**Definitions of “Employee” and “Employer” under the Employer Mandate Provisions of the Affordable Care Act**

**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. An employer includes a predecessor and successor employer. 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.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. “Disregarded entities” are not disregarded for §4980H purposes. The tax is imposed on the disregarded entity and not its owner(s).

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

The employer mandate was effective by statute in 2014 but the effective date has been postponed until 2015. The final regulations provide additional transition relief for 2015 and 2016. 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. 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.

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. 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.

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. 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) .***

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.

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 adopt the position 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 below.

**How do the final employer mandate regulations define contingent workers (leased employees and 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 and individuals hired through temporary staffing firms and independent contractors. 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.

It should be noted that the regulations 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 than 2-percent S corporation shareholders, and certain direct sellers and real estate agents.

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.

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. 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).

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.

 **Which workers are not considered “employees”?**

Various self-employed individuals are not “employees”. These include 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 is not an employee for these rules. 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.

**What is azsesser5555555r665ea dependent for purposes of the employer mandate?**

 Code section 4980H does not define the term “dependent,” Code section 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.”