PART XI: THE EMPLOYER MANDATE

(a/k/a Shared Responsibility or Play or Pay Rules)

Overview

431. What do the IRS regulations tell us about the employer mandate?

The IRS final regulations on Shared Responsibilities for Employer Regarding Health Coverage (the employer mandate or the play or pay rule) as well as Q&As deal with the application of the employer mandate and its penalties for “applicable large employers.”[[1]](#footnote-1) In determining the fifty-employee threshold, an employer, whether domestic or foreign, counts only those employees employed in the United States.[[2]](#footnote-2) While the statute requires the employer mandate to apply beginning in 2014, the IRS postponed the deadline until 2015.[[3]](#footnote-3) In addition, as discussed in more detail hereafter, there has been additional transition relief postponing the requirements to 2016 for some employers and reducing the percentage of employees who must be covered in 2015 for those employers subject to the mandate in 2015. The penalties are calculated on a calendar year basis regardless of the employer’s health plan year.

While the employer mandate penalties do not apply until 2015 (and 2016 under transition relief discussed below for smaller employers), employers can rely on the 2014 final regulations for periods prior to Jan. 1, 2015 for such things as the computation of look-back periods, etc.[[4]](#footnote-4) If an applicable large employer is subject to the employer mandate penalty, the penalty is not deductible.

432. What topics are covered in the employer mandate regulations?

The employer mandate regulations are organized as follows:

* Definitions;[[5]](#footnote-5)
* Status as an applicable large employer and applicable large employer member;[[6]](#footnote-6)
* Full-time employees;[[7]](#footnote-7)
* Assessable payments under § 4980H(a);[[8]](#footnote-8)
* Whether an employer is subject to assessable payments under § 4980H(b);[[9]](#footnote-9) and
* Rules relating to the administration and assessment of assessable payments under § 4980H.[[10]](#footnote-10)

Definitions

433. What employers are subject to the employer mandate penalty?

For purposes of the mandate, employer includes all related employers, predecessors, and successors.

The controlled and affiliated service group rules apply in counting employees, as all members of such a group are treated as one employer.[[11]](#footnote-11) An employer includes a predecessor and successor employer.[[12]](#footnote-12) The regulations do provide specific rules for identifying a predecessor or successor employer. Rules for identifying successor employers have been developed in the employment tax context for determining when wages paid by a predecessor may be attributed to a successor employer.[[13]](#footnote-13) However, Code section 4980H does not incorporate the separate line of business (SLOB) rules that allow separate testing for retirement plans. All employers (again including controlled group and affiliated service group members) that employ at least fifty full-time employees or an equivalent combination of full-time and part-time employees are subject to the Employer Shared Responsibility provisions, including for-profit, not-for-profit, and government entity employers.[[14]](#footnote-14) “Disregarded entities” are not disregarded for §4980H purposes. The tax is imposed on the disregarded entity and not its owner(s).[[15]](#footnote-15)

433.01 What transition relief exists for the employer mandate penalty in 2014, 2015, and 2016?

As discussed above, the employer mandate was effective by statute in 2014 but the

the effective date has been postponed until 2015. The final regulations provide additional transition relief for 2015 and 2016.[[16]](#footnote-16) It also provides special rules for fiscal year health plans, as discussed below.

Generally, if an ALE member fails to offer coverage to a full-time employee for any day of a calendar month, that employee is treated as not offered coverage during that entire month.[[17]](#footnote-17) Solely for purposes of January 2015, if an ALE member offers coverage to a full-time employee no later than the first day of the first payroll period that begins in January 2015, the employee will be treated as having been offered coverage for January 2015.[[18]](#footnote-18)

The applicable large employer (“ALE”) status (what triggers the potential application of the mandate) for a calendar year is generally based on the number of employees in the preceding calendar year.[[19]](#footnote-19) Transition rules include non-calendar year health plans, the ability to count employees for less than 12 months in 2014 to determine applicable large employer status, initial offers of health coverage in 2015, dependent coverage, employers with at least 50 but less than 100 full-time and full-time equivalent (FTE) employees, and reduction of the 95 percent offer of health coverage requirement to 70 percent for 2015.

To determine if an employer is an ALE for a calendar year, employers generally count employees for the prior year. If an employer was not in existence during the prior calendar year, an employer is a large employer for the current calendar year if it is reasonably expected to employ at least 50 FTEs. Employers who are new ALEs (employers not in existence in 2014) will not be subject to penalties for January through March of their first year of applicability as long as they offer employee coverage that provides minimum value on or before April 1. If an employer’s FTEs exceed 50 for 120 days or less and the excess employees are seasonal workers, then the employer is not a large employer.[[20]](#footnote-20)

For purposes of the employer mandate penalty assessments (as opposed to determining whether the employer is an applicable large employer), the law defines full-time as 30 hours of service per week, and the regulations provide that 130 (not 120) hours per month is the monthly equivalent, both determined in the current month/year. To address the calculation difficulty concern, the regulations provide alternatives to a month-by-month determination. For on-going employees, an employer has the option of using a “look-back measurement” method for determining current full-time status. The employer selects a measurement period of three to twelve months and calculates whether the employee on average had 30 hours of service per week (or 130 hours per month) during that period. If so, the employer must treat the employee as full-time during a subsequent “stability period”, which must be at least six months but no shorter than the length of the measurement period. Thus, if the employer used a twelve-month look-back measurement period beginning on January 1, 2014, employees who are determined to be full-time must be treated as full-time for all of calendar year 2015. An employer may also utilize an optional administrative period of up to 90 days between the measurement period and the stability period in order to determine which on-going employees are eligible for health insurance coverage during the subsequent stability period. However, the administrative period cannot create a gap in coverage. An employee who was enrolled in coverage must remain enrolled during the administrative period.

If an employer has on average fewer than 50 Full-Time (and full-time equivalent) employees in 2014:

* No change. Employer is not subject to the mandate. Employers close to the fifty employee threshold may count employees during any consecutive six-month period (as chosen by the employer) during 2014.

If employer has on average between 50 and 99 full-time (including full-time equivalents) employees in 2014, the employer may not qualify for the delay if the employer currently offers no plan or has made significant changes to the plan. The rules for determining status as an ALE include application of the rule regarding employers whose workforce exceeds the applicable threshold (99 for this transition rule) for 120 days or fewer during the calendar year due to the employment of seasonal workers.[[21]](#footnote-21) Under this 50-99 transition rule:

* An employer has a one-year delay in the employer mandate until January 1, 2016 (and for non-calendar-year plans, any calendar months during the plan year beginning in 2015 that fall in 2016) if:
* Employer certifies it did not lay off employees during the period beginning on February 9, 2014 and ending on Dec. 31, 2014 to fall below the 100 employee threshold and that employer did not reduce any coverage already offered, and
* During the period beginning on February 9, 2014 and ending on Dec. 31, 2014, employer does not eliminate or materially reduce the health coverage, if any, offered as of February 9, 2014. An employer will not be treated as eliminating or materially reducing health coverage if, for each employee who is eligible for coverage on February 9, 2014:

(a) The employer offers to make a contribution toward the cost of employee-only coverage that is either (i) at least 95 percent of the dollar amount of the contribution the employer was making toward the coverage in effect as of February 9, 2014, or (ii) at least the same percentage of the cost of coverage that the employer offered to contribute toward coverage in effect as of February 9, 2014;

(b) Benefits offered as of February 9, 2014 at the employee-only coverage level does not change, or, if it does, the coverage after the change provides minimum value; and

(c) Eligibility under the employer’s group health plans is not amended to narrow or reduce the class or classes of employees (or the employees’ dependents) to whom coverage under those plans was offered as of February 9, 2014.

* Such employer must still report its coverage of employer’s employees for 2015 under the reporting provisions.
* For employers eligible for the “smaller employer” transition relief described above, no subsection 4980H(a) or (b) penalty will apply for any calendar month during 2015 or any calendar month during the portion of the 2015 plan year that falls in 2016.

If employer has on average 100 or more full-time (including full-time equivalents) employees in 2014:

* An employer failing to offer coverage to a full-time employee for any day of a calendar month, that employee will be treated as not having been offered coverage during the entire month. For January 2015, if an employer offers coverage to a full-time employee no later than the first day of the first payroll period that begins in January 2015, the employee will be treated as having been offered coverage for January 2015.In addition, for 2015 (and for any calendar months during a non-calendar year plan year beginning in 2015 that fall in 2016), the 95% threshold is lowered to 70%. Finally, for employers that must make an assessable payment under §4980H(a), the IRS will reduce the penalty for 2015, plus any calendar months of 2016 that fall within the 2015 plan year. For this period, the assessable payment under §4980H(a) will be calculated by subtracting 80 from the number of full-time employees, rather than 30, An employer fails to make an offer of coverage to its full-time employees if it does not offer health coverage at all or offers coverage to fewer than 70% of its full-time employees and (unless the employer qualifies for the 2015 dependent coverage transition relief) the dependents of those employees in 2015 and for any calendar months during a non-calendar year plan year beginning in 2015 that fall in 2016.

Employers With Fiscal Year Health Plans. ***The delayed effective date is available for fiscal year plans in effect on December 27, 2012, provided (1) the plan has not been subsequently amended after December 27, 2012 to postpone the plan year start date (e.g., to change the plan year from an April 1 plan year start date to a December 1 plan year start date) and (2) as of the first day of the 2015 plan year, the employer offers health plan coverage to at least 70% of its 30 hour or more a week employees (and, unless the employer qualifies for transition relief, their dependents) .*** For fiscal year plans that qualify for the transition relief, the play or pay penalties will not apply until the first day of the plan year that begins in 2015 with respect to employees in three situations.

Transition Rule #1 (Must be eligible for plan under eligibility provisions as of February 9, 2014). First, the employer will not be subject to a penalty until the first day of the 2015 plan year with respect to any of its employees, whenever hired, if they were (or would have been) eligible for coverage under the eligibility provisions of the plan in effect on February 9, 2014. However, to qualify for this relief, the employer must offer health plan coverage on the first day of the 2015 plan year that is “affordable” and provides “minimum value” (as those terms are defined by the regulators). Note that this is a limited form of relief that applies only to those employees who actually were, or would have been, eligible for the plan as of February 9, 2014 (provided that those employees were not eligible for any calendar year health plan maintained by the employer as of February 9, 2014).

Transition Rule #2 (As of February 9, 2014, must have covered or offered coverage to a minimum percentage of ALL employees). Under the second transition rule, an employer qualifies for relief if it either covered at least 1/4th of all of its employees (whether full or part-time) under the employer’s fiscal year health plans (each of which had the same plan year as of December 27, 2012) as of any date during the February 10, 2013 through February 9, 2014 period or the employer offered coverage under those fiscal year health plans to at least 1/3rd of all of its employees (whether full or part-time) during the most recent open enrollment period that ended before February 9, 2014. In that case, the employer will not be subject to a penalty under the pay or play rules until the first day of the 2015 plan year with respect to 30 hour or more a week employees (whenever hired) who both (1) were not eligible for coverage under a health plan maintained by the employer as of February 9, 2014 that had a calendar year plan year and (2) are offered health plan coverage as of the first day of the 2015 plan year that is “affordable” and provides “minimum value”.

For employees in that second category, the rule is designed to allow the employer additional employees who were not previously eligible for coverage. For example, if during the most recent open enrollment period ending before February 9, 2014, an employer offered coverage under its medical plan with a July 1 plan year to at least one-third of all of its employees, the employer will not be liable for any penalty for failing to offer coverage from January 2015 through June 2015 for those non-eligible employees if, by July 1, 2015, the employer expands the plan to offer employer mandate-compliant coverage to those previously ineligible full-time employees.

Transition Rule #3 (As of February 9, 2014, must have covered or offered coverage to a minimum percentage of 30 hour or more a week employees). The third transition rule is similar to Transition Rule #2 except that it considers only 30 hour or more a week employees. That is, the third transition rule applies if the employer either covered at least 1/3rd of its 30 hour or more a week employees under the employer’s fiscal year health plans (each of which had the same plan year as of December 27, 2012) as of any date during the February 10, 2013 through February 9, 2014 period or the employer offered coverage under those fiscal year health plans to at least ½ of its 30 hour or more a week employees during the most recent open enrollment period that ended before February 9, 2014. In that case, the employer will not be subject to a penalty under the pay or play rules until the first day of the 2015 plan year with respect to its 30 hour or more a week employees (whenever hired) who both (1) were not eligible for coverage under a health plan maintained by the employer as of February 9, 2014 that had a calendar year plan year and (2) are offered health plan coverage as of the first day of the 2015 plan year that is “affordable” and provides “minimum value”.

Section 6056 Reporting For 2015 Transition Period For Non-Calendar Year Plans. Large employers subject to the ACA’s shared responsibility provisions must file a return with the IRS that reports the terms and conditions of the health care coverage provided to the employer’s full-time employees for the calendar year. Related statements must also be provided to employees.

Because this reporting is needed by the employee and the IRS for the administration of the premium tax credit, applicable large employers are required to report this information for the entire 2015 calendar year, even if during some calendar months in 2015 employer mandate liability will not apply. The section 6056 return instructions will provide additional information on how to report for 2015.

Dependent Coverage Transition Rule. In order to avoid exposure for the employer mandate penalty, an employer must offer coverage not only to full-time employees but also their dependents (but not spouses). The final regulations provide transition relief to plan years that begin in 2015 if the employer takes steps during the 2015 plan year toward satisfying this requirement.in 2016. The transition relief applies to employers for the 2015 plan year for plans under which (i) dependent coverage is not offered, (ii) dependent coverage that does not constitute minimum essential coverage is offered, or (iii) dependent coverage is offered for some, but not all, dependents. This relief is not available, however, if the employer had offered dependent coverage during either the plan year that begins in 2013 or the 2014 plan year and subsequently eliminated that offer of coverage.

See Also Q23, Q24, Q441 and Q442.

434. Which workers qualify as employees?

Section 4980H(c)(2) defines an applicable large employer with respect to a calendar year as an employer that employed an average of at least fifty full-time employees and full-time equivalent employees or FTEs) on business days during the preceding calendar year. The regulations[[22]](#footnote-22) adopt the position outlined in Notice 2011-36 that an employee is an individual who is an employee under the common law standard, and an employer is the person that is the employer under the common law standard, as discussed in the next question

**434.01 How do the final employer mandate regulations deal with contingent workers (leased employees & independent contractors), seasonal employees, rehired employees, volunteers, education employees, student workers and adjunct faculty?**

The 2014 employer mandate final regulations contain rules on contingent workers, including temporary employees, individuals hired through temporary staffing firms and independent contractors.[[23]](#footnote-23) Under the final regulations, a full-time employee remains defined as one who works an average of at least 30 hours per week or 130 hours each month under both the look-back measurement method and the monthly measurement method. The look-back measurement method for identifying full-time employees is available only for purposes of determining and computing liability for an employer mandate payment and not for purposes of determining if the employer is an applicable large employer.

The definition of employee and the key provisions of the final regulations’ rules for contingent and other types of workers are summarized below. The regulations also do not provide any specific relief for employers in high turnover” industries, such as retail workers hired for the holidays, although the latter will be generally excludable under the regular seasonal employee rules.

Definition of Employee. The IRS uses the common law definition of employee to determine employer-employee status. Generally, an individual is the common law employee of an entity if that entity has the right to control the individual’s performance of services. The final regulations exclude from the definition of employee the following: leased employees, sole proprietors, partners in a partnership, more 2-percent S corporation shareholders, and certain direct sellers and real estate agents.[[24]](#footnote-24)

Common Law Employees of the Client Employer. When the client (recipient) employer is the common law employer, an offer of coverage made by the staffing firm on behalf of the client employer is treated as an offer of coverage by the client employer if the client employer pays a higher fee to the staffing firm for those employees who enroll in the staffing firm’s plan. Thus, if the contract provides for a flat fee per employee placement irrespective of whether the employee enrolls in the staffing company’s coverage, the employer will not be considered to have made an offer of coverage. This could lead to exposure under the pay-or-play mandate’s $2,000 per full-time employee “no coverage offered” penalty if more than 5 percent of its full-time employees (more than 30 percent in 2015) are employed through the staffing agency.

Contingent Worker Misclassification Issues. Employers are not required to offer coverage to independent contractors. However, an IRS examination finding that common law employees have been misclassified as independent contractors could result in significant penalty exposure to the employer. Employers that engage a significant number of such “1099 employees” run the risk of incurring the pay-or-play mandate’s $2,000 per full-time employee “no coverage offered” penalty, even if they offer coverage to all of the employees they categorize as full-time. If the number of 1099 employees who are reclassified as common law employees exceeds 5 percent of the employer’s full-time workforce (30 percent in 2015), the “no coverage offered” penalty may be triggered.

Another important issue for employers that hire independent contractors is whether they could rely on the IRS so-called “Section 530” relief for identifying common law employees. The ACA employer mandate final regulations reject the availability of section 530 relief for purposes of the pay-or-play requirements. Thus, employers should carefully review their contractual arrangements with service providers to ensure that they have been properly classified as independent contractors as opposed to common law employees under the more traditional common law tests.

Short-Term Full-Time Employees. Short-term employees (other than seasonal employees) who are reasonably expected to work full-time (30 hours or more per week) at date of hire must generally be offered coverage within 90 days. There is no exemption for short-term full-time employees—if employment extends beyond the end of the third full calendar month of employment, the employer must offer coverage regardless of the projected termination date.

Variable Hour & Seasonal Employees From Temporary Staffing Firms. Variable hour employees are employees with no set schedule or seasonal employees (generally those working 6 months or less on a seasonal basis). An employer (staffing company) can use a determination period of from 3 to 6 to 12 months to determine an individual’s full-time status for a following so-called “stability period” of 6 or 12 months. The final regulations provide criteria that a staffing company may consider to determine whether a new employee is “variable hour.” This assessment is done at the time of hire based on the staffing company’s reasonable expectations. Considerations may include whether other similar employees of the staffing company: retain the right to reject assignments, have periods during which no assignments are available, are offered assignments of differing lengths, and are typically offered assignments that do not extend more than thirteen weeks. No one factor is dispositive.

Seasonal Employees. Those in positions for which the customary annual employment is six months or less generally will not be considered full-time employees.

Rehired Employees. For all employers other than educational institutions, a returning employee may be treated as a new hire as long as there is a break in service (a period without an hour of service) of at least 13 weeks. For educational institutions, a rehired employee can be considered a new hire if the break in service is at least 26 weeks.[[25]](#footnote-25)

Volunteers. Hours contributed by bona fide volunteers for a government or tax-exempt entity, such as volunteer firefighters and emergency responders, will not cause them to be considered as full-time employees. Thus, employers need not track or count volunteer hours. A bona fide volunteer is defined as an employee of a government entity or nonprofit organized under section 501(c) of the tax code whose only compensation from the employer is in the form of reimbursements or allowances for reasonable expenses incurred while performing volunteer work or reasonable benefits and nominal fees customarily paid to volunteers by organizations similar to the employer.[[26]](#footnote-26) For many educational institutions, this may include any number of volunteers, including coaches and athletic trainers. A question remains regarding the extent to which this exclusion applies to individuals who may receive compensation from the school as regular employees and who also work as volunteers.

Educational Employees. Teachers and other educational employees will not be treated as part-time for the year simply because their school is closed or operating on a limited schedule during the summer.

Student Work-Study Programs. Service performed by students under federal or state-sponsored work-study programs will not be counted in determining whether they are full-time employees. For all other positions, hours worked by students are included for purposes of determining full-time employee status under the mandate. This includes any paid internships or externships. This clarification has significant implications for schools with their own student workers like graduate assistants and for schools with students that participate in cooperative (co-op) programs.

Adjunct Faculty. The regulations continue to allow higher education institutions to use any reasonable method to count adjunct faculty hours. Additionally, employers of adjunct faculty may credit an adjunct faculty member with a total of 2 1/4 hours of service for each hour of teaching or classroom time. If an institution uses this safe harbor, an adjunct faculty member would reach the 30-hour threshold by teaching in excess of 13 1/3 hours per week. Educational institutions may also use other reasonable methods for determining the number of hours of service for adjunct faculty. In addition, adjuncts may receive an hour of service per week for each additional hour outside of the classroom the faculty member spends performing duties he or she is required to perform (such as required office hours or required attendance at faculty meetings).[[27]](#footnote-27)

These are just a few of the significant issues employers need to consider as they identify their worker classification arrangements. Employers must also examine their contractual agreements with any temporary staffing agency and other possible legal requirements, such as ERISA section 510 liability for intentional interference with attainment of benefits and the healthcare reform whistleblower protections.

435. Which workers are not considered employees?

Various self-employed individuals are not “employees”. These include a sole proprietors, partners, or 2-percent or more S corporation shareholders.. Thus, LLPs, LLCs (taxed as partnerships), and partnerships can design eligibility, coverage, and premium obligations for their members/partners however the LLC/partnership desires. An individual who provides services as both an employee and a non-employee (such as an individual serving as both an employee and a director) is an employee for hours of service as an employee.

The regulations provide that a leased employee as defined under § 414(n) is not an employee for these rules.[[28]](#footnote-28) However, those rules will seldom be met. Additionally, in many if not most cases, the IRS views leased employees as common law employees of the firm that uses their services (the service recipient), not the business that pays them, if the service recipient has the right to control their working conditions.

Bona fide independent contractors, as opposed to employees that an employer erroneously treats as independent contractors, are not employees for this purpose.

435.01 Who are dependents for purposes of the employer mandate?

 Code § 4980H does not define the term “dependent,” Code § 152(f) defines the term to include biological children, stepchildren, adopted children, and foster children. However, the employer mandate regulations define dependent to mean “a child (as defined in section 152(f)(1)) but excluding a stepson, stepdaughter or an eligible foster child (and excluding any individual who is excluded from the definition of dependent under section 152 by operation of section 152(b)(3))) of an employee who has not attained age 26.”

Applicable Large Employers

436. Which “applicable large employers” are potentially subject to the employer mandate penalties?

Generally speaking, employers with fifty or more full time and full-time-equivalent U.S. employees in the prior calendar year are subject to the employer mandate penalties.

Employers are not required to provide health coverage but employer mandate penalties, discussed later in this Part, may apply if they do not and the “employer” has fifty or more full-time and full-time equivalent employees on business days during the preceding calendar year.[[29]](#footnote-29) While large employers need not provide health care coverage to part-time employees working less than thirty hours per week, these part-time employees are included in calculating the threshold number of fifty workers (including full-time equivalents) that would require employers to offer affordable coverage to full-time employees and their dependents (but not spouses) or pay a penalty.

Employees working outside the United States are not counted and are excluded.[[30]](#footnote-30) The reference to business days is not explained or defined. It is not clear whether the threshold must be met on one business day, all business days, or some average. Most employers will use an alternate method, discussed subsequently, which allows a monthly counting of employees in the prior year.

437. Are related employers treated as one employer?

As discussed in Q 433, related employers under the controlled group or affiliated service group rules are treated as one employer.

438. What about new employers that do not have a prior year to which to refer?

An employer not in existence during an entire preceding calendar year is an applicable large employer for the current calendar year if it is reasonably expected to employ an average of at least fifty full-time and full-time employees (taking into account FTEs) on business days during the current calendar year.[[31]](#footnote-31) It is not clear what happens if circumstances change during the current year so that the original determination is no longer reasonable.

Two Alternate Employer Mandate Penalties

439. In general, what are the two alternative employer mandate penalties?

There are two alternative penalties. The annual amounts are $2,000 [4908H(a)] or $3,000 [4908H(b)] , but the actual amount is calculated monthly. Both the $2,000 and $3,000 penalty amounts will be adjusted for inflation.[[32]](#footnote-32) Neither penalty is triggered unless an employee receives a tax credit for the purchase of health insurance on a state exchange. See Q 23.

The 4980H(a) penalty is assessed when an employee does not offer the required minimum essential coverage (MEC). See Q 441. The 4908H(b) penalty is assessed if the MEC is offered but is unaffordable or does not provide minimum value. See Q 442.

One of the employer mandate penalties applies in 2015 to applicable large employers unless they offer affordable and adequate coverage with essential health benefits for insured plans that are not grandfathered plans. No special rules are provided as to what proof is required for an employer to demonstrate an offer of coverage, but an offer must occur at least once each plan year.[[33]](#footnote-33) An applicable large employer is one with at least fifty full-time equivalent employees. This includes all controlled group and affiliated service group members. The exchanges will police this. Status as an “applicable large employer” is determined based on employees’ actual hours of service for the preceding calendar year – full year, no equivalencies. However, the regulations include special transition relief so that employers may use a shorter 2014 look-back period to determine whether the employer is an “applicable large employer” for 2015. The look-back measurement method for identifying full-time employees is available only for purposes of determining and computing liability for an employer mandate payment and not for purposes of determining if the employer is an applicable large employer.

Note that neither penalty is triggered unless at least one full-time employee enrolls in a qualified health plan through an exchange for that month and must receive an applicable premium tax credit for that month’s coverage.[[34]](#footnote-34)

440. What is an employer offer of health coverage?

If an employee has not been offered an effective opportunity to accept coverage, the employee will not be treated as having been offered the coverage for purposes of the employer mandate. This offer must be made no less than once during each plan year.[[35]](#footnote-35) If the employee does not pay for the employee’s share of coverage within thirty days of when payment is due, the employer need not provide coverage.[[36]](#footnote-36)

441. How does the 4980H(a) penalty work?

The applicable large employer offers at least once during each plan year no minimum essential coverage (MEC)[[37]](#footnote-37) to “substantially all” (all but 5 percent or five employees, if greater)[[38]](#footnote-38) of its full-time employees (and their dependent and adult children up to age 26,[[39]](#footnote-39) but not spouses)[[40]](#footnote-40) and one or more full-time employee is certified to the employer by a state health insurance exchange as having received an applicable premium tax credit or cost- sharing reduction [section 4980H(a) liability]. The penalty is the number of full-times employees less thirty times $2,000 per year. Thus, if an employer has thirty-four full-time employees and does not offer MEC, the penalty is (34 – 30) = 4 x $2,000 or $8,000 for that year. The penalty is calculated monthly.

The 4980H(a) employer mandate penalty applies to an employer that fails to offer “minimum essential coverage.” Minimum essential coverage does not include excepted benefits, such as stand-alone vision or stand-alone dental benefits. Employers seeking to minimize or avoid the employer penalty must offer minimum essential coverage to 95 percent of their full-time employees and their dependents, including children under age twenty six. Minimum essential coverage is the coverage required to avoid the individual and employer mandates.[[41]](#footnote-41) It is an “eligible employer-sponsored plan,” a term that means any group health plan (other than for excepted benefits) offered by an employer to employees, coverage offered in a state’s small or large group market, or a self-insured plan[[42]](#footnote-42) meeting only the required Public Health Service Act requirements (discussed in Part VII).[[43]](#footnote-43) It includes grandfathered plans.[[44]](#footnote-44) In other words, any health insurance plan legally sold in a state and self-insured plans meeting PHSA requirements are an “eligible employer-sponsored plan.”

442. How does the 4980H(b) alternative penalty work?

Even if an applicable large employer is not subject to the 4980H(a) penalty because the employer offers minimum essential coverage to 95 percent of its employees and their dependents, including children up to age twenty six, that employer can be subject to the alternative 4980H(b) penalty. The 95 percent margin of error rule for the (a) penalty does not apply to the (b) penalty. The (b) penalty applies if the employer offers 95 percent of its full-time employees (and their dependent and adult children up to age twenty six) the opportunity to enroll in MEC[[45]](#footnote-45) under an employer sponsored plan and one or more full-time employees is certified to the employer as having received an applicable premium tax credit or cost-sharing reduction. The second 4980H(b) penalty applies if the coverage offered by the employer is (a) unaffordable under IRC § 36B(c)(2)(C)(i) or (b) does not provide minimum value under § 36B(c)(2)(C)(ii).

The 4908H(b) penalty applies to employers that offer coverage to at least 95 percent of their full-time employees (or all but five employees if greater) and dependents in 2015, but that have one or more full-time employee who receives a premium tax credit because the coverage is not affordable or does not offer minimum value. The 4980H(b) penalty employer mandate penalty payment is computed separately each month. The amount of the payment for the month equals the number of full-time employees who receive the premium tax credit for that month multiplied by 1/12 of $3,000. The liability cannot exceed the payment that the employer would owe if it did not offer any minimum essential coverage, i.e., $2,000 times the number of full-times employees less thirty each year. Except in the case of terminated employees, if an employer fails to offer coverage to an eligible full-time employee for any day of a calendar month during which the employee is employed by the employer, the employee is treated as not being offered coverage during that month. However, the employer is not penalized if the employee fails to pay the employee’s share of the premium if the employee is afforded the opportunity to do so.

Employer group health plans are not required to provide a particular benefits package to avoid the employer mandate assessable penalties, as long as the plan meets the "affordability" and "minimum value" standards.

443. What does “affordable value” for a plan mean?

Affordable plans are those that cost an employee no more for employee-only coverage than 9.5 percent of the employee’s household (or using the safe harbor, the employee’s W-2) income.[[46]](#footnote-46)

Employees with household incomes between 100 percent and 400 percent of the federal poverty level, if not eligible for Medicaid, are eligible for tax credits for exchange coverage if they do not have access to affordable employer-sponsored coverage that is of at least a minimum value. The state health insurance exchange makes the determination as to whether their income is below 400 percent of federal poverty, but the employer can determine if coverage is affordable by using the employee’s Box 1, W-2 Income for the current year to determine if the cost to the employee for employee-only coverage exceeds 9.5 percent of the employee’s household (or using the safe harbor, the employee’s W-2) income. See Q 446.

444. When does an employer health plan provide minimum value?

A plan fails to provide minimum value if the plan's share of the total allowed costs of benefits provided under the plan is less than 60 percent of those costs.[[47]](#footnote-47) Employers will be able to enter information about the plan, such as deductibles and copays, into a calculator being developed to determine whether its plan provides minimum value by covering at least 60 percent of the total allowed cost of benefits expected to be incurred under the plan.[[48]](#footnote-48) Employers may also obtain an actuarial certification to show minimum value by an actuary who is a member of the American Academy of Actuaries.[[49]](#footnote-49)

Employer contributions to an HSA and amounts newly made available under integrated HRAs that may be used only for cost sharing can be taken into account in determining minimum value.[[50]](#footnote-50) For example, a $1,000 HSA employer contribution is treated in the MV calculator as if a plan with a $1,000 deductible is reduced to zero. The $1,000 contribution is counted as the average dollar value it would cost to reduce a $1,000 deductible to zero.[[51]](#footnote-51) Whether other types of integrated HRAs could count toward minimum value is not yet determined. The HRA rules leave important questions unanswered, such as the definition of “integrated” and the meaning of the “used only for cost sharing” condition.

445. When is employer coverage unaffordable?

An employer-sponsored plan is affordable if the employee's required contribution (within the meaning of § 5000A(e)(1)(B)) for that employee’s self-only coverage does not exceed 9.5 percent of the employee's household income for the taxable year.[[52]](#footnote-52) Household income is the modified adjusted gross income of the employee and any members of the employee's family (including a spouse and dependents) who are required to file income tax returns.[[53]](#footnote-53) Thus, the cost of dependent coverage is irrelevant in measuring affordability.

446. What safe harbors are available for an employer to determine if its health coverage is affordable?

Three safe harbors for affordability (and employer immunity for the penalty) are offered.

(1) Employer’s W-2 Pay for Current Year. One is the employee’s W-2 wages reported in Box 1 safe harbor (this does not count 401(k) and 125 plan elective deferrals) by that employer.

(2) Rate of Pay Safe Harbor. The employer (1) takes the hourly rate of pay for each hourly employee who is eligible to participate in the health plan as of the beginning of the plan year, (2) multiplies that rate by 130 hours per month, and (3) determines affordability based on the resulting monthly wage amount. Specifically, the employee's monthly contribution amount (for the self-only premium of the employer's lowest cost coverage that provides minimum value) is affordable if it is equal to or lower than 9.5 percent of the computed monthly wages (that is, the employee's applicable hourly rate of pay x 130 hours). For salaried employees, monthly salary would be used instead of hourly salary multiplied by 130. An employer may use this safe harbor only if, with respect to the employees for whom the employer applies the safe harbor, the employer did not reduce the hourly wages of hourly employees or the monthly wages of salaried employees during the year. The rate of pay safe harbor is a design-based safe harbor that should be easy for employers to apply and allows them prospectively to satisfy affordability without the need to analyze every employee's wages and hours.

(3) Federal Poverty Line (FPL) Safe Harbor. Employer provided coverage offered to an employee is affordable if the employee's cost for self-only coverage under the plan does not exceed 9.5 percent of the FPL for that employee, not the family. Employers use the most recently published poverty guidelines as of the first day of the plan year of the health plan.

446.1 What are the limited non-assessment periods when the employer mandate penalty will not be assessed?

An employer will not be subject to an employer mandate penalty under Code § 4980H(a), and in certain cases Code § 4980H(b), during a “limited non-assessment period”[[54]](#footnote-54) with respect to an employee in the following circumstances:

•the transition rule for an employer’s first year as an applicable large employer;[[55]](#footnote-55)

•the application of Code § 4980H for the three full calendar month period beginning with the first full calendar month in which an employee is first otherwise eligible for an offer of coverage under the monthly measurement method;[[56]](#footnote-56)

•the application of Code § 4980H during the initial three full calendar months of employment for an employee reasonably expected to be a full-time employee at the start date, under the look-back measurement method;[[57]](#footnote-57)

•the application of Code § 4980H during the initial measurement period to a new variable-hour employee, seasonal employee, or part-time employee determined to be employed on average at least 30 hours of service per week, under the look-back measurement method;[[58]](#footnote-58)

•the application of Code § 4980H following an employee’s change in employment status to a full-time employee during the initial measurement period, under the look-back measurement method;[[59]](#footnote-59) and

•the application of Code § 4980H to the calendar month in which an employee’s start date occurs on a day other than the first day of the calendar month.[[60]](#footnote-60)

Relief from the penalty under Code § 4980H provided by the rules above does not affect an employee’s eligibility for a premium tax credit.[[61]](#footnote-61)

HRA Reimbursement Arrangements and the Employer Penalty

447. Can an employer health reimbursement account (HRA) that pays or reimburses employees for exchange or individual health insurance qualify as employer-provided minimum essential coverage to avoid the 4980H(a) penalty?

No. The definition of eligible employer-sponsored plan is that of a “group health plan” and not individual policy arrangements.[[62]](#footnote-62) IRS Notice 2013-54 and FAQ guidance issued in January 2013 indicates that, for purposes of the application of the annual and lifetime limits, employer-sponsored health reimbursement accounts (HRAs) cannot satisfy the exception for integrated arrangements if they are integrated with individual market coverage or with an employer plan that provides coverage through individual policies.[[63]](#footnote-63) Thus, even if an offer of HRA coverage constituted an offer of minimum essential coverage, the offer would violate the rule prohibiting annual and lifetime dollar limits.

Separate Assessment of Shared Responsibility Penalties within Controlled Group

448. Where there is an applicable large employer comprised of related employers, how is the employer mandate penalty, if applicable, calculated?

While determination of large employer status is made on a related group of employers’ basis, the assessment of the shared responsibility penalties is determined on a member-by-member basis within the employer group. Therefore, shared responsibility penalties are “computed and assessed separately for each applicable large employer, taking into account that member’s offer of coverage and based on that member’s number of full-time employees.”

Thirty Full-Time Employee Subtraction Prorated. Within an employer group of related employers, only a single thirty full-time employee reduction in determining the penalty is allowed. It must be prorated among the employers in the employer group to prevent smaller members of the group from avoiding the penalty altogether.

449. Will the insured plan nondiscrimination requirements, when effective, impact health insurance offered by related employers?

Yes. While delayed indefinitely until the IRS issues regulations, the nondiscrimination requirements for insured plans (other than for grandfathered plans), when they are effective, will also apply to controlled and affiliated service group members. The nondiscrimination rules will limit an employer’s ability to offer coverage to some members of an employer group, while not offering coverage to other members, unless done on a nondiscriminatory basis.

Determining Applicable Large Employer Status

450. How are those “applicable large employers” potentially subject to the employer mandate penalty determined?

Code § 4980H(c)(2) defines an applicable large employer (“ALE”) on a calendar year basis and as an employer that employed an average of at least fifty full-time and full-time equivalent common law employees on business days during the preceding calendar year. ALE status is determined based on the employer’s average number of full-time equivalent employees during the prior calendar year. Full-time employees are those that work on average at least 30 hours a week. For this purpose, the hours of service of part-time employees are taken into account by aggregating the number of hours of service of all part-time employees for each month and dividing by 120 to determine the number of ‘full-time equivalent employees’ for the month. The determination of whether an employer is an applicable large employer is made by aggregating the hours of service of employees of all members of a controlled group of corporations or businesses under common control. However, penalties are assessed separately against each member of the group.

The look-back measurement method for identifying full-time employees is available only for purposes of determining and computing the section 4980H liability for an employer mandate payment but not for purposes of determining if the employer is an applicable large employer. Note that to calculate the penalty, the monthly number of hours for a full time employee is 130, not 120 for either the look-back method or the monthly method. Special rules apply to employers who wish to measure service based on payroll periods rather than calendar weeks and months.If the employer was not in existence during the preceding calendar year, the employer will qualify as an applicable large employer if the employer is reasonably expected to employ on average at least fifty full-time and full-time equivalent employees and actually employs an average of at least fifty fulltime and full-time equivalent employees. Any fractional full-time equivalent employee total is rounded down. In addition, if the new employer offers minimum value coverage on or before April 1 of the first year it is an applicable large employer, the employer will not be subject to penalties for January through March of that year. A special rule is provided that exempts employers whose workforce exceeds 50 full-time employees for 120 days or fewer during the year if those excess employees are seasonal workers.

451. What if payroll periods begin after the calendar year starts or end after the calendar year ends?

Since payroll periods may not correspond to calendar months, employers using weekly, biweekly, or semi-monthly payroll periods can use those periods and exclude the portion of a payroll period otherwise falling within the measurement period, but only if the employer includes the portion of a payroll period otherwise falling outside the measurement period. For instance, an applicable large employer that uses a calendar-year measurement period can exclude the entire payroll period that includes January 1, Year 1, but only if it includes the entire payroll period that includes, and extends beyond, December 31, Year 1, into January of Year 2. An employer could exclude the payroll period that includes December 31, Year 2, but only if it includes the entire payroll period that includes January 1, Year 2 that includes a portion of December, Year 1.[[64]](#footnote-64)

452. What if the employer only has fifty or more full time and full-time equivalent employees for four or fewer months?

If, in the prior calendar year, the employer only exceeds forty-nine employees for four or less calendar months (not necessarily consecutive) or 120 or fewer days (not necessarily consecutive) and the excess over forty-nine for those four months or 120 days are seasonal employees, then the employer is not an applicable large employer. Seasonal employees are defined by reference to a DOL regulation for seasonal agricultural workers[[65]](#footnote-65) and also include retail workers employed exclusively during holiday seasons.[[66]](#footnote-66) However, seasonal workers are not limited to agricultural or retail workers. The term “seasonal employee” is defined as “an employee who is hired into a position for which the customary annual employment is six months or less.”[[67]](#footnote-67) Employers may apply a reasonable, good faith interpretation of the statutory definition of seasonal worker.[[68]](#footnote-68)

Even if an employer is not an applicable large employer, while it is not subject to the employer mandate, it is subject to other healthcare reform rules (other than rules not applicable to grandfathered plans if it has a grandfathered plan), such as the health insurance reforms discussed in Part 7 of this book. For example, such employers are subject to the new wellness program rules and the ninety-day waiting period limitation, both of which go into effect for plan years beginning on or after January 1, 2014.

452.1. How are total U.S. employees for the preceding calendar year determined using the look-back method?

To determine if the employer is an applicable large employer, the calculation is made as follows:

* Calculate the number of full-time employees (including seasonal employees) for each calendar month in the preceding calendar year.
* Calculate the number of full-time equivalents (including seasonal employees) for each calendar month in the preceding calendar year (using the method described above).
* Add the number of full-time employees and full-time equivalents obtained in for each month of the preceding calendar year.
* Add up the twelve monthly numbers from the preceding items and divide the sum by twelve. This is the average number of full-time employees for the preceding calendar year. Fractional amounts are disregarded

If the number obtained is less than fifty, then the employer is not an applicable large employer for the current calendar year. If the number obtained is fifty or greater and the employer included seasonal employees in one or both of the first two steps, the employer may then apply the special rule for seasonal employees to see if they can be excluded, as discussed below

451.2. What if an employer’s workforce exceeds fifty full-time employees for no more than 120 days?

The statute provides that an employer with fifty or more full-time employees can avoid applicable large employer status if

* the employer's workforce exceeds fifty full-time employees for no more than 120 days (or four calendar months) during the calendar year; and
* the employees in excess of fifty employed during such 120-day (or four calendar month) period were seasonal workers.[[69]](#footnote-69)

The four-month or 120-day periods need not be consecutive.

Thus, large employer status does not exist where the employer’s non-seasonal workforce (including full-time equivalents for part-time employees) is forty nine or fewer.

The 120-day period referred to in § 4980H(c)(2)(B)(ii) is not part of the definition of the term seasonal worker, and an employee would not necessarily be precluded from being treated as a seasonal worker merely because the employee works, for example, on a seasonal basis for five consecutive months. In addition, the 120-day period referred to in § 4980H(c)(2)(B)(ii) is relevant only for applying the seasonal worker exception for determining status as an applicable large employer. It is not relevant for determining whether an employee is a seasonal employee for purposes of the look-back measurement method (meaning that an employee who provides services for more than 120 days per year may nonetheless qualify as a seasonal employee).

An open question exists as to someone hired as a seasonal employee who is converted to a regular employee. Logic indicates that they should be immediately eligible for the employer’s health plan if they were hired to work as seasonal help thirty-plus hours a week and remain employed beyond 120 days (or 4 months).

453.3 How is an employer with less than fifty employees except seasonal employees treated?

This question is addressed in the treasury regulation’s Example 3::[[70]](#footnote-70)

During 2015, Employer has forty full-time employees for the entire calendar year, none of whom are seasonal workers. In addition, Employer has eighty seasonal full-time workers who work from September through December 2015. Employer has no full-time equivalent employees during 2015.

Before applying the seasonal worker exception, Employer has forty full-time employees during each of eight calendar months of 2015, and 120 full-time employees during each of four calendar months of 2015, resulting in an average of 66.5 employees, namely, (40 × 8) plus (120 × 4) divided by twelve equals 66.66, rounded down to 66. However, Employer can apply the seasonal employees’ exception because its workforce exceeded fifty full-time employees for only four calendar months (treated as 120 days) during 2015, and the number of full-time employees would be less than fifty during those months if seasonal workers were disregarded. Thus, Employer is not a large employer for 2016.

Calculating the Penalty For Applicable Large Employers

464. How are employees counted in the current year for the “applicable large employer” penalty calculation?

While the determination of whether a company is an applicable large employer is based on prior calendar year employment except for new employers, the shared responsibility penalties are calculated on a monthly basis in the current year or an alternative look-back year. If an employer is not an applicable large employer based on the prior calendar year, then it need not worry how to determine if it is liable for any penalty and can ignore the following rules.

There are two ways to calculate the number of full-time employees for employers that are applicable large employers based on their employee count in the prior calendar year.

One method is the actual month-by-month method.[[71]](#footnote-71) Under this method, full-time employee status is determined each month in the current year to calculate the penalty. There is no counting of full-time equivalent employees for calculating the penalty. The potential liability of a large employer for the “play or pay” penalty for a month is determined by the number of full-time employees it had during a calendar month, while the liability under the “play or pay” penalty is determined by the number of full-time employees who enrolled in exchange coverage and received a premium tax credit or cost-sharing reduction during the calendar month.

The difficulty employers can have with making monthly determinations of full-time status is that an employee’s status for a month may not be known until the month is over. In addition, monthly determinations could result in employees moving in and out of employer versus exchange coverage. Therefore, the regulations include an optional look-back measurement method to calculate the penalty that employers can use as an alternative to making a monthly determination.[[72]](#footnote-72) The regulations permit the use of different methods for different categories of employees (i.e., salaried vs. hourly, employees in different states and collectively bargained vs. non-collectively bargained), and also sets forth rules for changing from one method to the other.[[73]](#footnote-73)

Counting U.S. Employees

Full-time and Part-time

453. How are employees’ U.S. hours of service counted and determined?

Only hours of service in the United States are counted. The United States is the fifty states and the District of Columbia. “Hours of service” is defined as it is in ERISA, i.e., hours for which an employee is paid or entitled to be paid, including paid time off, such as vacation, holiday, illness, incapacity (including disability paid by a third party insurer), layoff, jury duty, military duty, or leave of absence.[[74]](#footnote-74) This overturns the “hours worked” definition in IRS Notice 2012-58. However, special rules also result in counting unpaid FMLA or USERRA leave. Two options exist.[[75]](#footnote-75) Hours of service worked outside of the U.S. are not counted, regardless of the residency or citizenship of the individual.

Hours of service calculations that result in a fraction are rounded up to the nearest whole number.

454. How are hours of service counted for hourly workers?

For hourly paid employees, the employer is required to calculate actual hours of service from records of hours worked and for non-worked hours for which payment is made or due (vacation, holiday, illness, incapacity, etc., as described in Q 453).[[76]](#footnote-76)

455. How are salaried employees’ hours of service counted?

For salaried employees, an employer has the option to count actual hours or service in each day or two equivalencies, i.e., eight hours per day worked or forty hours per week worked unless the equivalencies understate the hours. Thus, the daily equivalency cannot be used for someone who works three ten-hour days per week.[[77]](#footnote-77) The employer is NOT required to use the same hours of service calculation method for all non-hourly employee as long as the classifications are reasonable and consistently applied.

456. Are there rules for employees with special work patterns?

Yes. Unless and until further guidance is issued, any reasonable method for calculating hours of service may be used for the following types of employees:

* Commissioned employees
* Adjunct faculty
* Transportation employees (e.g., airline pilots)
* Employees in similar positions

Hours of service for adjunct faculty must be based not only on time spent teaching classes, but also time preparing for classes. The following safe harbor is provided. One (but not the only reasonable) method is to count (1) an additional 1 ¼ hours for each hour of teaching or classroom time (to allow for preparation, grading tests, etc.) plus (2) an hour of service per week for each additional hour outside of the classroom the faculty member spends performing duties he or she is required to perform (such as required office hours or required attendance at faculty meetings).[[78]](#footnote-78)

Hours of service for commissioned employees would also include business travel for a traveling salesperson compensated on a commission basis. An averaging method is provided for employees of education institutions that generally would result in an employee who works full-time during the active portions of the academic year being a full-time employee.

457. Can different counting methods be used by different controlled or affiliated group members?

Yes. An applicable large employer member is not required to apply the same methods as other applicable large employer members of the same applicable large employer group for the same or different classifications of non-hourly employees, provided that in each case the classifications are reasonable and consistently applied by the applicable large employer member.[[79]](#footnote-79)

458. What is healthcare reform’s definition of a full-time employee?

The definition is the same for purposes of determining applicable large employer status and calculating the penalty for an applicable large employer. The statute defines full-time employees as those who, with respect to any month, have at least thirty hours of service per week or 130 hours of service in a calendar month, provided the employer applies the actual hour or equivalency rules (discussed subsequently) on a reasonable and consistent basis.[[80]](#footnote-80) Hours of service worked outside of the U.S. are not counted, regardless of the residency or citizenship of the individual. Absent use of a look back period, employees must be counted monthly.

The employer mandate penalty must be paid monthly. It is not possible to know for certain whether coverage must be offered to any particular employee because of his or her full-time status until the end of a month because the excise tax payments are determined month-by-month. Since this monthly calculation would make determinations very difficult, the employer can use a look back period to determine if an employer is an “applicable large employer” potentially subject to the employer mandate penalty. If the employer is an applicable large employer during the look back period, then it must offer affordable minimum value coverage during the “stability period” to avoid the penalty.

459. What is the optional method for counting full-time employees in a prior year that eliminates the need to count for the current month?

To calculate the potential penalty for an applicable large, employer, the regulations provide a method for calculating the number of full-time employees during the preceding calendar year, the look-back method, that does not differentiate between business days and non-business days.[[81]](#footnote-81) Rather than looking at days, the method focuses on the number of full-time employees during each calendar month and then obtains an average number of full-time employees by dividing by twelve.

Specifically, the method involves the following steps:

(1) Calculate the number of full-time employees (including seasonal employees) for each calendar month in the preceding calendar year.

(2) Calculate the number of full-time equivalents (including seasonal employees) for each calendar month in the preceding calendar year (using the method described above).

(3) Add the number of full-time employees and full-time equivalents obtained in Steps 1 and 2 for each month of the preceding calendar year.

(4) Add up the twelve monthly numbers from Step 3 and divide the sum by twelve. This is the average number of full-time employees for the preceding calendar year.[[82]](#footnote-82)

(5) If the number obtained in Step 4 is less than fifty, then the employer is not an applicable large employer for the current calendar year. If the number obtained in Step 4 is fifty or greater and the employer included seasonal employees in Step 1 and/or Step 2, the employer may then apply the special rule for seasonal employees. This rule is described in Q 460.

460. What are part-time employees and variable hour employees and how does one determine how part-time employees are converted into full-time equivalent employees?

For applicable large employers (i.e., employers who employed at least 50 full-time and full-time equivalent employees on business days during the preceding calendar year), complying with the employer mandate, i.e., the shared responsibility or play or pay rules , determining an employee’s status as is important. The regulations establish two methods to count employees for purposes of calculating the potential penalty: (1) the current monthly (month-by-month) measurement method and (2) the look-back measurement method. The look-back measurement method classifies newly-hired employees as full-time, variable hour, seasonal or part-time. Of these, what constitutes a “new variable hour employee” has proved to be the most confusing.

A new part-time employee is “a new employee who the applicable large employer member reasonably expects to be employed on average less than 30 hours of service per week during the initial measurement period, based on the facts and circumstances at the employee’s start date.”[[83]](#footnote-83) Part-time employees are tested along with new variable hour and new seasonal employees under the provisions of the look-back measurement method dealing with the initial measurement periods. Once a part-time employee has been employed for a full standard measurement period, he or she is tested as an “ongoing employee.”

The number of full-time equivalents the employer employed during the preceding calendar year are taken into account. All employees (including seasonal workers) who were not employed on an average of at least thirty hours of service per week for a calendar month in the preceding calendar year are included in calculating the number of full-time equivalents for that calendar month.[[84]](#footnote-84) Hours of service worked outside of the U.S. are not counted, regardless of the residency or citizenship of the individual.

The approach for converting part-time employees to full-time equivalents is as follows:

* Calculate the aggregate hours of service in a month for employees who are not full-time employees, including seasonal employees, for that month. Do not include more than 120 hours of service for any employee.
* Divide the total hours of service from Step 1 by 120.[[85]](#footnote-85)

Note that for part-time employees, unlike full-time employees, there is no 130-hour per month option. The number is 120 hours for this rule.

The result is the number of full-time equivalent employees for the month. This can result in a number and a fraction. The fraction is rounded down. For example, if for a calendar month employees who were not employed on average at least thirty hours of service per week have 1,260 hours of service taken together, there would be 10.5 FTEs for that month. Thus, 49.9 full-time employees (including FTEs) for the preceding calendar year would be rounded down to forty-nine full-time employees.

Calculating the Employer Mandate Penalty

464. How are employees counted in the current year for the “applicable large employer” penalty calculation?

While the determination of whether a company is an applicable large employer is based on prior calendar year employment except for new employers, the shared responsibility penalties are calculated on a monthly basis in the current year. If an employer is not an applicable large employer based on the prior calendar year, then it need not worry how to determine if it is liable for any penalty and can ignore the following rules.

There are two ways to calculate the number of full-time employees.

One method, while difficult and burdensome, is the actual method. Under this method, full-time employee status is determined in the current year to calculate the penalty. There is no counting of full-time equivalent employees for calculating the penalty. The potential liability of a large employer for the “play or pay” penalty for a month is determined by the number of full-time employees it had during a calendar month, while the liability under the “play or pay” penalty is determined by the number of full-time employees who enrolled in Exchange coverage and received a premium tax credit or cost-sharing reduction during the calendar month.

The IRS acknowledged the difficulties employers may have with making monthly determinations of full-time status. Concerned that monthly determinations could result in employees moving in and out of employer versus Exchange coverage, the proposed regulations include an optional look-back measurement method to calculate the penalty that employers can use as an alternative to making a monthly determination.

465.How does the look-back method work?

Rather than using current monthly calculations (month-by-month)[[86]](#footnote-86) for the employer mandate penalty, employers can identify full-time employees by calculating employees’ hours during a specified period selected by the employer of three to twelve months (lookback standard measurement period) and then locking in that status (full-time or not) for a subsequent specified period (stability period), which is the same length as the measurement period or six months, whichever is greater. If an employer wants to have an open enrollment during a period that is not part of a measurement or the subsequent stability period, it may do so by using an administrative period not to exceed ninety days between the stability and measurement periods. Thus, the rules require that

* the measurement and stability periods are no longer than twelve 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 ninety days

A “measurement period” is the look-back period over which hours are calculated to determine whether an employee has averaged at least thirty hours per week. There are two types of measurement periods: standard and initial measurement periods.

These alternative guidelines set out criteria that can help applicable large employers make determinations about the full-time status of employees, including following concepts:

* Initial measurement period – The term initial measurement period means a time period selected by an applicable large employer member of at least three consecutive calendar months but not more than twelve consecutive calendar months.[[87]](#footnote-87) Pay periods including the beginning and end dates of the measurement period may be used.[[88]](#footnote-88) The period begins on the employee’s hire date and ends at the end of the three to twelve month initial measurement period.[[89]](#footnote-89)
* Standard measurement period – An annual designated period of not less than three months or more than twelve months used to determine whether an ongoing variable or seasonal employee is full-time.
* Optional administrative period – A optional period of up to ninety days for making full-time determinations and offering/implementing full-time employee coverage for the stability period.
* Stability period – An annual designated period of not less than six months (and not less than the corresponding measurement period) during which the employer must offer affordable minimum essential health coverage to all full-time employees, or face financial penalties for not doing so.
* Full-time employees – Employees are full-time if they average thirty hours of service per week or 130 hours (remember is it 120 hours per month for determining if the employer is an applicable large employer that needs to make this current year calculation on a month by month basis) of service per month. If a new employee is reasonably expected to average at least thirty hours per week at the time of hire, the employee must automatically be treated as full-time and offered group health coverage within three months of hire, which must also meet the ninety-day maximum waiting period rule.
* Variable hour and seasonal employees – A variable hour employee is someone whom the employer cannot reasonably determine will average at least thirty hours per week at the time of hire. No definition is provided for a seasonal employee, but presumably it would include anyone who works on a seasonal basis. Employers may use the initial measurement period to determine whether a newly hired variable or seasonal employee actually averages at least thirty hours per week, and the standard measurement period to determine whether an ongoing variable or seasonable employee actually averages at least thirty hours per week. If the employee does average at least thirty hours per week during the initial measurement period or standard measurement period, the employer must offer affordable minimum essential health coverage during the stability period or face financial penalties for not doing so.
* Transition from new to ongoing employee status – Once a new employee has completed an initial measurement period and has been employed for a full standard measurement period, the employee must be tested for full-time status under the ongoing employee rules for that standard measurement period, regardless of whether the employee was full-time during the initial measurement period.

These concepts are discussed in more detail in the following questions and answers.

465.01 What are the rules for stability periods that are longer than the associated measurement period?

 There could be a period of time between the stability period associated with the initial measurement period and the stability period associated with the first full standard measurement period during which a variable hour employee or seasonal employee has been employed. This may occur in cases in which a new employee begins providing services a short period after the beginning of the standard measurement period that would apply to the employee if the employee were an ongoing employee.[[90]](#footnote-90) To prevent this administrative period from creating a period during which coverage is not available, the administrative period must overlap with the prior stability period, so that, during any such administrative period applicable to ongoing employees following a standard measurement period, ongoing employees who are enrolled in coverage because of their status as full-time employees based on a prior measurement period must continue to be covered through the administrative period.[[91]](#footnote-91)

465.02 How are measurement and stability periods implemented?

Generally, for a new employee who is not reasonably expected (on the date of hire) to work an average of 30 or more hours per week during the first 12 months of employment, the employer must track actual hours during those first 12 months to determine whether the employee must be treated as full-time during the following 12-month stability period. Rather than tracking actual hours during each new employee’s (individual) first 12 months of employment, employers may limit the number of initial measurement periods (and initial stability periods) by grouping new hires into 12 groups for purposes of determining initial measurement periods (and initial stability periods). An employer can create such groups by adopting an initial measurement period that begins on the first day of the first calendar month following the employee’s start date (or, if later, as of the first day of the first payroll period beginning on or after the employee’s start date). For example, an employer that establishes 12-month initial measurement periods that begin on the first day of the first calendar month following the employee’s start date will group all variable hour employees and seasonal employees who are hired in the month of May into one group for purposes of determining average hours actually worked during the initial measurement period; each employee in that group will have an initial measurement period that begins on the following June 1st (rather than on the employee’s start date).

Many employers will use a 12-month stability period. i.e., the period during which an employee’s status as full-time or not full-time generally is determined for employer mandate purposes. Using a 12-month stability period dictates that the preceding measurement period also must be 12-months long. However, for the stability period that begins in 2015, employers may adopt a transition measurement period that is shorter than 12 months but that is no less than six months. The transition measurement period must begin no later than July 1, 2014 and must end no earlier than 90 days before the first day of the 2015 plan year (90 days being the maximum permissible administrative period). For example, an employer with a calendar year plan (and calendar year stability period) may use a transition measurement period from April 15, 2014 through October 14, 2014 (six months), followed by an administrative period ending on December 31, 2014.

466. How are new non-seasonal full-time employees treated?

If an employee is reasonably expected at his or her start date to be a full-time employee and average thirty hours of service or more per week, and is not a seasonal employee, the look-back and stability period safe harbor rules do not apply.[[92]](#footnote-92) Service to more than one member in the controlled or affiliated service group is aggregated for purpose of determining full-time status.[[93]](#footnote-93) If an applicable large employer does not offer coverage to such employee at or before the end of the employee’s initial three full calendar months of employment, the employer may be subject to a penalty for those first three months as well as for any subsequent months of employment for which coverage is not offered.[[94]](#footnote-94) The maximum ninety-calendar-day waiting period rule, which applies to employers of all sizes, must also be met and can require that coverage be offered more quickly than the complete three-month rule when an employee is hired mid-month.[[95]](#footnote-95) Employers are apparently not subject to penalties for failing to offer coverage to such an employee if the employee is hired for less than three months. However, an employee who is hired for a period of less than three months and then later rehired may be a “continuous employee” under the break in service rules. See the following for a more detailed discussion of the break in service rules.

If the employer did not offer coverage to the employee by the end of the employee's initial three full calendar months of employment, the employer may be subject to a section 4980H assessable payment for those months as well as for any subsequent months for which coverage was not offered.[[96]](#footnote-96)

467. How are ongoing employees tested during the safe harbor standard measurement period?[[97]](#footnote-97)

An “ongoing employee” is an employee who has been employed for at least one complete standard measurement period.[[98]](#footnote-98) If an employer's group health plan offers coverage only to full-time employees, the employer may use both a measurement period of between three and twelve consecutive months. The months are not required to be calendar months. Thus, a twelve-month measurement period could begin Oct. 15 and end the following Oct. 14, followed by an optional administrative period of up to ninety days for variable-hour and seasonal employees. An employer can choose the months when the standard measurement period starts and ends, such as the calendar year, plan year, or the period ending just before open enrollment begins. Previously determined full-time employees already enrolled in coverage continue to be offered coverage through the administrative period.[[99]](#footnote-99)

468. Can payroll periods be used in lieu of calendar months?

Yes. Since hours are commonly counted during payroll periods and since payroll periods may not correspond to calendar months, a special rule to align calendar month measurement periods with payroll periods for employers using weekly, biweekly, or semi-monthly payroll periods. The employer can exclude the portion of the first, partial payroll period falling in the measurement period if the employer includes the portion of the last payroll period otherwise falling outside the measurement period. For example, if the employer uses a calendar-year measurement period, it can exclude the entire payroll period that starts before the calendar year and includes January 1, Year 1, but only if it includes the entire last payroll period that includes, and extends beyond, December 31, Year 1, into January of Year 2. Similarly, the employer could exclude the entire payroll period that includes December 31 if it includes the entire payroll period that includes January 1, (which will include a portion of the prior calendar year).[[100]](#footnote-100)

469. What happens after an employee has completed an initial measurement period and has been employed for a full standard measurement period?

Once a new employee has completed an initial measurement period and has been employed for a full standard measurement period, the employee must be tested for full-time status under the ongoing employee rules for that standard measurement period, regardless of whether the employee was full-time during the initial measurement period.

The “stability period” is the look-forward period for which an employee’s status determined during the measurement period is locked in, regardless of the employee’s actual hours during this stability period as long as the employee remains employed. The stability period begins at the end of the measurement period and any administrative period, if the employer elects to have one.[[101]](#footnote-101)

If an employee was employed an average of at least thirty hours of service per week, this stability period must be least six consecutive calendar months and up to twelve months. The stability period can be no shorter than the standard measurement period.[[102]](#footnote-102) Even if employee’s position or employment status changes during the stability period, it will not affect the employee’s coverage, which must continue to the end of the stability period.[[103]](#footnote-103)

If an employee was not employed an average at least thirty hours of service per week during the standard measurement period, the applicable large employer may treat the employee as not a full-time employee during the stability period that follows, but is not longer than, the standard measurement period. The stability period must begin immediately after the end of the measurement period and any applicable administrative period.[[104]](#footnote-104)

Thus, combining these two rules, if there is a measurement period in which some employees are full-time and others are not, the stability period must be the same length as the standard measurement period, and the standard measurement period must be at least six months.

470. How does the optional administrative period work?

The “optional administrative period,” if utilized, is a period after the end of a measurement period and before the beginning of the next stability period, not to exceed ninety days, during which the employer can perform administrative tasks, such as calculating the hours for the measurement period, determining eligibility for coverage, providing enrollment materials to eligible employees, and conducting open enrollment.[[105]](#footnote-105) An example would be an employer with a calendar year plan that chooses a measurement period of Oct. 15 to Oct. 14, 2014, a 2 ½ month administrative period from Oct. 15 to Dec. 31 in advance of its 2015 calendar plan year, which is the stability period. The administrative period must overlap with the prior stability period, i.e., full-time employees enrolled in coverage based on a prior measurement period must continue to be covered through the administrative period connected to a more recent measurement period to prevent a gap in health coverage.[[106]](#footnote-106)

Applicable large employer members may use administrative periods that differ in length for the categories of employees. Those categories are discussed in Q 472.

471. Can an employer changing measurement and stability periods?

Yes. An employer may change its standard measurement and stability periods each year but cannot make a change for a given year once the standard measurement period has begun.

472. May different measurement and stability periods be used for different types of employees?

Yes. A ninety-day or less stability period may be used after the measurement period, but any stability period selected by the applicable large employer member must be uniform for all employees. An applicable large employer member may apply different measurement periods, stability periods, and administrative periods for the following categories of employees:

(1) each group of collectively bargained employees covered by a separate collective bargaining agreement,

(2) collectively bargained and non-collectively bargained employees,

(3) salaried employees and hourly employees,

(4) employees whose primary places of employment are in different states, and

(5) employees employed by different employers in the related employer group.[[107]](#footnote-107)

**Old Q 474. What is a new employee for purposes of the look-back rule?**

A “new employee” is an employee who has not been employed for at least one complete standard measurement period.[[108]](#footnote-108)

To determine if the employees meet any minimum hour plan requirements, for determining the full-time employee status of new employees, the methods vary depending upon whether the new employees are (1) reasonably expected to work full-time (and are not seasonal) or (2) are variable hour employees or seasonal employees.[[109]](#footnote-109) If a new variable-hour or seasonal employee is determined not to be a full-time employee during the initial measurement period, the employer may treat the employee as not a full-time employee during the stability period that follows the initial measurement period.

473. How does the optional lookback method apply to new variable hour, part-time and new seasonal employees?

A benefit of the look-back measurement method is that the employer is not penalized for failing to offer group health plan coverage to newly hired variable hour, seasonal, or part-time employees during their initial measurement period. If the variable hour, seasonal, or part-time employee is determined to work on average 30 hours or more per week during the initial measurement period, he or she must be offered coverage during the corresponding stability period, despite that he or she no longer works on average 30 hours or more per week, so long as he or she remains employed. A similar approach applies to ongoing employees. On the other hand, a new employee who is hired into a position that is full-time, and who does not qualify as part-time, variable hour or seasonal, must be offered coverage within ninety days in order to avoid the prospect of a $100 per day excise tax, and the employer mandate excise tax will apply if the employee is not offered coverage by the earlier of the three-complete-months rule or the 90-day maximum waiting period requirement. Where a person is contracted, for example, to work 35 hours a week for 2 months, they are a full time employee but if they extend beyond the 2-month period and remain full time, the employer still can make the offer of health coverage in time to avoid any penalty.

An employee is a “variable hour employee” if, based on the facts and circumstances at the employee’s start date, the employer cannot determine whether the employee is reasonably expected to be employed on average at least 30 hours of service per week during the initial measurement period because the employee’s hours are variable or otherwise uncertain. The final regulations prescribe a series of factors to be applied in making this determination and are discussed in a later question.

A “seasonal employee” is an employee who is hired into a position for which the customary annual employment is six months or less.

A “part-time employee” means a new employee who the employer reasonably expects to be employed on average less than 30 hours of service per week during the initial measurement period, “based on the facts and circumstances at the employee’s start date.” As is the case with variable hour employee determinations, the final regulations prescribe a series of factors to be applied.

For new variable hour employees and new seasonal employees, applicable large employer members are permitted to determine whether the new employee is a full-time employee using an initial measurement period of between three and twelve months selected by that applicable large employer member that begins on any date between the employee's start date and the first day of the first calendar month following the employee's start date.[[110]](#footnote-110) Thus, new non-full-time employees will have initial measurement periods depending on their employment commencement date. The applicable large employer member measures the new employee's hours of service during the initial measurement period and determines whether the employee was employed on average at least thirty hours of service per week during this period.

The stability period for such employees must be the same length as the stability period for ongoing employees.[[111]](#footnote-111) The stability period begins immediately after the end of the initial measurement period and any associated administrative period and is the longer of six consecutive calendar months or the length of the standard measurement period.[[112]](#footnote-112)

If an employer’s group health plan offers coverage only to full-time employees, the employer may use both a measurement period of between three and twelve months and an administrative period of up to ninety days. The stability period for such employees cannot be more than one month longer than the initial measurement period and must not exceed the remainder of the standard measurement period plus any associated administrative period in which the initial measurement period ends. Thus, an employer could use an eleven-month initial measurement period and still comply with the general rule that the initial measurement period and administrative period combined may not extend beyond the last day of the first calendar month beginning on or after the one-year anniversary of the employee’s start date.

475. How are new variable hour employees treated for an applicable large employer using the look-back method?

An employee is a “variable hour employee” if, based on the facts and circumstances at the employee’s start date, the employer cannot determine whether the employee is reasonably expected to be employed on average at least 30 hours of service per week during the initial measurement period because the employee’s hours are variable or otherwise uncertain. To prevent abuse, as new variable hour employees need not be offered health coverage, the regulations prescribe a series of factors to be applied in making this determination. The regulations identify a number of factors that ALEs can consider in evaluating whether it is reasonable to determine that a new employee is a variable-hour employee, including whether the employee is replacing an employee who was or was not a full-time employee, the extent to which employees in the same or comparable positions are or are not full-time employees, and whether the job was advertised, or otherwise communicated to the new hire or otherwise documented (for example, through a contract or job description), as requiring hours of service that would average 30 (or more) hours of service per week or less than 30 hours of service per week. No single factor is determinative, and other factors may be considered; however, these factors are only relevant for a particular new employee if the ALE has no reason to anticipate that the facts and circumstances related to that new employee will be different.[[113]](#footnote-113)

Additional factors apply where the employer is a temporary staffing firm (and the temporary staffing firm, not the company where the employee is placed, is considered to be the employer of the employee), including whether other employees in the same position of employment with the temporary staffing firm (1) retain the right to reject temporary placements that the temporary staffing firm offers the employee; (2) typically have periods during which no offer of temporary placement is made; (3) typically are offered temporary placements for differing periods of time; and (4) typically are offered temporary placements that do not extend beyond 13 weeks.[[114]](#footnote-114)

If the terms of an employment contract provide for termination before the end of the initial measurement period, can the employer take into account that the employee may terminate employment before the end of the initial measurement period?’ What if there is some other restriction (such as the expiration of a work visa) that will make it impossible for the employee’s employment to continue through the end of the initial measurement period? The IRS informally has said this facts cannot be taken into account in determining if the employee is a variable hour employee.[[115]](#footnote-115) In its answer, the IRS states: “The purpose of the prohibition on taking into account the likelihood of termination of employment is to avoid making assumptions about employees in positions with high turnover, which would penalize employees who are working full-time hours throughout the initial measurement period. This concern is not present when the employment is of a fixed duration, either by agreement or by operation of law.”[[116]](#footnote-116) However, the purpose of the variable hour rule is not so limited. Variable hour status is based on the employer’s inability at the date-of-hire to reasonably determine whether the employee will work full-time over the initial measurement period. The 1,560 (52 x 30) hour test is applied at the end of the initial measurement period to determine whether the employer must extend an offer of health coverage during the following stability period. Viewed this way, the cap on employee annual hours, whether by contract or otherwise, removes that uncertainty and thus is inconsistent with the premise of variable hour status.

New variable-hour employees must be treated as if they will work the entire initial measurement period.

An employer cannot take into account the likelihood that the employee may terminate employment before the end of the initial measurement period.[[117]](#footnote-117) Therefore, an employer cannot classify an employee as a variable-hour employee based solely on the expectation that the employee will terminate employment at some point before the initial measurement period ends (and therefore will not average thirty hours per week over the entire initial measurement period).

476. What happens if there is a change in status to full-time for new variable hour or seasonal employees?

A new variable hour employee or seasonal employee who has a change in employment status, such that the individual is reasonably expected to work thirty or more hours of service per week during the initial measurement period, must be treated as a full-time employee on the first day of the fourth month following the change in status. However, a change in employment status of an ongoing employee does not change the employee’s status as a full-time or non-full-time employee. However, in both of these situations, an employer is always allowed to change the employee’s status to full-time.

477. What happens after variable-hour and seasonal employees have been employed for at least one standard measurement period?

Once a new employee has been employed for an entire standard measurement period, the employee must be tested for full-time status, beginning with that standard measurement period, at the same time and under the same conditions as other “ongoing employees.” Thus, an employer, for example, with a calendar-year standard measurement period that also uses a one-year initial measurement period beginning on the employee’s start date would test a new variable-hour employee whose start date is February 12 for full-time status first based on the initial measurement period (February 12 through February 11 of the following year) and again based on the calendar-year standard measurement period (if the employee continues in employment for that entire standard measurement period) beginning on January 1 of the year after the start date.

An employee determined to be a full-time employee during an initial measurement period or standard measurement period must be treated as a full-time employee for the entire associated stability period. This is the case even if the employee is determined to be a full-time employee during the initial measurement period but determined not to be a full-time employee during the overlapping or immediately following standard measurement period. In that case, the employer may treat the employee as not a full-time employee only after the end of the stability period associated with the initial measurement period. Thereafter, the employee’s full-time status would be determined in the same manner as that of the employer’s other ongoing employees.

In contrast, if the employee is determined not to be a full-time employee during the initial measurement period, but is determined to be a full-time employee during the overlapping or immediately following standard measurement period, the employee must be treated as a full-time employee for the entire stability period that corresponds to that standard measurement period (even if that stability period begins before the end of the stability period associated with the initial measurement period). Thereafter, the employee’s full-time status would be determined in the same manner as that of the employer’s other ongoing employees.

478. Can you provide examples of how these rules work?

Examples – New Variable Hour Employees

The following examples, which are from the IRS regulations,[[118]](#footnote-118) illustrate the look-back measurement methods described in the regulations.[[119]](#footnote-119) In all examples the applicable large employer member offers all of its full-time employees and their dependents the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan. The coverage is affordable[[120]](#footnote-120) or is treated as affordable coverage under one of the affordability safe harbors[[121]](#footnote-121) and provides minimum value.[[122]](#footnote-122)

Example (1): Twelve-Month Initial Measurement Period Followed by One-Plus Partial Month Administrative Period. Facts. Employer B uses a twelve-month standard measurement period for ongoing employees of October 15 to October 14 of the following year and a twelve-month stability period associated with that standard measurement period starting the following January 1. During the administrative period from October 15 through December 31 of each calendar year, the employer continues to offer coverage to employees who qualified for coverage for that entire calendar year based upon working on average at least thirty hours per week during the prior standard measurement period.

For new variable hour employees, Employer B uses a twelve-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, 2015. Employee Y's initial measurement period runs from May 10, 2015, through May 9, 2016. Employee Y has an average of thirty hours of service per week during this initial measurement period ending May 9. The administrative period runs from June 1 to June 30. Employer B offers coverage to Employee Y for a stability period that runs from July 1, 2016, through June 30, 2017.

Conclusion. Employee Y has an average of thirty hours of service per week during his initial measurement period and Employer B uses an initial measurement period that does not exceed twelve months; an administrative period totaling not more than ninety days; and 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, 2017, Employer B is not subject to any employer mandate payment for 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 must test Employee Y again based on Employer B's first standard measurement period that begins after Employee Y's start date, i.e., from October 15, 2015, through October 14, 2016.

Example (2): Eleven-Month Initial Measurement Period Followed by Two-Plus Partial Month Administrative Period. Facts. Same as Example 1, except that Employer B uses an eleven-month initial measurement period that begins on the start date and applies an administrative period from the end of the initial measurement period until the end of the second calendar month beginning after the end of the initial measurement period. Employer B hires Employee Y on May 10, 2015. Employee Y's initial measurement period runs from May 10, 2015, through April 9, 2016. Employee Y has an average of thirty hours of service per week during this initial measurement period. The administrative period runs from May 1 to June 30. Employer B offers coverage to Employee Y for a stability period that runs from July 1, 2016, through June 30, 2017.

Conclusion. Same as Example 1.

Example (3): Eleven-Month Initial Measurement Period Preceded by Partial Month Administrative Period Followed by Two-Month Administrative Period. Facts. Same as Example 1, except that Employer B uses an eleven-month initial measurement period that begins on the first day of the first calendar month beginning after the start date and applies an administrative period that runs from the end of the initial measurement period through the end of the second calendar month beginning on or after the end of the initial measurement period. Employer B hires Employee Y on May 10, 2015. Employee Y's initial measurement period runs from June 1, 2015, through April 30, 2016. Employee Y has an average of thirty hours of service per week during this initial measurement period. The administrative period is June 1 to June 30. Employer B offers coverage to Employee Y for a stability period that runs from July 1, 2016, through June 30, 2017.

Conclusion. Same as Example 1.

Example (4): Twelve-Month Initial Measurement Period Preceded by Partial Month Administrative Period and Followed by Two-Month Administrative Period. Facts. For new variable hour employees, Employer B uses a twelve-month initial measurement period that begins on the first day of the first month following the start date and applies an administrative period that runs from the end of the initial measurement period through the end of the second calendar month beginning on or after the end of the initial measurement period. Employer B hires Employee Y on May 10, 2015. Employee Y's initial measurement period runs from June 1, 2015, through May 31, 2016. Employee Y has an average of thirty hours of service per week during this initial measurement period. The stability period is June 1 to July 31. Employer B offers coverage to Employee Y for a stability period that runs from August 1, 2016, through July 31, 2017.

Conclusion. Employer B does not satisfy the standards for the look-back measurement method[[123]](#footnote-123) because the combination of the initial partial month delay, the twelve-month initial measurement period, and the two month administrative period means that the coverage offered to Employee Y does not become effective until after the first day of the second calendar month following the first anniversary of Employee Y's start date. Accordingly, Employer B is potentially subject to an employer mandate penalty payment.

Examples for Staffing Firm Employees; Full-Time Employees Can Have Variable Hour Status. The provision barring employer reliance on expected employee tenure in making variable hour decisions does not mean, as some commentators have suggested, that beginning in 2015, newly-hired temporary employees who are offered full-time assignments on their start date cannot be treated as variable hour employees and must be offered health benefits within ninety days. This ignores the specific examples provided in the regulations for determining the variable hour status of temporary employees assigned by staffing firms. The examples make clear that, in 2014 and in the years following, staffing firms can use up to a full twelve-month look-back period for temporary employees as long as they are properly classified as variable hour employees based on those examples. The following is a brief summary of the relevant examples:[[124]](#footnote-124)

* In one example, a staffing firm expects, on the employee's start date, that the employee will be offered "short-term" assignments with "several different clients" with "significant gaps" in between, that the assignments will differ in average weekly hours, and that the number and duration of assignments offered and accepted, the gaps between, and the weekly hours, are all uncertain.
* In the other example, an employee is hired on an hourly basis to "fill in for employees who are absent and to provide additional staffing at peak times." In that example, the employer expects the employee to work "full-time for the first few months of employment, while assigned to a specific project, but also reasonably expects that the assignments will be of unpredictable duration, that there will be gaps of unpredictable duration between assignments, that the hours per week required by subsequent assignments will vary, and that [the employee] will not necessarily be available for all assignments."

The examples don't specifically define "short-term" or "few months" but the preamble to the regulations refers to assignment lengths "each generally lasting no more than two or three months"[[125]](#footnote-125) and, at another point, describes short-term as "4 or 5 months."[[126]](#footnote-126)

The examples reflect Treasury and IRS's recognition that temporary employees, when they do work, generally work full-time work weeks. Hence, the mere fact that temporary employee assignments are full-time at the start does not preclude a determination of variable hour status.[[127]](#footnote-127)

Continuous Full-Time Employee.

Example (5): Continuous Full-Time Employee. Facts. Employer B uses a twelve-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, 2015, as a variable hour employee. Employee Y's initial measurement period runs from May 10, 2015, through May 9, 2016. Employee Y has an average of thirty hours of service per week during this initial measurement period. Employer B offers coverage to Employee Y for a stability period that runs from July 1, 2016, through June 30, 2017. Employer B tests Employee Y again based on Employee Y's hours of service from October 15, 2015, through October 14, 2016, Employer B's first standard measurement period that begins after Employee Y's start date, and determines that Employee Y has an average of thirty hours of service a week during that period. It offers Employee Y coverage for July 1, 2017, through December 31, 2017. Employee Y also had an offer of coverage for the period of January 1, 2017, through June 30, 2017, because that period is covered by the initial stability period following the initial measurement period, during which Employee Y was determined to be a full-time employee.

Conclusion. Employer B is not subject to any potential employer mandate penalty payment for Employee Y.

Initially Full-Time Employee, Becomes Non-Full-Time Employee

Example (6): Initially Full-Time Employee, Becomes Non-Full-Time Employee. Facts. Same as Example 1; in addition, Employer B tests Employee Y again based on Employee Y's hours of service from October 15, 2015, through October 14, 2016, Employer B's first standard measurement period that begins after Employee Y's start date, and determines that Employee Y has an average of twenty-eight hours of service a week during that period. Employer B continues to offer coverage to Employee Y through June 30, 2017, (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, 2017, through December 31, 2017.

Conclusion. Employer B is not subject to any potential penalty payment for 2016 with respect to Employee Y, provided that it offers coverage to Employee Y from July 1, 2016, through June 30, 2017, the stability period associated with the initial measurement period.

Initially Non-Full-Time Employee

Example (7): Initially Non-Full-Time Employee. Facts. Same as Example 1, except that Employee Y has an average of twenty-eight hours of service per week during the period from May 10, 2015, through May 9, 2016, and Employer B does not offer coverage to Employee Y in 2016.

Conclusion. From Employee Y's start date through the end of 2016, Employer B is not subject to any employer mandate payment under Code § 4980H because Employer B complies with the standards for the measurement and stability periods for a new variable hour employee with respect to Employee Y.

Example (8): Initially Non-Full-Time Employee, Becomes Full-Time Employee. Facts. Same as Example 7; in addition, Employer B tests Employee Y again based on Employee Y's hours of service from October 15, 2015, through October 14, 2016, Employer B's first standard measurement period that begins after Employee Y's start date, and determines that Employee Y has an average of thirty hours of service per week during this standard measurement period, and offers coverage to Employee Y for calendar year 2017.

Conclusion. Employer B is not subject to any employer mandate payment for 2017 for Employee Y.

Six-Month Measurement and Stability Periods.

In Examples 9 and 10, the new employee is a new variable hour employee, and the employer uses a six-month standard measurement period with six-month stability periods associated with those standard measurement periods. The author believes that most employers will use twelve month measurement and stability periods, but shorter periods are permitted, as shown by the following examples.

Example (9): Initially Full-Time Employee. Facts. For new variable hour employees, Employer C uses a six-month initial measurement period that begins on the start date and applies an administrative period that runs from the end of the initial measurement period through the end of the first full calendar month beginning after the end of the initial measurement period. Employer C hires Employee Z on May 10, 2015. Employee Z's initial measurement period runs from May 10, 2015, through November 9, 2015, during which Employee Z has an average of thirty hours of service per week. The administrative period is Nov. 10 to Dec. 31. Employer C offers coverage to Employee Z for a stability period that runs from January 1, 2016, through June 30, 2016.

Conclusion. Employer C uses an initial measurement period that does not exceed twelve months; an administrative period totaling not more than ninety days; and a combined initial measurement period and administrative period that does not last longer than the final day of the first calendar month beginning on or after the one-year anniversary of Employee Z's start date. From Employee Z's start date through June 30, 2016, the end of the period when coverage was offered, Employer C is not subject to any employer mandate payment because Employer C complies with the standards for the measurement and stability periods for a new variable hour employee with respect to Employee Z. Employer C must test Employee Z again based on Employee Z's hours of service during the period from November 15, 2015, through May 14, 2016, Employer C's first standard measurement period that begins after Employee Z's start date.

Example (10): Initially Full-Time Employee, Becomes Non-Full-Time Employee. Facts. Same as Example 9; in addition, Employer C tests Employee Z again based on Employee Z's hours of service during the period from November 15, 2015, through May 14, 2016, i.e., Employer C's first standard measurement period that begins after Employee Z's start date, during which period Employee Z has an average of twenty-eight hours of service per week. Employer C continues to offer coverage to Employee Z through June 30, 2016, (the end of the initial stability period based on the initial measurement period during which Employee Z has an average of thirty hours of service per week) but does not offer coverage to Employee Z from July 1, 2016, through December 31, 2016.

Conclusion. Employer C is not subject to any employer mandate penalty payment for Employee Z for 2016.

New Seasonal Employee.

Example (11): Seasonal Employee, Twelve-Month Initial Measurement Period; One-Plus Partial Month Administrative Period. Facts. Employer D offers health plan coverage only to full-time employees and their dependents. Employer D uses a twelve-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, 2015, with an anticipated season during which Employee S will work running through March 15, 2016. Employer D determines that Employee S is a seasonal employee based upon a reasonable good faith interpretation of that term. Employee S's initial measurement period runs from November 15, 2015, through November 14, 2016. Employee S is expected to have fifty hours of service per week from November 15, 2015, through March 15, 2016, but is not reasonably expected to average thirty hours of service per week for the twelve-month initial measurement period.

Conclusion. Employer D cannot determine that Employee S is reasonably expected to average at least thirty hours of service per week for the twelve-month initial measurement period. Accordingly, Employer D may treat Employee S as a variable hour employee during the initial measurement period.

New Variable Hour Employee of Staffing Company.

Example (12): Variable Hour Employee. Facts. Employer E is in the business of providing temporary workers to numerous clients that are unrelated to Employer E and to one another. Employer E is the common law employer of the temporary workers based on all of the facts and circumstances. Employer E offers health plan coverage only to full-time employees (including temporary workers who are full-time employees) and their dependents. Employer E uses a twelve-month initial measurement period for new variable hour employees and new 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 E hires Employee T on January 1, 2015, and anticipates that it will assign Employee T to provide services for various clients. As of the beginning of the initial measurement period, Employer E reasonably expects that, over the initial measurement period, Employee T is likely to be offered short-term assignments with several different clients, with significant gaps between the assignments and that the assignments will differ in the average hours of service per week (meaning averaging both above and below thirty hours of service per week), all depending on client needs and Employee T's availability. The number of actual assignments that Employee T will be offered, the number that Employee T will accept, the duration of assignments, the length of the gaps between assignments, and whether various assignments will result in Employee T being employed on average at least thirty hours of service per week during the assignment are all uncertain.

Conclusion. Employer E cannot determine whether Employee T is reasonably expected to average at least thirty hours of service per week for the twelve-month initial measurement period. Accordingly, Employer E may treat Employee T as a variable hour employee during the initial measurement period.

New Variable Hour Employee Initially and Temporarily Expected to Work at Least Thirty Hours per Week.

Example (13). Variable Hour Employee. Facts. Employee A is hired on an hourly basis by Employer Y to fill in for employees who are absent and to provide additional staffing at peak times. Employer Y expects that Employee A will average thirty hours of service per week or more for A's first few months of employment, while assigned to a specific project, but also reasonably expects that the assignments will be of unpredictable duration, that there will be gaps of unpredictable duration between assignments, that the hours per week required by subsequent assignments will vary, and that A will not necessarily be available for all assignments.

Conclusion. Employer Y cannot determine whether Employee A is reasonably expected to average at least thirty hours of service per week for the initial measurement period. Accordingly, Employer Y may treat Employee A as a variable hour employee.

Anti-abuse Rules and Staffing (Employee Leasing or Professional Employment Organization) Firms

479. Are any anti-abuse rules contemplated for employers who shift employees to staffing companies?

The regulations preamble states that Treasury and IRS are aware of various structures being considered under which employers might use temporary staffing agencies (or other staffing agencies) purporting to be the common law employer to evade application of section 4980H. In one structure, the employer (referred to in this section as the “client'') would purport to employ its employees for only part of a week, such as twenty hours, and then to hire those same individuals through a temporary staffing agency (or other staffing agency) for the remaining hours of the week, thereby resulting in neither the “client'' employer nor the temporary staffing agency or other staffing agency appearing to employ the individual as a full-time employee. In another structure, one temporary staffing agency (or other staffing agency) would purport to employ an individual and supply the individual as a worker to a client for only part of a week, such as twenty hours, while a second temporary staffing agency or other staffing agency would purport to employ the same individual and supply that individual as a worker to the same client for the remainder of the week, thereby resulting in neither the temporary staffing agencies or the other staffing agencies, nor the client, appearing to employ the individual as a full-time employee.

The Treasury Department and the IRS anticipate that only in rare circumstances, if ever, would the “client'' under these fact patterns not employ the individual under the common law standard as a full-time employee.

The final regulations will likely contain an anti-abuse rule to address the situations described in this section of the preamble. Under that anticipated rule, if an individual performs services as an employee of an employer and performs the same or similar services for that employer in the individual's purported employment at a temporary staffing agency or other staffing agency of which the employer is a client, then all the hours of service are attributed to the employer.

Planning to Minimize Impact of Employer Mandate Penalties

480. Since the employer mandate penalty is calculated solely based on full-time (thirty hours of service per week) employees, can an employer reduce or eliminate the mandate’s impact by reducing hours of service to less than thirty hours per week?

Section 510 of the Employee Retirement Income Security Act (ERISA) bars discrimination for the purpose of interfering with the attainment of any right to employee benefits to which a worker may become entitled. An intentional reduction of hours from thirty or more to under thirty in order to prevent employees from getting benefits raises a potential ERISA § 510 claim. A violation can result in court ordered reinstatement of the worker, restitution, back pay, and the claimant’s legal fees. For large companies, there is a potential for class actions to be filed. The best case for a plaintiff would be reducing the hours of an employee currently receiving health benefits to under thirty hours, resulting in a loss of those benefits.

However, adopting a policy allowing future workers to work no more than twenty-nine hours per week would likely be a safe move because no action was taken to deprive them of a benefit they otherwise would have received.

Additionally, healthcare reform provides whistleblower protection, which allows for recovery of damages and attorneys’ fees. That section prohibits firing or discriminating against workers in retaliation for complaining to government authorities about noncompliance with healthcare reform’s consumer protections or objecting to the employer about noncompliance.[[128]](#footnote-128)

If a company fired workers to avoid the mandate, it might be permitted if it acted due to a legitimate need to save money. However, if it announced its intentions and then fired a worker who objected to the plan, it could be opening the door to a retaliation suit, even if that worker would have been fired regardless of the objections.

481. Is outsourcing work a solution to reduce the employee count?

The use of independent contractors to do work that would otherwise be done by employees is a way to reduce the workforce and the impact of the employer mandate penalties for applicable large employers. However, an employer that reclassifies existing employees as independent contractors takes a large risk in an audit challenging such reclassification. However, if the employees incorporate, with their corporations employing them and their corporation contracting with the employer, case law exists that would support such reclassification.[[129]](#footnote-129)

482. How can an applicable large employer offer low cost health benefits and still avoid or reduce the impact of the employer mandate penalty?

The employer mandate penalty comes in two parts, the 4980H(a)[[130]](#footnote-130) penalty and the 4980H(b)[[131]](#footnote-131) penalty. The (b) penalty cannot be greater than the (a) penalty. The (a) penalty is easy to avoid. Whether the (b) penalty is a serious issue for an employer depends on the facts relating to an employer’s workforce.

483. How does an employer avoid the 4980H(a) employer mandate penalty?

There are at least two ways to do so without an employer spending a lot on its health plan. One option to avoid the Code § 4980H(a) penalty is for an employer to offer its employees health coverage for which the employer pays nothing and employees pay for all of plan. Code § 4980H(a) merely requires that an employer make an offer of coverage. It does not require the employer to pay for any part of it. The affordability of the coverage is a concept involved in the 4980H((b) penalty only, as discussed in Q 484. This strategy to avoid the employer mandate would be premised on the employer’s belief that most employees who refused the employer’s offer of coverage would not purchase health insurance on an exchange, even if they qualified for a subsidy, because even with a subsidy, lower income healthy workers with no chronic medical condition would rather save the money and rely on hospital emergency room coverage if they need care.

Employers can also avoid the Code § 4980H(a) $2,000 employer mandate penalty (for every full time employee over thirty) by offering very limited (low benefit, skinny, or bare bones) health care plans that can lack key health benefits, such as hospital coverage. Such policies are low cost because they offer minimal benefits. Unlike the exchange plans, employer plans need not cover the ten categories of services for the healthcare law's essential health benefits. Thus, these low benefit plans are less expensive because they provide much lower benefits than an exchange plan. This technique will not work for employers in the small group insurance market (generally employers with under 100 employees) because healthcare reform requires that insurance to cover all ten essential health benefits.[[132]](#footnote-132)

Prior to healthcare reform, many employers, especially those with predominantly low wage employees, offered so-called “mini-med” health plans, which, as their name implies, had low cost and limited benefits. These low benefit plans may take their place. The law requires employers with fifty or more workers to offer coverage to 95 percent of their full-time employees and dependents or pay a penalty. Many persons understood the rules to require robust major medical insurance, covering a list of "essential" benefits such as mental-health services and a high percentage of workers' overall costs. However, that is not the way the law is written. Articles have reported that federal officials confirmed that this low benefit plan strategy works to avoid the 4980H(a) penalty.[[133]](#footnote-133)

To comply with the law, the low benefit plan cannot have a lifetime or annual dollar limit on benefits that are provided and must cover preventive services like vaccines and cancer screenings without any cost-sharing, i.e., without any employee deductibles or copays. However, such plans may not cover surgery, imaging, or prenatal care. Alternatively, they could provide a very limited benefit for hospitalizations or surgeries. They might also limit the number of doctor visits or prescriptions available to participants. The cap would be on the number, not the dollar-value of the benefits so they would not have a concern about prohibited annual dollar limits. Anyone wanting better coverage could then opt out and go to an exchange. Such plans could be paired with other limited benefit packages, such as hospital indemnity plans paying specified dollar amounts per day and/or catastrophic coverage, a very high deductible insurance policy.

The 4980H(a) employer mandate penalty applies to an employer that fails to offer “minimum essential coverage.” Minimum essential coverage does not include excepted benefits, such as stand-alone vision or stand-alone dental benefits. Employers seeking to minimize or avoid the employer penalty must offer minimum essential coverage to 95 percent of their full-time employees and their dependents, including children under age twenty six. Minimum essential coverage is the coverage required to avoid the individual and employer mandates.[[134]](#footnote-134) It is an “eligible employer-sponsored plan,” a term that means any group health plan (other than for excepted benefits) offered by an employer to employees or coverage offered in a state’s small or large group market or a self-insured plan[[135]](#footnote-135) meeting only the required Public Health Service Act requirements (discussed in Part VII).[[136]](#footnote-136) It includes grandfathered plans.[[137]](#footnote-137) In other words, any health insurance plan legally sold in a state and self-insured plans meeting PHSA requirements are an “eligible employer-sponsored plan.” In many states, insurers market inexpensive plans that cover a limited range of services. Further, PHSA requirements only apply if the plan offers the benefit in question. None of the PHSA benefit mandates apply to plans that do not offer a particular benefit. Thus, for example, the protections for mothers and newborns do not apply where a plan does not offer maternity benefits.

Thus, minimum essential coverage includes coverage that need not include the ten types of “essential health benefits.” Essential health benefits is the term used by health care reform to describe the benefits that qualified health plans (QHPs) sold on the state exchanges are required to cover.[[138]](#footnote-138) HHS defines essential health benefits with reference to state benchmark plans offered on state exchanges (marketplaces).[[139]](#footnote-139)

Also see Q 439 through Q 441.

484. How does an employer avoid or reduce the 4980H(b) employer mandate penalty?

Applicable large employers offering employee pay all coverage or a low benefit minimum essential coverage plan could still face the 4980H(b) penalty of $3,000 per year per full-time employee for workers who go to an exchange and qualify for subsidized coverage if the employer’s coverage is either (1) not affordable[[140]](#footnote-140) or (2) lacks minimum value.[[141]](#footnote-141) (See Q 439 and Q 442 through Q 445.) Whether this will be a significant penalty depends on how many of an employer’s employees qualify for and purchase subsidized health insurance on an exchange when the employer’s policy is unaffordable or fails to provide minimum value. In many cases, the result could be much less expensive than the 4980H(a) penalty because it is likely that many employees, especially those with low incomes, will not go to the exchanges due to the relatively high cost of the coverage after the subsidy and the availability of care at hospital emergency rooms. Additionally, employees can get insurance later if they develop a chronic condition because, beginning in 2014, insurers cannot impose a preexisting condition limit on insureds. Thus, some believe that many if not most of those going to the exchange will likely be only those with existing medical conditions.

Limited benefit policies can cost an employer far less than the employer mandate penalty or the cost of providing benefits that are more comprehensive. Some low benefit plans cost employers $40 - $100 monthly per employee depending on the benefits offered. The low benefit insurance approach is an attractive option for companies with many low wage workers, such as retailers and restaurant operators, especially if workers will not want to pay the cost of the richer exchange coverage. Only full-time employees who qualify for and purchase subsidized exchange coverage trigger the employer $3,000 per full-time employee employer mandate penalty. A full-time worker earning $9 an hour would have to pay approximately $70 a month for a midlevel exchange plan after the subsidies. At $12 an hour, an employee’s share of the premium would be approximately $140 per month due to a reduced federal subsidy. Of course, these figures are only examples, as every state exchange will have insurance costs that are based on local conditions.

As an example, San Antonio-based Bill Miller Bar-B-Q, a 4,200-worker chain, announced that it will implement a low benefit health plan in July 2013 and will aim to price the plan at less than $50 a month,. The new plan will have no dollar limits on benefits but will cover only preventive services, six annual doctors' visits, generic drugs. X-rays, and tests at a local urgent care chain. It will not cover surgeries or hospital stays.[[142]](#footnote-142) The chain plans to pay the $3,000 penalty for each worker who gets an exchange-plan subsidy. The employer believes that those are going to be the people who will be ill and need a more robust plan. Insuring them directly with major medical coverage would cost more than the penalty.

Many more workers will continue to go without insurance, despite the exchanges and the limited plan. Only one-quarter of workers eligible for the current Miller Bar-B-Q mini-med plan elect to take it.[[143]](#footnote-143) For these employees who purchase no employer or exchange coverage, the employer savings would be even greater, as there would be no cost for health insurance and no employer mandate penalty because the 4980H(b) penalty is only paid for those full-time employees qualifying for and purchasing subsidized health coverage on an exchange. Tex-Mex restaurant chain El Fenix also has announced that it will offer limited plans to its 1,200 workers, covering doctors’ visits, preventive care, and drugs, but not hospital stays or surgery. "What our goal was all along was to make [offering coverage] financially palatable for the company as a whole, so we didn't do damage and have to let people go or slow down our growth," said Brian Livingston, chief financial officer of Dallas-based Firebird Restaurant Group LLC, owner of El Fenix.[[144]](#footnote-144)

485. How does an applicable large employer utilize the 95 percent rule in planning for the employer mandate penalties?

On January 1, 2015, employers with fifty or more full-time and full-time equivalent employees will need to track their workforces’ hours of service (usually based on the prior year employee data) in order to comply with the employer mandate. The 95 percent rule allows an employer to be treated as offering qualifying coverage to all of its full-time employees and their dependents for a calendar month, if the employer offers coverage to all but five percent (or, if greater, five full-time employees) of its full-time employees and their dependents. The preamble to the regulations’ states that an employer can utilize the 95 percent rule even if the failure to offer coverage is intentional. The regulations when explaining the 95 percent rule do not condition a full-time employee being included in the calculation on any additional factor besides being a full-time employee (averaging thirty or more hours of service per week during the month).

Full-Time Employees under the Age of Twenty Six Count. An individual is eligible for a premium tax credit (which is required to trigger the employer mandate penalty) if the individual is not eligible for minimum essential coverage through a different medium other than eligibility through coverage in the individual market. Not all employees under the age of twenty six will be eligible for coverage through their parents or some other means. If such an employee met the other conditions to receive a premium tax credit, the full-time under age twenty six employee could trigger a §4980H penalty unless the 95 percent test is met, taking into account under age twenty six full-time employees.

Medicare and Medicaid Eligible Employees Count. Employees who are sixty-five years of age or older will not be eligible for a premium tax credit as they will be eligible for Medicare. However, it appears all full-time employees are included when calculating the 95 percent rule. Consequently, if employees eligible for Medicare are not offered the opportunity to enroll in qualifying employer coverage, they will count against the employer when calculating the 95 percent rule. Likewise, if Medicaid employees are not offered the opportunity to enroll in qualifying employer coverage, they will count against the employer when calculating the 95 percent rule.

Employees with Household Income of More than 400 Percent of the Federal Poverty Line Count. While not eligible for a premium subsidy on an Exchange, these employees will count against the employer when calculating the 95 percent rule.

Who Does Not Count When Calculating the 95 Percent Rule.

* Leased Employees, Sole Proprietors, Partners, and 2-Percent S Corporation Shareholders: Do No Count.
* Part-Time Employees. Whether or not a part-time employee is offered qualifying health coverage, the employee is not included when calculating the 95 percent rule.

New Employees – Rules Not Clear. A new non-variable hour employee who the employer reasonably expects to accumulate more than thirty hours of service per week must be offered coverage by the conclusion of the employee’s third full calendar month of employment. If a new employee (who the employer knows will work forty hours a week) is hired on March 15, 2014, that particular employee’s initial three full calendar months will be April 2014, May 2014, and June 2014. If the employer does not offer the employee coverage by June 30, 2014, the employee would count as a full-time employee who did not have coverage made available to him/her for April 2014, May 2014, and June 2014 as well as any subsequent month until coverage is offered for the entire calendar month when calculating the 95 percent rule. The partial month of March 2014 would not be included in the calculation of the 95 percent rule.

It is unclear how a new non-variable hour employee would count for the 95 percent rule if the employer offers coverage to the employee by the three-month deadline. For example, suppose a new employee (who the employer knows will work forty hours a week) is hired on March 15, 2014. The employer makes coverage available to the new employee by June 30, 2014. As in the example in the previous paragraph, it appears the partial month of March 2014 would not be included in the calculation of the 95 percent rule. There are three possibilities for April, May, and June:

1. The first possibility is to include the employee as a full-time employee who was not offered coverage for the calendar months of April 2014, May 2014, and June 2014. The regulations make no exceptions to the rule that 95 percent of full-time employees be offered coverage.

2. A second possibility would include the employee as a full-time employee who was timely offered coverage for the calendar months of April 2014, May 2014, and June 2014 when calculating the 95 percent rule.

3. The third possibility is the months of April 2014, May 2014, and June 2014 are not considered in the calculation of the 95 percent rule. The employee would begin to be included in the calculation of the 95 percent rule in July 2014.

New Variable Hour Employees. If an employer cannot determine if the employee is reasonably expected to average at least thirty hours of service per week, the regulations allow an employer to use the safe harbor measurement method if an employee can be classified as a variable hour employee. The regulations provide no guidance on how the periods associated with the safe harbor interact with calculating the 95 percent rule.

A reasonable interpretation is that all employees during the initial measurement period are excluded from the calculation of the 95 percent rule. If an employee is determined to be a full-time employee during the initial measurement period, the employee would be included in the calculation of the 95 percent rule during the entire corresponding stability period regardless of whether the employee was offered coverage during that period. However, if an employee is determined not to be a full-time employee during the initial measurement period, the employee would not be included in the calculation of the 95 percent rule during the entire corresponding stability period regardless of whether the employee was offered coverage during that period.

If an employee is determined to be a full-time employee during the standard measurement period, the employee would be included in the calculation of the 95 percent rule during the entire corresponding stability period regardless of whether the employee was offered coverage during that period. However, if an employee is determined not to be a full-time employee during the standard measurement period, the employee would not be included in the calculation of the 95 percent rule during the entire corresponding stability period regardless of whether the employee was offered coverage during that period.

In the case of overlapping stability periods, the employee being included as a full-time employee will always trump the employee not being included as a full-time employee for purposes of calculating the 95 percent rule. Overlapping stability periods should not result in a single employee being included twice when calculating the 95 percent rule.

**Employer Mandate Traps for Employers to Avoid**

Q \_\_\_\_\_\_\_\_\_\_\_ (Note - last question in chapter)

Q. 486 **What are the traps regarding employer mandate rules that employers should avoid?**

Failing Properly To Count All Hours of Service. As discussed earlier in this Part of the book, an hour of service is any hour for which an employee is paid or entitled to be paid. The definition includes hours that the employee is actually present at work performing services, but also includes other hours that the employee is not at work but is entitled to be paid, like paid vacation days, paid holidays, jury duty days, etc.. Employers must count “hours of service” to determine the number of full-time and full-time equivalents necessary to calculate the employer’s size. Hours of service must also be counted to determine whether an employee is considered full-time for purposes of offering coverage.

These rules have a direct impact on an employer’s liability under Code §4980H. Counting hours of service can also be particularly difficult for certain types of employees, like adjunct professors. Special rules exist for certain types of employees that are discussed earlier in this Part. One pitfall to avoid isrecording only the hours that employees are physically present at work.

Ignoring Other Employers within Same Controlled or Affiliated Service Group. Splitting up a single corporate entity into multiple entities owned by the same individual(s), holding company, or group of individuals was one of the initial reactions to avoid the employer mandate and its application to employers with 50 or more full-time and full-time equivalent employees.

As discussed in more detail earlier in this Part, under Code §414, a commonly owned group of entities – also known as a controlled group – may be treated as a single employer in certain circumstances. The employer mandate regulations incorporate the provisions of Code §414. This means that all of the employees of each entity within a controlled group must be counted for determining whether or not an employer has 50 or more full-time equivalent employees, and is subject to the employer mandate. In addition, all members of an affiliated service group, also defined in Code §414, are treated as one employer. These are the same employer aggregation rules that apply under ERISA for retirement and welfare benefit plans and testing for required coverage, nondiscrimination, etc.

Employers who are a subsidiary of a parent company, employers who own subsidiary companies, or employers who are owned by individual owners who have ownership in other companies should consult their attorney regarding whether or not the entity is part of a controlled group. If the answer is yes, the employer mandate may apply even though the employer in question employs less than 50 full-time and full-time equivalent employees within a single entity.

Failing to Identify & Measure Variable Hour Employees.. For employers who are not so large as to be aware that they are an applicable large employer (“ALE”), one of the most difficult items is the Look-back Measurement Method for variable hour and seasonal employees. A variable hour employee is an employee that the employer does not reasonably expect to work an average of 30 hours or more per week when that employee is hired. Many employers have an internal definition of full-time that is something more than 30 hours per week – it could be 40 hours, for example. In this scenario, employers often ask if they can measure employees working fewer hours than what their internal definition of full-time requires, or measure employees whose hours vary from week to week but are always above 30.

For healthcare reform compliance, internal employer definitions of full-time are disregarded. Employees reasonably expected to work an average of 30 hours per week when hired should be counted as full-time employees, regardless of the employer’s internal definition of full-time. If an employee is expected to work fewer than 30 hours per week, the employer should be prepared to administer either the Look-back Measurement Method or the Monthly Measurement Method for that employee.

Failing to identify whether an employee is full-time or variable hour may make an employer’s size calculation inaccurate, which may impact the availability of transition relief and also the employer mandate penalty calculation. Likewise, a failure to offer coverage to an individual who is considered full-time under the rules can expose an employer to unanticipated penalties.

Classifying Short Term Workers as Seasonal. A seasonal employee is an employee whose customary annual employment is 6 months or less, and whose position begins about the same time each year. Employers have adopted any variety of internal definitions of seasonal, and not all of these definitions align with the definition in the regulations. Employers in some industries hire “seasonal” employees to work 8 or 10 months out of the year. However, an employee who works 8 or 10 months out of the year is not a seasonal employee under the final employer mandate regulations. Likewise, an employee who works 6 months or less, but whose position does not begin at a consistent time each year, is not a seasonal employee. These employees are likely considered short-term employees under the rules and should be offered coverage within 90 days of employment if working full-time.

Misclassifying Independent Contractors and/or Temporary Staffers. Employers are required to offer coverage to their “common law” full-time employees. An individual is a common law employee of a company if the company has the right to “control and direct the individual who performs the work, not only as the result to be accomplished by the work but also as to the details and means by which that result is accomplished.” Do employers who pay some workers with a Form 1099 have to worry about this issue? Yes, most definitely. If workers paid with a Form 1099 are actually be employees but are classified incorrectly as independent contractors, the employer who thought it had too few employees to be an ALE could be an ALE and need to deal with the employer mandate penalty.

When it comes to temporary staffers, an individual might be issued a Form W-2 by the staffing company, but another company (the “recipient” for whom the worker is providing services) has the right to control and direct that individual as to what job needs to be done and how to do it. The company that has the right to control and direct that individual has the obligation to offer coverage, even though it is not the employer for payroll purposes. There are rules that allow the client employer to take credit for an offer of health coverage made by a staffing agency or employee leasing firm, but the arrangement between the client employer and the staffing agency must meet certain requirements for this to be done.

1. . http://www.irs.gov/uac/Newsroom/Questions-and-Answers-on-Employer-Shared-Responsibility-Provisions-Under-the-Affordable-Care-Act. [↑](#footnote-ref-1)
2. . Treas. Reg. § 54.4980H-1(a)(24)(ii)(C).

-------------------------------------------------------------------------------- [↑](#footnote-ref-2)
3. . IRS Notice 2013-45. [↑](#footnote-ref-3)
4. Shared Responsibility for Employers Regarding Health Coverage, 26 CFR Parts 1, 54, and 301, 79 Fed. Reg. 8543, 8577 (Feb. 12, 2014). [↑](#footnote-ref-4)
5. . Reg. § 54.4980H-1. [↑](#footnote-ref-5)
6. . Reg. § 54.4980H-2. [↑](#footnote-ref-6)
7. . Reg. § 54.4980H-3. [↑](#footnote-ref-7)
8. . Reg. § 54.4980H-4. [↑](#footnote-ref-8)
9. . Reg. § 54.4980H-5. [↑](#footnote-ref-9)
10. . Reg. § 54.4980H-6. [↑](#footnote-ref-10)
11. . IRC § 4980H(c)(2)(C)(i); Treas. Reg. § 54.4980H-1(a)(15). [↑](#footnote-ref-11)
12. . Treas. Reg. § 54.4980H-1(a)(15). [↑](#footnote-ref-12)
13. . Reg. § 31.3121(a)(1)-1(b). [↑](#footnote-ref-13)
14. . http://www.irs.gov/uac/Newsroom/Questions-and-Answers-on-Employer-Shared-Responsibility-Provisions-Under-the-Affordable-Care-Act at Q&A 6. [↑](#footnote-ref-14)
15. . Reg. §301.7701-2(c)(2)(v)(A)(5). [↑](#footnote-ref-15)
16. See preamble to Shared Responsibility for Employers Regarding Health Coverage, 26 CFR Parts 1, 54, and 301, 79 Fed. Reg. 8543, 8569–8576 (Feb. 12, 2014). [↑](#footnote-ref-16)
17. Treas. Regs. § 54 .4980H-4(c) and § 54 .4980H-5(c). [↑](#footnote-ref-17)
18. Shared Responsibility for Employers Regarding Health Coverage, 26 CFR Parts 1, 54, and 301, 79 Fed. Reg. 8543, 8573 (Feb. 12, 2014). [↑](#footnote-ref-18)
19. Treas. Reg. § 54 .4980H -2(b)(2). [↑](#footnote-ref-19)
20. Treas. Reg. § 54 .4980H -2(b)(2). [↑](#footnote-ref-20)
21. Treas. Reg. § 54 .4980H -2(b)(2). [↑](#footnote-ref-21)
22. Treas. Reg. § 31.3401(c)-1(b). [↑](#footnote-ref-22)
23. See <https://www.federalregister.gov/articles/2014/02/12/2014-03082/shared-responsibility-for-employers-regarding-health-coverage>. [↑](#footnote-ref-23)
24. Treas. Reg. § 54.4980H-1(a)(15). [↑](#footnote-ref-24)
25. Treas. Reg. § 4980H-3(c)(4)(v). [↑](#footnote-ref-25)
26. Treas. Reg. § 54.4980H-1(a)(7). [↑](#footnote-ref-26)
27. Preamble to final regulation at 79 Fed. Reg. p. 8,552. [↑](#footnote-ref-27)
28. . Treas. Reg. § 54.4980H-1(a)(13). [↑](#footnote-ref-28)
29. . Code § 4980H(c)(2)(A); Treas. Reg. § 54.4980H-1(a)(4). [↑](#footnote-ref-29)
30. . Shared Responsibility for Employers Regarding Health Coverage, 26 CFR Parts 1, 54, and 301, 78 Fed. Reg. 217, 221 (Jan. 2, 2013). [↑](#footnote-ref-30)
31. . Code § 4980H(c)(2)(C)(ii); Treas. Reg. § 54.4980H-2(b)(3). [↑](#footnote-ref-31)
32. . IRC Sec. 4980H(c)(5). [↑](#footnote-ref-32)
33. . Treas. Reg. § 54.4980H-4(b). [↑](#footnote-ref-33)
34. . Code § 4980H(a)(2). [↑](#footnote-ref-34)
35. . Treas. Reg. § 54.4980H-4(b). [↑](#footnote-ref-35)
36. . Treas. Reg. § 54.4980H-3(f). [↑](#footnote-ref-36)
37. . Minimum essential coverage includes coverage offered by a grandfathered group health plan. [↑](#footnote-ref-37)
38. . Treas. Reg. § 54.4980H-4(a). [↑](#footnote-ref-38)
39. . “Dependent” is defined as an employee’s child under IRC§152(f)(1) who is under 26 years of age. Reg. §54.4980H-1(a)(11). [↑](#footnote-ref-39)
40. . Reg. §54.4980H-1(a)(11). [↑](#footnote-ref-40)
41. . PPACA § 1301. [↑](#footnote-ref-41)
42. . Reg. §1.5000A-2(c)(1) [↑](#footnote-ref-42)
43. . IRC § 5000A(f)(2)(B); Prop. Reg.§1.5000A-2(a) and (c)(1)(ii). [↑](#footnote-ref-43)
44. . Reg. §1.5000A-2(a)(c)(1)(iii). [↑](#footnote-ref-44)
45. . Essential health benefits are subject to the lifetime and annual dollar limits and must include at least the following services: ambulatory patient services, emergency services, hospitalization, maternity and newborn care, mental health benefits and substance use disorder services, prescription drugs, rehabilitative and habilitative services and devices, laboratory services, preventive and wellness services and chronic disease managements, and pediatric services including oral and vision care. [↑](#footnote-ref-45)
46. . IRS Notice 2012-58,The 9.5 percent can be adjusted after 2014 to reflect rates of premium growth relative to growth in income and after 2018 to reflect rates of premium growth relative to growth in the consumer price index. See Prop. Treas. Regs. §§ 1.36B-0 through 1.36B-5. [↑](#footnote-ref-46)
47. . See IRS Notice 2012-31. [↑](#footnote-ref-47)
48. . http://www.irs.gov/uac/Newsroom/Questions-and-Answers-on-Employer-Shared-Responsibility-Provisions-Under-the-Affordable-Care-Act. at Q&A 12. [↑](#footnote-ref-48)
49. . 45 CFR § 156.145(b)(1). [↑](#footnote-ref-49)
50. . 45 CFR § 156.145(d). [↑](#footnote-ref-50)
51. . Minimum Value Calculator Methodology at http://cciio.cms.gov/resources/regulations/index.html. [↑](#footnote-ref-51)
52. . § 36B(c)(2)(C)(i) and Reg. § 1.36B-1(e). [↑](#footnote-ref-52)
53. . § 36B(d)(2)(A). [↑](#footnote-ref-53)
54. Treas. Reg. § 54 .4980H-1(a)(26). [↑](#footnote-ref-54)
55. Treas. Reg. § 54 .4980H-2(b)(5). [↑](#footnote-ref-55)
56. Treas. Reg. § 54 .4980H-3(c)(2). [↑](#footnote-ref-56)
57. Treas. Reg. § 54 .4980H-3(d)(2)(iii). [↑](#footnote-ref-57)
58. Treas. Reg. § 54 .4980H-3(d)(3)(iii). [↑](#footnote-ref-58)
59. Treas. Reg. § 54 .4980H-3(d)(3)(vii). [↑](#footnote-ref-59)
60. Treas. Reg. §§ 54 .4980H-4(c) and -5(c). [↑](#footnote-ref-60)
61. Preamble to final regulations (Shared Responsibility for Employers Regarding Health Coverage), 26 CFR Parts 1, 54, and 301, 79 Fed. Reg. 8543, 8560 (Feb. 12, 2014). [↑](#footnote-ref-61)
62. . Treas. Reg. § 1.5000A-2(c). [↑](#footnote-ref-62)
63. . See FAQs About the Affordable Care Act Implementation Part XI, Q/A-2, available at http://www.dol.gov/ebsa/faqs/faq-aca11.html (as visited Mar. 18, 2013). [↑](#footnote-ref-63)
64. . Treas. Reg. § 54.4980H-3(c)(1)(ii).

 [↑](#footnote-ref-64)
65. . 29 CFR § 502.10(b)(3)(ii)(A) provides, “Labor is performed on a seasonal basis where, ordinarily, the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. A worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though he may continue to be employed during a major portion of the year.” [↑](#footnote-ref-65)
66. . IRC § 4980H(c)(2)(B)(ii). [↑](#footnote-ref-66)
67. Treas. Reg. § 54.4980H-1(a)(38). [↑](#footnote-ref-67)
68. . 78 Fed. Reg. 217, 222 (Jan. 2, 2013). [↑](#footnote-ref-68)
69. . Code § 4980H(c)(2)(B); Treas. Reg. § 54.4980H-2(b)(2). [↑](#footnote-ref-69)
70. . Treas. Reg. § 54.4980H-2(d) Example 3. [↑](#footnote-ref-70)
71. Treas. Reg. § 54.4980H-3(c). [↑](#footnote-ref-71)
72. Treas. Reg. § 54.4980H-3(d). [↑](#footnote-ref-72)
73. Treas. Reg. § 54.4980H-3(e). [↑](#footnote-ref-73)
74. . Treas. Reg. § 54.4980H-1(a)(21). This definition borrows heavily from existing DOL regulations. 29 CFR § 2530.200b-2(a). [↑](#footnote-ref-74)
75. . Reg. §54.4980H-3(e)(4)). Option #1: Determine the average hours of service per week for the employee during the measurement period, excluding the special unpaid leave period, and use that average as the average for the entire measurement period. Option #2: Treat employees as credited with hours of service for special unpaid leave at a rate equal to the average weekly rate at which the employee was credited with hours of service during the weeks in the measurement period that are not special unpaid leave. [↑](#footnote-ref-75)
76. . Treas. Reg. § 54.4980H-3(b)(1). [↑](#footnote-ref-76)
77. . Treas. Reg. § 54.4980H-3(b)(2). [↑](#footnote-ref-77)
78. Preamble to final regulations at 79 Fed. Reg. p. 8,552. [↑](#footnote-ref-78)
79. . Treas. Reg. § 54.4980H-3(b)(2)(ii). [↑](#footnote-ref-79)
80. . Treas. Reg. § 54.4980H-1(a)(18). [↑](#footnote-ref-80)
81. . Treas. Reg. § 54.4980H-2(b)(1). [↑](#footnote-ref-81)
82. . Fractional amounts are ignored and the employer rounds down to the next-lowest whole number after dividing by 12 (i.e., 49.9 equals 49 full-time employees). [↑](#footnote-ref-82)
83. Treas. Reg. § 54.4980H-1(a)(32). [↑](#footnote-ref-83)
84. . Treas. Reg. § 54.4980H-2(c)(1). [↑](#footnote-ref-84)
85. . Treas. Reg. § 54.4980H-2(c)(2). [↑](#footnote-ref-85)
86. Treas. Reg. § 54.4980H-3(c). [↑](#footnote-ref-86)
87. . Treas. Reg. § 54.4980H-1(a)(22). [↑](#footnote-ref-87)
88. . Treas. Reg. § 54.4980H-3(c)(1)(ii). [↑](#footnote-ref-88)
89. . Treas. Reg. §54.4980H-3(c)(1)(ii). [↑](#footnote-ref-89)
90. 79 Fed. Reg. p. 8,559. [↑](#footnote-ref-90)
91. Treas. Reg. § 54.4980H-3(d)(1)(vi). [↑](#footnote-ref-91)
92. . Treas. Reg. § 54.4980H-3(c)(2). [↑](#footnote-ref-92)
93. . Treas. Reg. § 54.4980H-1(a)(21)(ii). [↑](#footnote-ref-93)
94. . Treas. Reg. § 54.4980H-3(c)(2). [↑](#footnote-ref-94)
95. . PHSA § 2708, added by PPACA § 1201 (2010). The 90 days cannot be extended to the first day of the next month or by a weekend. Thus, an employer wanting to enroll people on the first day of a month could use a 60 day wait with enrollment coinciding with or next following end of the 60 days. Treas. Reg. § 54.9815-2708(d); Prop. DOL Reg. § 2590.715-2708(d); Prop. HHS Reg. § 147.116(d). [↑](#footnote-ref-95)
96. . Treas. Reg. § 54.4980H-3(c)(2). [↑](#footnote-ref-96)
97. . Treas. Reg. § 54.4980H-1(a)(40). [↑](#footnote-ref-97)
98. . Treas. Reg. § 54.4980H-1(a)(27). [↑](#footnote-ref-98)
99. . Treas. Reg. § 54.4980H-3(c)(1)(viii), Example (i). [↑](#footnote-ref-99)
100. . Treas. Reg. § 54.4980H-3(c)(1)(ii). [↑](#footnote-ref-100)
101. . Treas. Reg. § 54.4980H-1(a)(39). [↑](#footnote-ref-101)
102. . Treas. Reg. § 54.4980H-3(c)(1)(iii). [↑](#footnote-ref-102)
103. . Treas. Reg. § 54.4980H-3(c)(1). [↑](#footnote-ref-103)
104. . Treas. Reg. § 54.4980H-3(c)(1)(iv). [↑](#footnote-ref-104)
105. . Treas. Reg. § 54.4980H-1(c)(1)(vi). [↑](#footnote-ref-105)
106. . Treas. Reg. § 54.4980H-3(c)(1)(vi). [↑](#footnote-ref-106)
107. . Treas. Reg. § 4980H- 3(c)(1)(v). [↑](#footnote-ref-107)
108. . Treas. Reg. § 54.4980H-1(a)(26). [↑](#footnote-ref-108)
109. . IRS Notice 2012-58. [↑](#footnote-ref-109)
110. . Treas. Reg. § 54.4980H-3(c)(3)(i). [↑](#footnote-ref-110)
111. . Treas. Reg. § 54.4980H-1(c)(3). [↑](#footnote-ref-111)
112. . Treas. Reg. § 54.4980H-3(c)(3)(ii). [↑](#footnote-ref-112)
113. Treas. Reg. § 54.4980H-1(a)(49)(ii)(A). [↑](#footnote-ref-113)
114. \*Treas. Reg. § 54.4980H-1(a)(49)(ii)(B). [↑](#footnote-ref-114)
115. Questions & Answers, American Bar Association’s Section of Taxation, Employee Benefits Committee, May 9, 2014 meeting in Washington, D.C., Q&A 25. available at <http://www.americanbar.org/content/dam/aba/events/employee_benefits/2014_irs_qa.authcheckdam.pdf>. [↑](#footnote-ref-115)
116. Id. [↑](#footnote-ref-116)
117. . Treas. Reg. § 54.4980H-1(a)(43). [↑](#footnote-ref-117)
118. Treas. Reg. § 54.4980H-3(c)(5) [↑](#footnote-ref-118)
119. Treas. Reg. § 54.4980H-3(c)(2) through (4). [↑](#footnote-ref-119)
120. IRC § 36B(c)(2)(C)(i). [↑](#footnote-ref-120)
121. Described in Treas. Reg. § 54.4980H-5. [↑](#footnote-ref-121)
122. IRC § 36B(c)(2)(C)(ii). [↑](#footnote-ref-122)
123. Treas. Reg. § 54.4980H-3(c)(4)(v). [↑](#footnote-ref-123)
124. 78 Fed. Reg. at 248. Examples 12 and 13. [↑](#footnote-ref-124)
125. 78 Fed. Reg. at 230. [↑](#footnote-ref-125)
126. 78 Fed. Reg. at 229. [↑](#footnote-ref-126)
127. 78 Fed. Reg. at 227 [↑](#footnote-ref-127)
128. . FLSA § 18C. [↑](#footnote-ref-128)
129. . *Idaho Ambucare Center Inc. v. U.S*., 57 F.3d 752 (9th Cir. 1995); *Sargent v. CIR*, 929 F.2d 1252 (8th Cir. 1991). [↑](#footnote-ref-129)
130. . IRC § 4980H(a). [↑](#footnote-ref-130)
131. . IRC § 4980H(b). [↑](#footnote-ref-131)
132. . Beginning in 2014, a health insurance issuer that offers health insurance coverage in the individual or small group market must include essential health benefits package required under section 1302(a) of the Patient Protection and Affordable Care Act. A small employer is “an employer who employed an average of at least 1 but not more than 100 employees on business days during the preceding calendar year and who employs at least two employees on the first day of the plan year.” For plan years beginning before January 1, 2016, a state may elect to define small employer as an employer who employed an average of at least 1 but not more than 50 employees on business days during the preceding calendar year, which likely will be appealing for states already using that definition. An employer not in existence throughout the preceding calendar year will determine whether it is a small or large employer “based on the average number of employees that it is reasonably expected such employer will employ on business days in the current calendar year.” The control and affiliated service group aggregation rules set forth in Code §§ 414(b), (c), (m), and (o) apply to count employees of an “employer.” [↑](#footnote-ref-132)
133. . Employers Can Minimize Their Exposure To Obamacare's Penalties By Offering Low-Cost 'Skinny' Coverage, Forbes (June 21, 2013) at http://www.forbes.com/sites/theapothecary/2013/05/21/employers-can-minimize-their-exposure-to-obamacares-health-insurance-mandate-by-offering-low-cost-skinny-coverage, Kevin McCurdy, "Skinny" Plans Under PPACA: Are They a Solution?, at http://www.mondaq.com/unitedstates/x/252518/Employee+Benefits+Compensation/Skinny+Plans+Under+PPACA+Are+They+a+Solution&email\_access=on. [↑](#footnote-ref-133)
134. . PPACA § 1301. [↑](#footnote-ref-134)
135. . Prop Reg. §1.5000A-2(c)(1) [↑](#footnote-ref-135)
136. . IRC § 5000A(f)(2)(B); Prop. Reg.§1.5000A-2(a) and (c)(1)(ii). [↑](#footnote-ref-136)
137. . Prop. Reg.§1.5000A-2(a)(c)(1)(iii). [↑](#footnote-ref-137)
138. . PPACA § 1302(b). [↑](#footnote-ref-138)
139. . 45 CFR § 156.100. [↑](#footnote-ref-139)
140. . Coverage is affordable for IRC § 4980H purposes if the cost to the employee of self-only coverage does not exceed 9.5 percent of the employee’s “household income.” This is true irrespective of whether he or she qualifies for some other level of coverage (e.g., self plus dependents, family). Thus, although family coverage might require a larger employee premium, affordability for IRC § 4980H purposes is determined based on the cost of self-only coverage. The Act defines “household income” to mean “modified adjusted gross income of the employee and any members of the employee’s family (including a spouse and dependents) who are required to file an income tax return.” Alternatively, employers may use one of three safe harbors as proxies: W-2, rate-of-pay, or Federal Line. [↑](#footnote-ref-140)
141. . To provide minimum value, a plan must pay for at least 60 percent of plan costs. The remaining 40 percent are paid for by the covered individual in the form of co-pays, deductibles, co-insurance, and other cost sharing features. [↑](#footnote-ref-141)
142. . Employers Eye Bare-Bones Health Plans Under New Law, Wall Street Journal (May 20, 2013) at http://online.wsj.com/article/SB10001424127887324787004578493274030598186.html. [↑](#footnote-ref-142)
143. . Id. [↑](#footnote-ref-143)
144. . Id. [↑](#footnote-ref-144)