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The employer mandate, effective beginning in 2015, requires employers with 50 or more employees to pay a penalty if certain conditions are not met. One of these conditions is to provide affordable coverage. Coverage is considered to be affordable if an employee's required contribution does not exceed 9.5% of the employee's household income – something that is not readily accessible by employers. As previously reported, the IRS proposed a safe harbor that would allow employers to use the W-2 wages of an employee to determine whether coverage is affordable for purposes of the employer mandate, instead of using household income.

In Notice 2012-58, the IRS confirms that the Form W-2 safe harbor will be available to employers to determine affordability with respect to the employer penalty provisions, at least through 2014. To take advantage of the safe harbor, employers must offer full-time employees and their dependents the opportunity to enroll in minimum essential coverage under an employer-sponsored plan, and ensure that the employee portion of the self-only premium for the employer's lowest cost coverage that provides minimum value does not exceed 9.5% for the employee's W-2 wages.

Application of the safe harbor would be determined after the end of the calendar year and on an employee-by-employee basis, taking into account the employee's particular W-2 wages and contribution. The safe harbor can also be used prospectively, at the beginning of the year, by structuring the

plan to set the employee contribution at a level that would not exceed 9.5% of the employee's W-2 wages.

It is important to note the safe harbor only applies for purposes of determining whether an employer's coverage satisfies the affordability test for purposes of the employer mandate – it would not affect an employee's eligibility for a premium tax credit, which continues to be based on the affordability of employer-sponsored coverage relative to an employee's household income. Thus, in some cases, this means that an employer's offer of coverage to an employee could be considered affordable based on W-2 wages for purposes of determining whether the employer is subject to a penalty under the employer mandate, and the same offer could be treated as unaffordable based on household income for purposes of determining whether the employee is eligible for a premium tax credit (i.e., no penalty even though the employee receives subsidized coverage in the Exchange).

Although this guidance is helpful to employers and will make it easier to look at contribution structures for benefit programs in 2015, further guidance is still needed in several areas, including what constitutes a "minimum value" plan, and what constitutes providing coverage to "substantially all" full-time employees in order to avoid the application of the penalty that applies with respect to not offering coverage.