Arthur J. Gallagher & Co.
BUSINESS WITHOUT BARRIERS™

Spotlight On...

Public Sector Employers under PPACA

The Patient Protection and Affordable Care Act ("PPACA") inundated employers with new mandates and requirements, resulting in additional complexities for employers offering coverage to employees. The true scope of the level of complexity faced by public sector employers, as they work to implement PPACA, is further impacted by the legal and regulatory framework in which they operate. This article from Arthur J. Gallagher & Co. spotlights the most significant PPACA considerations faced by public sector employers to help them deal with the unique issues that they face.

Significant Issues Introduced by PPACA

In general, PPACA creates challenges for public sector employers due to the environment in which they operate and the nature of their workforce. For instance, collective bargaining agreements may control plan terms for certain employees for years, plan eligibility may be established by state or local legislation, which conflicts with PPACA's definition of full-time employee, and some previously uncovered employees may become full-time employees for purposes of PPACA and may thus trigger Employer Shared Responsibility penalties. These, as well as other special challenges are highlighted below.

Collective Bargaining Agreements create special concerns. For many public entities, the employee benefit structure for certain employees, such as police officers and firefighters, is controlled by a collective bargaining agreement. The terms of the agreement may "lock" plan design and eligibility in place for multiple years. As a result, public sector employers may not be able to alter the terms to accommodate the provisions and mandates of PPACA, such as adding additional benefits when responding to new regulatory requirements. Public sector employers should review existing and future collective bargaining agreements to ensure that the agreements stipulate that the terms may be renegotiated for compliance with PPACA. To protect their ability to make adjustments for the impact of PPACA, public sector employers should include reopener clauses or renegotiation clauses that specify when and which terms can be renegotiated before their agreements expire in order to adapt to changes under PPACA.

Challenges arise from statutory or regulatory eligibility definitions. Another concern for public sector employers involves the challenge of complying with local and state regulations in addition to PPACA. Specifically, an employee who was considered "part-time" or ineligible for benefits under applicable state or local law may be considered a full-time employee under PPACA because the employee works at least 30 hours a week. For example, employees designated as temporary or who work in hourly-paid positions that are not included in the definition of employees who are eligible for coverage may actually be full-time employees for purposes of PPACA. In order to avoid Employer Shared Responsibility penalties, public sector employers may wish to offer coverage to those previously ineligible employees who work 30 or more hours per week. However, doing so may conflict with state or local legislation. In addition, public sector employers may wish to make use of measurement and stability period safe harbors to determine an employee's eligibility for health coverage, but employee eligibility may be established by another state or local governmental body. If so, such employers must work together to establish a connection between the eligibility criteria and the measurement and stability periods; public sector employers may wish to work with their state and local authorities to amend or expand coverage under governing law.

Variable hour employees' hours of service generate new tracking requirements. Traditionally, certain classes of employees such as long-term substitutes and multi-season seasonal employees (e.g., Parks and Recreation Department employees) have been excluded from eligibility for employee benefits. However, as a result of the requirement to provide coverage to individuals who average 30 or more hours per week in order to avoid Employer Shared Responsibility penalties, public sector employers may need to revisit whether to provide health insurance benefits to such traditionally excluded individuals. If such employees are considered to be full-time, employers must be mindful that they will count toward the determination of whether the entity reaches the 70% coverage threshold for 2015 (95% for 2016 and beyond) for purposes of determining whether an employer has made an "offer of coverage" under the employer mandate. Fortunately, the final Employer Shared Responsibility regulations permit employers to use measurement and stability period safe harbors for "variable hour" employees like substitute teachers and multi-seasonal. With the use of such safe harbors come new tracking requirements. Given that many public sector employers will be subject to the employer mandate in 2015, such employers should take steps this year to establish measurement and stability periods and install processes to be able to accurately track variable hour employees' hours of service.

Seasonal Employees' hours of service create issues. Throughout the year, the public sector employs various types of seasonal workers such as lifeguards in public pools, summer camp counselors, snow plow drivers, and grounds crews for Parks and Recreation departments. Traditionally, such employees have been excluded from eligibility for benefits. For purposes of the Employer Shared Responsibility penalties and measuring employee hours utilizing the "look-back method," a seasonal employee is defined as "an employee in a position for which the customary annual employment is six months or less." A seasonal employee must begin employment at approximately the same time each year (e.g., June of each year). The final Employer Shared Responsibility regulations permit exceptions to the six-month rule for unusual extensions. For example, if a snow plow driver normally has an annual employment period of six months, but due to an unusually long snow season, that driver's annual employment lasts seven months, he may still be considered to be a "seasonal employee."

Many of these seasonal employees work forty or more hours per week and are potentially full-time employees for purposes of PPACA. This means that they could trigger Employer Shared Responsibility penalties when the employer mandate becomes effective. However, if a public sector employer calculates employee hours utilizing the "look-back" method, the employer does not need to classify new seasonal employees as full-time employees when hired. Rather, the employer may impose an initial measurement period to determine whether the seasonable employee should be considered a full-time employee. Even if a new seasonal employee is working on average 30 hours a week, the employer would not be required to offer coverage to that employee until the end of the initial measurement period. Given the variety of seasonal employees working in the public sector, this will be a beneficial safe harbor.

Good news on counting hours of service for Volunteer Firefighters and Emergency Responders. Members of the public sector rely on volunteer firefighters and emergency responders to protect and care for their communities. Historically, the public sector was not required to provide these volunteers with health benefits in exchange for their service. However, there was some uncertainty as to whether PPACA would treat these individuals as “employees” and require the public sector to offer coverage to volunteer firefighter and emergency responders for their hours of service in order to avoid Employer Shared Responsibility penalties.

Final regulations classify volunteer firefighter and emergency responders to be “*bona fide* volunteers” when certain conditions are met. The hours of service performed by *bona fide* volunteers are excluded from determining who is a full-time employee for purposes of Employer Shared Responsibility penalties and will not count toward determining an employer’s size. A *bona fide* volunteer is any volunteer who is an employee of a government entity whose only compensation from that entity or organization is in the form of:

i) reimbursement for (or reasonable allowance for) reasonable expenses incurred in the performance of services by volunteers, or
ii) reasonable benefits (including length of service awards), and nominal fees, customarily paid by similar entities in connection with the performance of services by volunteers.

If volunteer firefighters and emergency medical responders meet these conditions, public sector employers need not include them as potential full-time employees under PPACA. Thus, employers need not count their hours of service and need not offer them coverage in order to avoid penalties under the Employer Shared Responsibility mandate.

Establishing responsibility for Sections 6055 and 6056 reporting is key. Earlier this year, the IRS issued final regulations regarding the reporting requirements under PPACA. Public sector employers that have self-funded plans or otherwise provide minimum essential coverage will be required to comply with Section 6055 reporting. Section 6055 reporting is necessary to determine whether individuals are maintaining minimum essential coverage. Additionally, large public sector employer will be required to report under Section 6056. Section 6056 reporting is needed for the administration of the Employer Shared Responsibility mandate and premium tax credits.

The general rule is that each individual employer must furnish Section 6055 and/or 6056 reports to both the IRS and certain employees (those named in the IRS report). Yearly reporting obligations under Sections 6055 and 6056 begin for the 2015 plan year. The first reports must be filed with the IRS no later than February 29, 2016, or March 31, 2016, if filed electronically. The first employee statements must be furnished no later than February 1, 2016.

The preparation and furnishing of these reports could place a burden on public sector employers. Fortunately, a governmental employer that maintains a self-insured group health plan may enter into a written agreement with another governmental unit (or an agency or instrumentality of a governmental unit) to designate the other governmental unit, agency, or instrumentality as the “person” required to file the returns and to furnish the statements required by Sections 6055 and 6056. Many public sector employers may be part of larger groups pooled to provide benefits and thus may not have ready access to information necessary for reporting and would benefit by seeking assistance from another entity. However, obtaining a written agreement from another governmental entity or instrumentality may take time. Nevertheless, public sector employers may wish to take advantage of shifting the burden of the IRS reporting requirement under PPACA to another entity.

The Cadillac plan tax poses a significant financial risk. A significant financial risk posed to public sector is the “Cadillac” plan tax. The Cadillac plan tax is a 40% excise tax that will be imposed on health care coverage that provides benefits exceeding the annual threshold beginning in 2018. The tax applies only to the coverage value that exceeds the threshold. Annual thresholds are initially set at: $10,200 for individuals and $27,500 annually for families. For employees engaged in “high-risk professions” (e.g., law enforcement, firefighters, construction works, first responders), the annual thresholds are: $11,850 for individuals and $30,950 for families. The family coverage threshold applies for all levels of coverage provided through a multiemployer plan (i.e., $27,500 or $30,950 for 2014).

Public sector employers should start planning for the Cadillac plan tax now despite the fact that 2018 is several years away. Many of today’s health plans will likely exceed the Cadillac plan tax thresholds due to current rich nature of collectively bargained benefits and the projected increased costs to provide coverage over the next several years. Financial analysis should be conducted to determine the potential for the value of coverage to exceed the 2018 Cadillac plan tax thresholds. Because current collective bargaining agreements are likely in force for multiple years, the agreements may be set to expire just after the imposition of the Cadillac plan tax in 2018. If the agreement does not provide for renegotiation of locked in benefits, self-funded public sector employers may ultimately be liable for the 40% tax. It may also be necessary to adjust contract terms to permit negotiations to occur in 2016 or 2017 to address potential changes needed to avoid imposition of the Cadillac plan tax. For example, contract terms might be shortened to two year terms in order to permit negotiations in 2017, or reopener provisions might be expanded to include provisions that might impact values under the Cadillac plan tax.

Action Steps

- Evaluate whether collective bargaining agreements have appropriate clauses to permit changes to comply with PPACA and potentially renegotiate to accommodate the impact of PPACA before the agreement expires.

- Determine whether the benefits provided to employees will exceed the 2018 Cadillac plan tax threshold and what changes, if any, will be needed to avoid tax liability.

- Establish processes to track hours for all employees, excluding hours of service performed by *bona fide* volunteers.

- Determine employment status for all employees.

- Determine the number of full-time and full-time equivalent employees, and whether coverage should be offered to avoid Employer Shared Responsibility penalties.

- Determine whether an agreement for another entity to perform Sections 6056 reporting and disclosure is in order.

- Stay tuned for more.

Employers should carefully evaluate their health and welfare plans to determine if they are in compliance with both federal and state law. If you have any questions about information contained in this Spotlight or would like additional information, please contact your Gallagher Consultant or account team member.

The intent of this analysis is to provide you with general information. It does not necessarily fully address all your organization's specific issues. It should not be construed as, nor is it intended to provide, legal advice. Questions regarding specific issues should be addressed by your organization's general counsel or an attorney who specializes in this practice area.