree coverage.

If your plan data does not include dependent data in the detail necessary to identify eligible dependents who may be Medicare Beneficiaries, you may choose to provide the notice to all eligible employees to assure proper notice to all Medicare Beneficiaries. Notice to the employee will constitute notice to dependents unless you have a separate address for a non-resident spouse/dependent.

Plan Sponsors must also provide a Medicare Part-D notice:

- a. Prior to an individual's Initial Enrollment Period for Part-D;
- b. Prior to the effective date of coverage for any Medicare eligible individual that joins the Plan;
- c. Whenever the entity no longer offers prescription drug coverage or changes the coverage offered so that it is no longer creditable or becomes creditable; and,
- d. Upon the request by the individual.

"Prior to" means that the individual must have received the Disclosure Notice within the past twelve months. So, plans that issue the Part-D notice at time of policy renewals do not need to provide another notice.

The notices are provided in English and Spanish at <http://www.cms.gov/CreditableCoverage/Model%20Notice%20Letters.asp#TopOfPage>. You can also contact your SML Account Team to request a copy be emailed to you.

Disclosure to CMS Form. Don't forget that you must also disclose to CMS whether your plans' coverage is creditable or non-creditable. This is done online at www.cms.hhs.gov/CreditableCoverage/45_CCDisclosureForm.asp

This disclosure must be made within 60 days following the start of the plan year, within 30 days after termination of a prescription drug plan, and within 30 days after any change in the plan's creditable coverage status.

Full-time Employee and Waiting Period Guidance

On August 31, the Internal Revenue Service released [IRS Notice 2012-58](#) and [IRS Notice 2012-59](#). These notices provide guidance on determining full-time employees (FTEs) for purposes of the shared responsibility provision, and the 90-day waiting period provision, respectively. The guidance clarifies and expands the safe harbor methods that employers may use in determining which employees must be treated as full-time employees working at least 30 hours per week. Employers can rely upon this guidance until at least January 1, 2015.

Under the Patient Protection and Affordable Care Act (PPACA), effective plan years beginning on or after January 1, 2014, employers with 50 or more employees must provide coverage to their full-time employees (defined as those working at least 30 hours per week). This provision is contained in U.S. code § 4980H. The 90-day waiting period provision found in Public Health Service Act (PHSA) § 2708 applies to all sized group health plans, but not to excepted benefits. This means it only applies to medical, unless the dental and/or vision are bundled with the medical.

Under the FTE guidance, employers can use an initial measurement period for their new hires with variable hours and for seasonal employees. This initial period must be not less than 3 months and no more than 12 months and is considered a “look back” period to determine average number of hours worked. (Note: Under PPACA an employee is a variable hour employee if, based on the facts and circumstances as of their start date, it cannot be determined that the employee is reasonably expected to work on average at least 30 hours per week. Seasonal workers are defined under PPACA as those who work no more than 120 days per year.)

If the employer determines that an employee in either of these two classes meets the full-time definition then that employee must be treated as eligible for coverage for at least 6 months, but no less than the measurement period. This is referred to as the stability period. If you have a 12-month measurement period, then the stability period would be 12-months. If the employer determines that the employee does not meet the full-time definition, then that employee is treated as ineligible for coverage during the stability period. In this case, there is no minimum length, but it cannot be longer than the standard measurement period.

Employees who continue to work a variable hour schedule after their initial measurement period may be tested annually using a different time frame known as a standard measurement period. This is also limited to a minimum of 3 months and a maximum of 12 months. For example, the initial period might be 6 months from date of hire and the standard period can be January 1—November 30th.

The standard measurement period and the stability period may be varied between employees for the following categories: (1) collectively bargained employees and non-collectively bargained employees; (2) salaried employees and hourly employees; (3) employees of different entities; and (4) employees located in different States.

Under the waiting period guidance, if eligibility is based on completing a threshold number of hours, that number cannot exceed 1,200 hours. Employers may use the retrospective initial measurement period, but at the end of this period, coverage must begin. Employers may not then impose another 90 day waiting period.

Employers may use an administrative period of up to 90 days in addition to using the initial and standard measurement periods with variable hour and seasonal employees. The purpose of the administrative period is to allow the employer time to determine their eligibility status and provide employees with enrollment materials. When an employee is hired mid-month, guidance allows for a maximum of a 12 month initial measurement followed by 1 month

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Full-time Employee and Waiting Period Guidance *cont'd*

administrative period and the partial month. The guidance makes it clear that so long as the employee is permitted to enroll within 90 days, if the employee fails to promptly complete enrollment and does so after 90 days there is no violation of the maximum waiting period.

Examples of Variable Hour Employees

Example 1: Facts. 12-Month Initial Measurement Period Followed by 1+ Partial Month Administrative Period, 12-month Standard Measurement period starting October 15 for ongoing employees, and a 12-month stability period associated with the standard period starting January 1. For new variable hour employees, Employer B uses a 12-month initial measurement period that begins on the start date and applies an administrative period from the end of the initial measurement period through the end of the first calendar month beginning on or after the end of the initial measurement period. Employer B hires Employee Y on May 10, 2014. Employee Y's initial measurement period runs from May 10, 2014, through May 9, 2015. Employee Y works an average of 30 hours per week during this initial measurement period. Employer B offers coverage to Employee Y for a stability period that runs from July 1, 2015 through June 30, 2016.

Conclusion. Employee Y works an average of 30 hours per week during his initial measurement period and Employer B uses (1) an initial measurement period that does not exceed 12 months; (2) an administrative period totaling not more than 90 days; and (3) a combined initial measurement period and administrative period that does not last beyond the final day of the first calendar month beginning on or after the one-year anniversary of Employee Y's start date. Accordingly, from Employee Y's start date through June 30, 2016, Employer B is not subject to any payment under § 4980H with respect to Employee Y, because Employer B complies with the standards for the initial measurement period and stability periods for a new variable hour employee. Employer B also complies with PHS Act § 2708. Employer B must test Employee Y again based on the period from October 15, 2014 through October 14, 2015 (Employer B's first standard measurement period that begins after Employee Y's start date).

Example 2: Facts. Initially Full-Time Employee, Becomes Non-Full-Time Employee. Same as Example 1; in addition, Employer B tests Employee Y again based on Employee Y's hours from October 15, 2014 through October 14, 2015 (Employer B's first standard measurement period that begins after Employee Y's start date), and determines that Employee Y worked an average of 28 hours a week during that period. Employer B continues to offer coverage to Employee Y through June 30, 2016 (the end of the stability period based on the initial measurement period during which Employee Y was determined to be a full-time employee), but does not offer coverage to Employee Y for the period of July 1, 2016 through December 31, 2016.

Conclusion. Employer B is not subject to any payment under § 4980H and complies with PHS Act § 2708 for 2016 with respect to Employee Y, provided that it offers coverage to Employee Y from July 1, 2015 through June 30, 2016 (the entire stability period associated with the initial measurement period).

Example of Seasonal Employee

Example 1: Facts. 12-Month Initial Measurement Period; 1+ Partial Month Administrative Period. Employer D offers health plan coverage only to fulltime employees (and their dependents). Employer D uses a 12-month initial measurement period for new variable hour employees and seasonal employees that begins on the start date and applies an administrative period from the end of the initial measurement period through the end of the first calendar month beginning after the end of the initial measurement period. Employer D hires Employee S, a ski instructor, on November 15, 2014 with an anticipated season during which Employee S will work running through March 15, 2015. Employer D determines that Employee S is a seasonal employee based upon a reasonable good faith

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Full-time Employee and Waiting Period Guidance *cont'd*

interpretation of that term. Employee S's initial measurement period runs from November 15, 2014, through November 14, 2015. Employee S works 60 hours per week from November 15, 2014 through March 15, 2015, but is not reasonably expected to average 30 hours per week for the 12-month initial measurement period. Accordingly, Employer D does not treat Employee S as a full-time employee, and does not offer Employee S coverage.

Conclusion. Employer D uses (1) an initial measurement period that does not exceed 12 months; (2) an administrative period totaling not more than 90 days; and (3) a combined initial measurement period and administrative period that does not extend beyond the final day of the first calendar month that begins on or after the one-year anniversary of an employee's start date. Accordingly, from Employee S's start date through November 14, 2015, Employer D is not subject to any payment under § 4980H, because Employer D complies with the standards for the initial measurement period and stability periods for a new seasonal employee with respect to Employee S. PHS Act § 2708 does not apply to Employee S during this period because, pursuant to the plan's eligibility conditions, Employee S does not become eligible during this period for coverage under the plan. Accordingly, Employer D also complies with PHS Act § 2708 with respect to Employee S during this period.

Ongoing Employees Example

Facts. Employer W chooses to use a 12-month stability period that begins January 1 and a 12-month standard measurement period that begins October 15. Consistent with the terms of Employer W's group health plan, only an ongoing employee who works full-time (an average of at least 30 hours per week) during the standard measurement period is offered coverage during the stability period associated with that measurement period. Employer W chooses to use an administrative period between the end of the standard measurement period (October 14) and the beginning of the stability period (January 1) to determine which employees worked full-time during the measurement period, notify them of their eligibility for the plan for the calendar year beginning on January 1 and of the coverage available under the plan, answer questions and collect materials from employees, and enroll those employees who elect coverage in the plan. Previously-determined full-time employees already enrolled in coverage continue to be offered coverage through the administrative period.

Employee A and Employee B have been employed by Employer W for several years, continuously from their start date. Employee A worked full-time during the standard measurement period that begins October 15 of Year 1 and ends October 14 of Year 2 and for all prior standard measurement periods. Employee B also worked fulltime for all prior standard measurement periods, but is not a full-time employee during the standard measurement period that begins October 15 of Year 1 and ends October 14 of Year 2.

Conclusions. Because Employee A was employed for the entire standard measurement period that begins October 15 of Year 1 and ends October 14 of Year 2, Employee A is an ongoing employee with respect to the stability period running from January 1 through December 31 of Year 3. Because Employee A worked full-time during that standard measurement period, Employee A must be offered coverage for the entire Year 3 stability period (including the administrative period from October 15 through December 31 of Year 3). Because Employee A worked full-time during the prior standard measurement period, Employee A would have been offered coverage for the entire Year 2 stability period, and if enrolled would continue such coverage during the administrative period from October 15 through December 31 of Year 2.

Because Employee B was employed for the entire standard measurement period that begins October 15 of Year 1 and ends October 14 of Year 2, Employee B is also an ongoing employee with respect to the stability period in Year 3.

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Because Employee B did not work full-time during this standard measurement period, Employee B is not required to be offered coverage for the stability period in Year 3 (including the administrative period from October 15 through December 31 of Year 3). However, because Employee B worked full-time during the prior standard measurement period, Employee B would be offered coverage through the end of the Year 2 stability period, and if enrolled would continue such coverage during the administrative period from October 15 through December 31 of Year 2.

Employer W complies with the standards of this section because the measurement and stability periods are no longer than 12 months, the stability period for ongoing employees who work full-time during the standard measurement period is not shorter than the standard measurement period, the stability period for ongoing employees who do not work full-time during the standard measurement period is no longer than the standard measurement period, and the administrative period is no longer than 90 days.

Waiting Period Examples

Example 1: Facts. Employer X's group health plan limits eligibility for coverage to full-time employees. Coverage becomes effective on the first day of the calendar month following the date the employee becomes eligible. Employee B begins working full time for Employer X on April 11. Prior to this date, B worked part time for X. B enrolls in the plan and coverage is effective May 1.

Conclusion. In this Example, the period from April 11 through April 30 is a waiting period. The period while B was working part time is not part of the waiting period because B was not in a class of employees eligible for coverage under the terms of the plan while working part time, and full-time versus part-time status is a bona fide employment-based condition that is not considered to be designed to avoid compliance with the 90-day waiting period limitation.

Example 2: Facts. Employee D begins working 25 hours per week for Employer Z on January 3 and is considered a part-time employee for purposes of Z's group health plans. Z sponsors a group health plan that provides coverage to part-time employees after they have completed a cumulative 1,200 hours of service. D satisfies the plan's cumulative hours of service condition on December 15.

Conclusion. In this Example 4, the cumulative hours of service condition with respect to part-time employees is not considered to be designed to avoid compliance with the 90-day waiting period limitation. Accordingly, coverage for D under the plan must begin no later than the 91st day after D works 1,200 hours. (If the plan's cumulative hours of service requirement were more than 1,200 hours, the Departments would consider the requirement to be designed to avoid compliance with the 90-day waiting period limitation.)

This reliance covers a measurement period that begins in 2013 or 2014 and the associated stability period (which may extend into 2014, 2015 or 2016). For example, the use of a 12-month measurement period in accordance with this notice beginning on July 1, 2013 and ending on June 30, 2014 might be used to classify employees for a stability period that runs from July 1, 2014 through June 30, 2015. In addition, as stated earlier, use of any of the safe harbor methods described in this notice is not required, but rather is optional for all employers.

What's Next: The IRS Notices provide many additional examples. Please follow the links to see the complete notices. [IRS Notice 2012-58](#) and [IRS Notice 2012-59](#). Comments were requested on several questions including how the term "seasonal worker" will be defined under § 4980H as well as determining full-time status of short-term assignment employees, temporary staffing employees and employees hired into high-turnover positions.

SML will continue to keep our clients up to date on any changes!