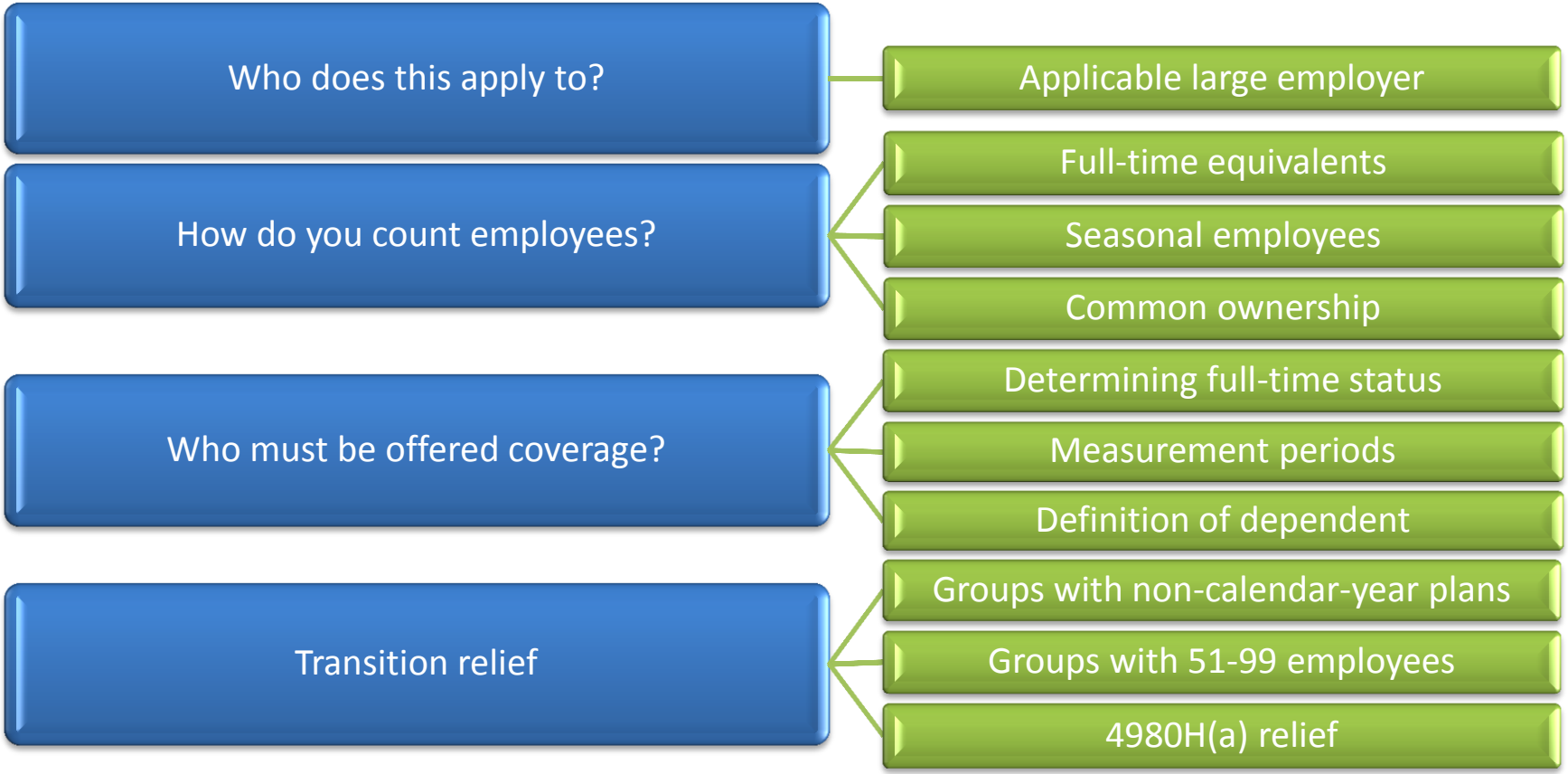
Module VII

EMPLOYER MANDATE

Employer Mandate



In This Module

Two primary sources:

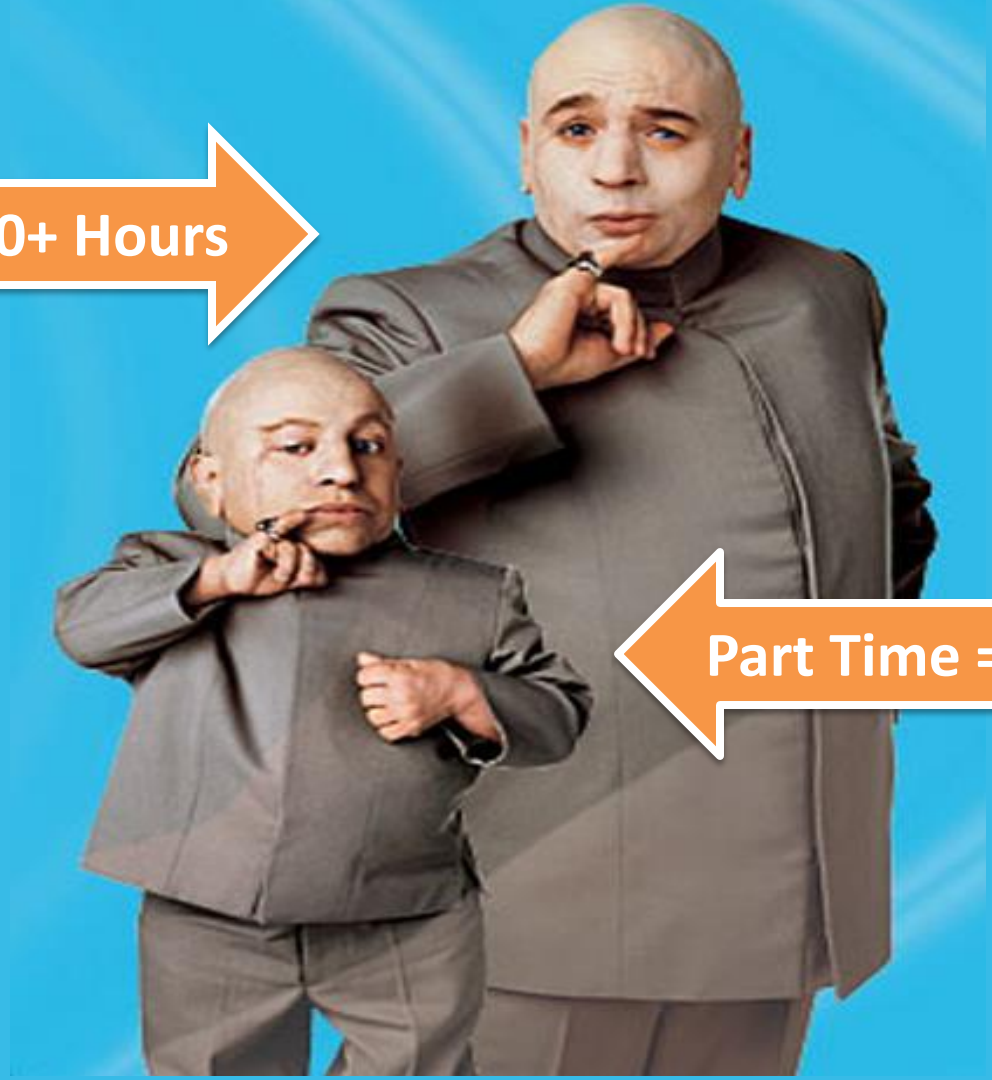
- Final rule issued by the IRS on February 12, 2014.
- Accompanying FAQs issued by the IRS on February 12, 2014.

Most prior guidance is either no longer relevant or is incorporated into the final rules.

Applicable Large Employer

50+ FTEs

Full Time = 30+ Hours



Part Time = % of Full-Time

The Employer Mandate – Summarized

Does NOT offer coverage to at least 95% of full-time employees

- $2,000 penalty per full-time employee with first 30 excluded
- Not tax deductible
- “Sledge hammer penalty”

DOES offer coverage to at least 95% of full-time employees

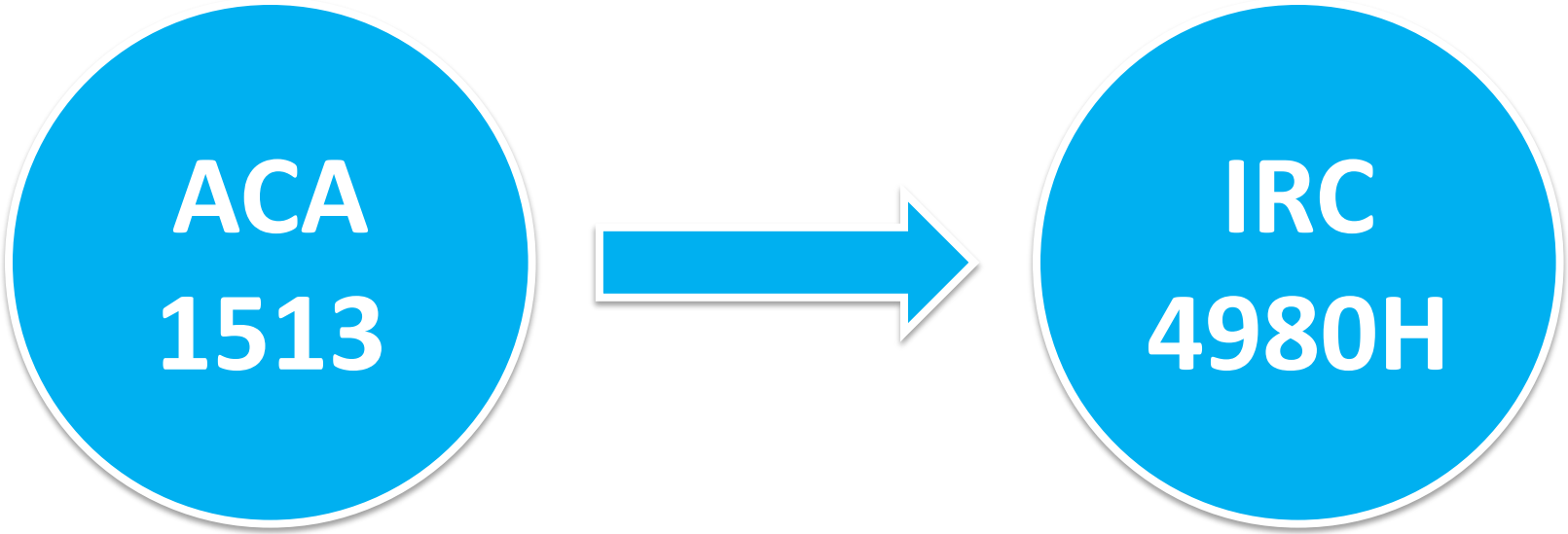
- $3,000 penalty per full-time employee that gets a tax credit
- Not tax deductible
- “Tack hammer penalty”

(Section 4980H)

I. SHARED RESPONSIBILITY FOR EMPLOYERS

The Employer Mandate = 4980H

- IRC Section 4980H – THE EMPLOYER MANDATE - was added by ACA section 1513.



Applies to Groups Averaging 50+ FTEs Last Year

Applicable large employer: an employer that employed an average of at least 50 full-time employees (including full-time equivalent employees, FTEs) on business days during the preceding calendar year.

Penalty

Penalty for employers that don't offer qualified, affordable coverage if any full-time employee accesses tax credit:

- $2,000 per full-timer minus first 30 if no coverage offered
- $3,000 per employee that gets tax credit if coverage offered

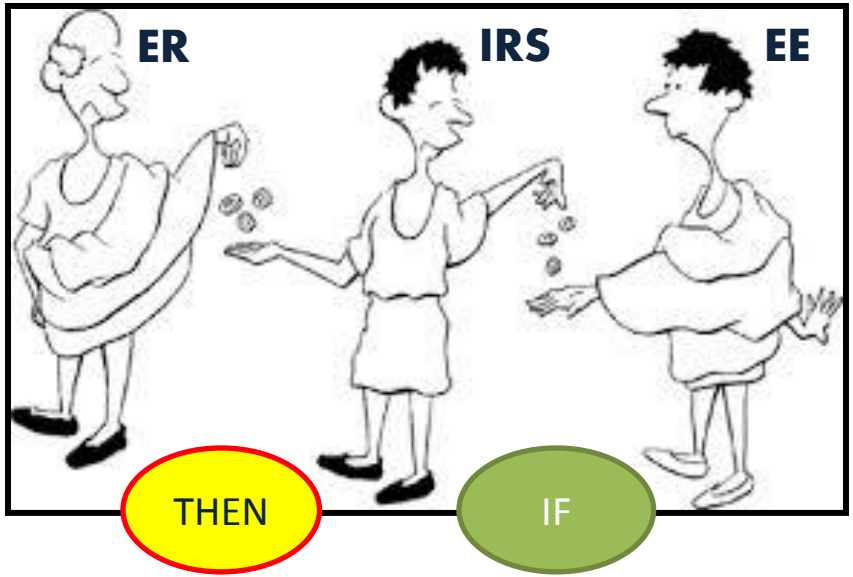
Previous Guidance

2011-12	• 4 notices
Dec. 28, 2012	• Proposed rules
July 9, 2013	• **IRS Notice 2013-45** • Employer mandate penalty wouldn't apply in 2014 • No 6056 reporting requirements for 2014

(Sections 5000A and 36B)

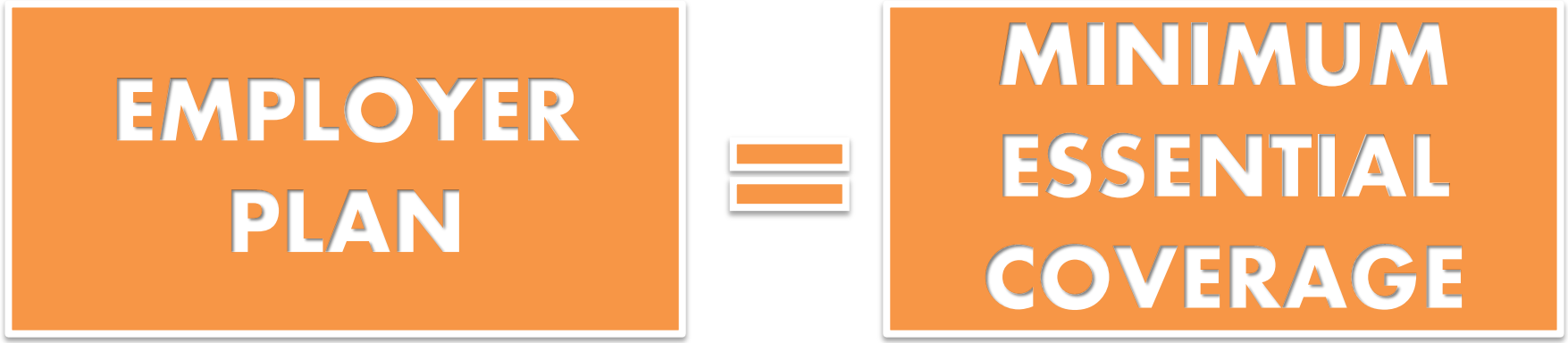
II. MINIMUM ESSENTIAL COVERAGE, MINIMUM VALUE AND AFFORDABILITY

Employer only pays a penalty if an employee gets a tax credit



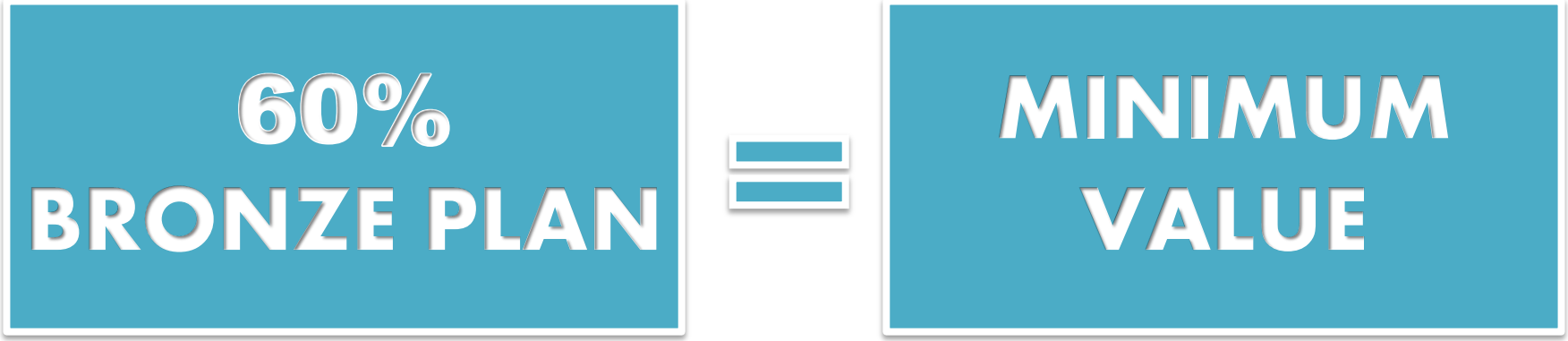
Minimum Essential Coverage

- An eligible employer-sponsored plan is considered Minimum Essential Coverage.



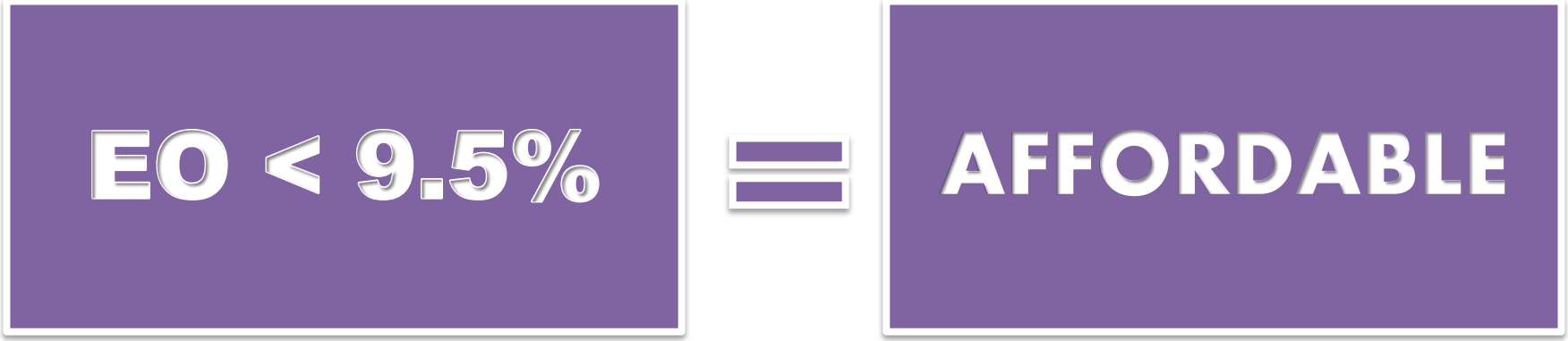
Minimum Value

- If the coverage offered by an employer fails to provide MV, an employee may be eligible to receive coverage in a qualified health plan supported by the premium tax credit.
- A plan fails to provide MV if the plan's share of the total allowed costs of benefits provided under the plan is less than 60 percent of those costs.



Affordability

- An employee is not eligible for subsidized coverage if eligible employer-sponsored plan is offered that provides MV and that is affordable to the employee.
- Coverage for an employee under an eligible employer-sponsored plan is affordable if the employee's required contribution for self-only coverage does not exceed 9.5 percent of the taxpayer's household income for the taxable year.



(Section 6056)

III. REPORTING REQUIREMENTS FOR APPLICABLE LARGE EMPLOYERS

Section 6056

Section 6056, enacted by the Affordable Care Act, directs an applicable large employer to file a return with the IRS that reports, for each employee who was a full-time employee for one or more months during the calendar year, certain information described in section 6056(b) about the health care coverage the employer offered to that employee (or, if applicable, that the employer did not offer health care coverage to that employee).

Section 6056 also requires applicable large employers to furnish, by January 31 of the calendar year following the calendar year for which the return must be filed, a related statement described in section 6056(c) to each full-time employee for whom information is required to be included on the return.

Section 6056 Proposed Rule

September 5, 2013: Treasury Department and the IRS released proposed rules providing guidance under section 6056

- Included certain simplified reporting methods under consideration by the Treasury Department and the IRS.

(Public Health Service Act Section 2708)

IV. THE 90-DAY LIMIT ON WAITING PERIODS

90 Day Waiting Period

For plan years beginning on or after January 1, 2014, a group health plan or health insurance issuer offering group health insurance coverage may not apply any waiting period that exceeds 90 days.

Section 2708 of the PHS Act does not require the employer to offer coverage to any particular employee or class of employees, but prevents an otherwise eligible employee (or dependent) from waiting more than 90 days before coverage becomes effective.

90 Day Waiting Period

There are times when an employer will not be subject to an assessable payment with respect to an employee although the employer does not offer coverage to that employee during that time.

However, the fact that an employer will not owe an assessable payment under section 4980H for failure to offer coverage during certain periods of time does not, by itself, constitute compliance with section 2708 of the PHS Act during that same period.

V. DETERMINATION OF STATUS AS AN APPLICABLE LARGE EMPLOYER

Full Time Equivalents

- Full-time equivalents must be counted **when determining large employer status**.

<30 hours = fraction of full time employee

30+ hours = full time employee

Common Ownership

An applicable large employer may consist of multiple related entities (such as corporations) due to the application of the aggregation rules.

Each such entity is referred to as an ***applicable large employer member***.

Companies not in existence throughout the preceding calendar year

Determination of whether such employer is an applicable large employer for the current calendar year is based on the **average number of employees that it is reasonably expected such employer will employ** on business days in the current calendar year.

An employer is treated as not having been in existence throughout the prior calendar year only if the employer was not in existence on any business day in the prior calendar year.

Seasonal Workers

An employer is not considered to employ more than 50 full-time employees if

- the employer's workforce exceeds 50 full-time employees for 120 days or fewer during the calendar year, and
- the employees in excess of 50 employed during such 120-day period are seasonal workers.

Example

- Company normally has 35 employees
- Staffs up during 3-month holiday season to 80 employees
- Still considered a small group because did not employ 50+ for 120+ days

Seasonal Workers

Seasonal Worker: a worker who performs labor or services on a seasonal basis as defined by the Secretary of Labor, including (but not limited to) workers covered by 29 CFR 500.20(s)(1) and retail workers employed exclusively during holiday seasons.

Reasonable Good Faith Interpretation

Employers may apply a ***reasonable, good faith interpretation*** of the term seasonal worker.

Aggregation Rules

For purposes of determining whether an employer is an applicable large employer, companies treated as a single employer under section 414(b), (c), (m) or (o) are treated as one employer.

414 b

(b) Employees of controlled group of corporations

- For purposes of sections 401, 408 (k), 408 (p), 410, 411, 415, and 416, all employees of all corporations which are members of a controlled group of corporations (within the meaning of section 1563 (a), determined without regard to section 1563 (a)(4) and (e)(3)(C)) shall be treated as employed by a single employer. With respect to a plan adopted by more than one such corporation, the applicable limitations provided by section 404 (a) shall be determined as if all such employers were a single employer, and allocated to each employer in accordance with regulations prescribed by the Secretary.

414 c

(c) Employees of partnerships, proprietorships, etc., which are under common control

- For purposes of sections 401, 408 (k), 408 (p), 410, 411, 415, and 416, under regulations prescribed by the Secretary, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer. The regulations prescribed under this subsection shall be based on principles similar to the principles which apply in the case of subsection (b).

414 m

(m) Employees of an affiliated service group

- (1) In general : For purposes of the employee benefit requirements listed in paragraph (4), except to the extent otherwise provided in regulations, all employees of the members of an affiliated service group shall be treated as employed by a single employer.
- (2) Affiliated service group: For purposes of this subsection, the term “affiliated service group” means a group consisting of a service organization (hereinafter in this paragraph referred to as the “first organization”) and one or more of the following:
  - (A) any service organization which— (i) is a shareholder or partner in the first organization, and (ii) regularly performs services for the first organization or is regularly associated with the first organization in performing services for third persons, and
  - (B) any other organization if— (i) a significant portion of the business of such organization is the performance of services (for the first organization, for organizations described in subparagraph (A), or for both) of a type historically performed in such service field by employees, and (ii) 10 percent or more of the interests in such organization is held by persons who are highly compensated employees (within the meaning of section 414(q)) of the first organization or an organization described in subparagraph (A).
- (3) Service organizations: For purposes of this subsection, the term “service organization” means an organization the principal business of which is the performance of services.

(m) Employees of an affiliated service group

- (4) Employee benefit requirements: For purposes of this subsection, the employee benefit requirements listed in this paragraph are—
  - (A) paragraphs (3), (4), (7), (16), (17), and (26) of section 401 (a), and
  - (B) sections 408 (k), 408 (p), 410, 411, 415, and 416.
- (5) Certain organizations performing management functions: For purposes of this subsection, the term “affiliated service group” also includes a group consisting of—
  - (A) an organization the principal business of which is performing, on a regular and continuing basis, management functions for 1 organization (or for 1 organization and other organizations related to such 1 organization), and
  - (B) the organization (and related organizations) for which such functions are so performed by the organization described in subparagraph (A).
- For purposes of this paragraph, the term “related organizations” has the same meaning as the term “related persons” when used in section 144 (a)(3).
- (6) Other definitions: for purposes of this subsection—
  - (A) Organization defined: The term “organization” means a corporation, partnership, or other organization.
  - (B) Ownership: In determining ownership, the principles of section 318 (a) shall apply.

(o) Regulations

- The Secretary shall prescribe such regulations (which may provide rules in addition to the rules contained in subsections (m) and (n)) as may be necessary to prevent the avoidance of any employee benefit requirement listed in subsection (m)(4) or (n)(3) or any requirement under section 457 through the use of—
  - separate organizations,
  - employee leasing, or
  - other arrangements.
- The regulations prescribed under subsection (n) shall include provisions to minimize the recordkeeping requirements of subsection (n) in the case of an employer which has no top-heavy plans (within the meaning of section 416 (g)) and which uses the services of persons (other than employees) for an insignificant percentage of the employer's total workload.

Aggregation Rules

The determination of any potential assessable payment under section 4980H(a) or (b) is made separately for each entity (referred to as an applicable large employer member) that together with other entities is treated as the applicable large employer.

Aggregation Rules – Example

- 80 person group: $3,000 penalty for each full-timer who gets a subsidy
- 40 person group: $2,000 penalty on all but 33% of it's first 30 employees

80 full-time employees

Offers MEC

40 full-time employees

Does not offer MEC

Government entities, and churches

Until further guidance is issued, those entities may apply a ***reasonable, good faith interpretation*** of section 414(b), (c), (m) and (o) in determining their status as an applicable large employer.

Predecessor Employers

For purposes of determining whether an employer is an applicable large employer, any reference to an employer includes a reference to any predecessor of the employer.

Until further guidance is issued, taxpayers may rely upon a ***reasonable, good faith interpretation*** of the statutory provision on predecessor (and successor) employers for purposes of the applicable large employer determination.

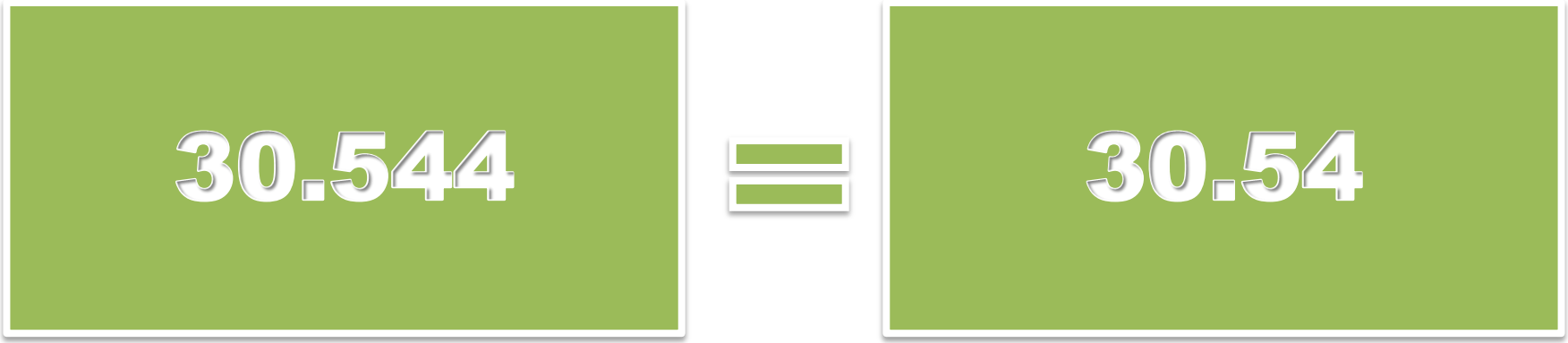
For this purpose, use of the rules developed in the employment tax context for determining when wages paid by a predecessor employer may be considered as having been paid by the successor employer (see § 31.3121(a)(1)-1(b)) is deemed reasonable.

Administrative Period for New Applicable Large Employers

- With respect to an employee who was not offered coverage at any point in the prior calendar year, that if the applicable large employer offers coverage on or before April 1 of the first year in which the employer is an applicable large employer, the employer will not be subject to an assessable payment (for January through March of the first year the employer is an applicable large employer) under section 4980H(a) by reason of its failure to offer coverage to the employee for January through March of that year, and the employer will not be subject to an assessable payment (for January through March of the first year the employer is an applicable large employer) under section 4980H(b) if the coverage offered provides MV.
- However, if the employer does not provide coverage (or does provide coverage but it doesn't meet minimum value) by April 1, it may be subject to a cap a or cap b penalty for those first three months.
- This rule applies only during the first year for which an employer is an applicable large employer

Rounding FTE Count

- In response to a request for a rounding rule, the final regulations provide, as an option, that an employer may round the resulting monthly FTE calculation to the nearest one hundredth.
- For example, an employer with a calculation of 30.544 FTEs for a calendar month may round that number to 30.54 FTEs.



Break Period Rules and Special Unpaid Leave Rules

- These final regulations also provide a method under which special unpaid leave and employment break periods during a measurement period are not treated as a period during which zero hours of service are credited when applying the look-back measurement method.
- ***These rules are not extended to the applicable large employer determination calculation.***

VI. HOURS OF SERVICE

Hours of Service – Definition

Each hour for which an employee is paid, or entitled to payment, for the performance of duties for the employer

Each hour for which an employee is paid, or entitled to payment by the employer for a period of time during which no duties are performed due to:

Vacation	Holiday	Illness	Incapacity (including disability)	Layoff	Jury duty	Military duty	Leave of absence

Hours of Service – Hourly Employees

- For employees paid on an hourly basis, an employer is required to calculate actual hours of service from records of hours worked and hours for which payment is made or due.

Hours of Service – Salaried Employees

- **For employees paid on a non-hourly basis** (such as salaried employees), an employer may calculate the actual hours of service using the same method as for hourly employees, or use a **days-worked equivalency crediting the employee with eight hours of service for each day for which the employee would be required to be credited with at least one hour of service**, or a weeks-worked equivalency whereby an employee would be credited with 40 hours of service for each week for which the employee would be required to be credited with at least one hour of service.
- Use of these equivalencies is prohibited in circumstances in which their use would result in a substantial understatement of an employee's hours of service in a manner that would cause that employee not to be treated as a full-time employee.

Hours of Service

- An employer is not required to use the same method of calculating a non-hourly employee's hours of service for all non-hourly employees, and may apply different methods of calculating a non-hourly employee's hours of service for different categories of non-hourly employees, provided that the categories are reasonable and consistently applied.
- An employer may change the method of calculating a non-hourly employee's hours of service for one or more categories of non-hourly employees for each calendar year as well.

Hours of Service – Salaried Employees

- **Example:** If an employer had 100 non-hourly employees who each worked two days per week for 10 hours each day, the employer could not use the days-worked equivalency because that would result in 400 fewer hours of service being included in the FTE calculation for each week, even though the understatement would not affect the employees' treatment as full-time employees (because these employees are not full-time employees, regardless of the use of equivalencies).

Volunteer Employees

- Hours worked by a volunteer who does not receive (and is not entitled to receive) compensation in exchange for the performance of services are not treated as hours of service for purposes of section 4980H.
- The final regulations provide that hours of service do not include hours worked as a "bona fide volunteer." For this purpose, the definition of "bona fide volunteer" is generally based on the definition of that term for purposes of section 457(e)(11)(B)(i), which provides special rules for length of service awards offered to certain volunteer firefighters and emergency medical providers under a municipal deferred compensation plan.
- For purposes of section 4980H, however, bona fide volunteers are not limited to volunteer firefighters and emergency medical providers. Rather, bona fide volunteers include any volunteer who is an employee of a government entity or an organization described in section 501(c) that is exempt from taxation under section 501(a) whose only compensation from that entity or organization is in the form of (i) reimbursement for (or reasonable allowance for) reasonable expenses incurred in the performance of services by volunteers, or (ii) reasonable benefits (including length of service awards), and nominal fees, customarily paid by similar entities in connection with the performance of services by volunteers.

Student Employees

- The federal work study program, as a federally subsidized financial aid program, is distinct from traditional employment in that its primary purpose is to advance education. See 34 CFR part 675. To avoid having the application of section 4980H interfere with the attainment of that goal, the final regulations provide that hours of service for section 4980H purposes **do not include hours of service performed by students in positions subsidized through the federal work study program** or a substantially similar program of a State or political subdivision thereof.
- **However, the final regulations do not include a general exception for student employees.** All hours of service for which a student employee of an educational organization (or of an outside employer) is paid or entitled to payment in a capacity other than through the federal work study program (or a State or local government's equivalent) are required to be counted as hours of service for section 4980H purposes.
- Services by an intern or extern would not count as hours of service for section 4980H purposes under the general definition of hours of service contained in the regulations to the extent that the student does not receive, and is not entitled to, payment in connection with those hours.

Members of Religious Orders

- Until further guidance is issued, a religious order is permitted, for purposes of determining whether an employee is a full-time employee under section 4980H, to not count as an hour of service any work performed by an individual who is subject to a vow of poverty as a member of that order when the work is in the performance of tasks usually required (and to the extent usually required) of an active member of the order.

Applying Hours of Service to Certain Employees

- Until further guidance is issued, employers of adjunct faculty, employers of employees with layover hours, including the airline industry, and employers of employees with on-call hours, as described in sections VI.C.1 through VI.C.3 of this preamble, respectively, are required to use a reasonable method of crediting hours of service that is consistent with section 4980H.
- Further, employers of other employees whose hours of service are particularly challenging to identify or track or for whom the final regulations' general rules for determining hours of service may present special difficulties, such as commissioned salespeople, are required to use a reasonable method of crediting hours of service that is consistent with section 4980H.
- A method of crediting hours is not reasonable if it takes into account only a portion of an employee's hours of service with the effect of characterizing, as a non-full-time employee, an employee in a position that traditionally involves at least 30 hours of service per week. For example, it is not a reasonable method of crediting hours to fail to take into account travel time for a travelling salesperson compensated on a commission basis.

Adjunct Faculty

- A reasonable method for crediting spent preparing for class is permitted.

Layover Hours

- With respect to layover hours, it is not reasonable for an employer to not credit a layover hour as an hour of service if the employee receives compensation for the layover hour beyond any compensation that the employee would have received without regard to the layover hour or if the layover hour is counted by the employer towards the required hours of service for the employee to earn his or her regular compensation.

On Call Hours

- It is not reasonable for an employer to fail to credit an employee with an hour of service for any on-call hour for which payment is made or due by the employer, for which the employee is required to remain on-call on the employer's premises, or for which the employee's activities while remaining on-call are subject to substantial restrictions that prevent the employee from using the time effectively for the employee's own purposes.

VII. IDENTIFICATION OF FULL-TIME EMPLOYEES

Two Methods to Determine Full-Time Employment Status

Full-time employee:

with respect to any month, an employee who is employed on average at least 30 hours of service per week.

Two methods for determining full-time employee status

- the **monthly measurement method**
- the **look-back measurement method**

Only the Minimum Standards

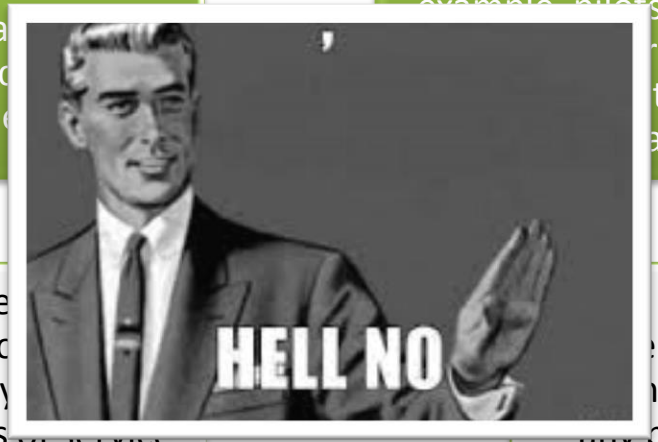
The requirements for use of the look-back measurement method and the monthly measurement method prescribe **minimum standards** for the identification of full-time employees for purposes of the employer mandate.

Employers may always treat additional employees as eligible for coverage, subject to compliance with any nondiscrimination or other applicable requirements.

Requests to Change 30 Hour Threshold

Commenters requested that the 30 hours of service per week threshold be increased as part of the final regulations, either genera
applied with respect to
positions or industri

Other commenters pointed to employees whose hours of service are restricted by federal or other law (for
s), arguing that in such
threshold should be
termine whether the
a full-time employee.



Because the statute
that the threshold fo
a full-time employ
average of 30 hours
per week, the final regulations do not adopt these suggestions.

30 hours of service
old is not adjusted for
particular industry or position of employment in the final regulations.

Monthly Equivalency

- The proposed regulations provide that, for purposes of determining full-time employee status, 130 hours of service in a calendar month is treated as the monthly equivalent of at least 30 hours of service per week, provided that the employer applies this equivalency rule on a reasonable and consistent basis. This monthly standard takes into account that the average month consists of more than four weeks.
- Commenters suggested that the 130 hours of service monthly standard is not an appropriate proxy for 30 hours of service per week during certain shorter calendar months.
- However, the 130 hours of service monthly standard may also be lower than an average of 30 hours of service per week during other longer months of the calendar year (for example, the seven calendar months that consist of 31 days).
- Under the look-back measurement method in particular, any effect of this approximation will balance out over the calendar year (for example, over a 12-month measurement period, over two successive six-month measurement periods, or over four successive three-month measurement periods).

Monthly Equivalency – Alternatives Considered

- In developing the final regulations, the Treasury Department and the IRS considered whether the 130 hours of service monthly equivalency standard should apply to the monthly measurement method, described in section VII.B of this preamble, under which the determination of full-time employee status is based on each calendar month.
- A standard was considered that would prorate any additional days beyond the minimum 28 days in a calendar month, so that, for example, the months of January, March, May, July, August, October, and December would be treated as requiring 133 hours of service for full-time employee status (equal to 4 3/7 weeks multiplied by 30 hours of service per week).
- However, that standard would result in no less than three different monthly equivalencies (one for February, one for the four calendar months with 30 days, and one for the seven calendar months with 31 days).

Monthly Equivalency – Alternatives Considered

- In addition, a calendar month may start on any day of the week, and there is no standard workweek for all employees so that some employees may, for example, perform services on weekends or for longer or varying shifts rather than set hours Monday through Friday. For these reasons, different standards for each calendar month would not only be an additional burden for employers, but also do little to address the variation in treatment that may occur, for example, between an employee generally performing hours of service on the weekend and an employee performing services on business days, solely due to the day of the week upon which a calendar month begins.
- **Accordingly, the final regulations adopt a standard of 130 hours of service per calendar month for determining whether an employee is a full-time employee under both the look-back measurement method and the monthly measurement method.**
- The 130 hours of service standard is equal to 30 hours of service per week multiplied by 52 weeks and divided by 12 calendar months.

Common Ownership – Aggregation of Hours

For purposes of identifying a full-time employee, hours of service must be counted across all applicable large employer members.

For example, an employee who for a calendar month averaged 25 hours of service per week at one applicable large employer member and 15 hours of service per week at another applicable large employer member of the same applicable large employer would be a full-time employee for that calendar month.

Monthly Measurement Method

- Commenters requested further information about the identification of full-time employees by employers electing not to use the look-back measurement method.
- Pursuant to the statute, these full-time employees would be identified based on the hours of service for each calendar month; accordingly, these regulations refer to this method of identifying full-time employees as the ***monthly measurement method***.

Monthly Measurement Method

- Under the look-back measurement method set forth in the proposed regulations, if an employee is reasonably expected at his or her start date to be a full-time employee, an employer that sponsors a group health plan that offers coverage to the employee at or before the conclusion of the employee's initial three full calendar months of employment will not be subject to an assessable payment under section 4980H by reason of its failure to offer coverage to the employee for up to the initial three full calendar months of employment.
- See section VII.D of this preamble for a discussion of clarifications made to this rule in the final regulations. In developing the final regulations, the Treasury Department and the IRS considered whether a similar rule should be provided under the monthly measurement method.

Monthly Measurement Method

- Under the monthly measurement method in the final regulations, an employer will not be subject to an assessable payment under section 4980H(a) with respect to an employee because of a failure to offer coverage to that employee before the end of the period of three full calendar months beginning with the first full calendar month in which the employee is otherwise eligible for an offer of coverage under a group health plan of the employer if the employee is offered coverage no later than the day after the end of that three-month period.
- If the coverage for which the employee is otherwise eligible provides MV, the employer also will not be subject to an assessable payment under section 4980H(b) during that three-month period. For this purpose, an employee is otherwise eligible for an offer of coverage in a month if the employee meets all conditions to be offered coverage under the plan other than the completion of a waiting period, within the meaning of § 54.9801-2.

Monthly Measurement Method

- This rule applies only once per period of employment of an employee and applies with respect to each of the three full calendar months for which the employee is otherwise eligible for an offer of coverage under a group health plan of the employer.
- Accordingly, the relief may be available even if the employee terminates before that date (and before coverage is offered).

Monthly Measurement Method

- To avoid inequitable application of the rule that applies to employees who are first otherwise eligible for an offer of coverage by characterizing former employees as rehired employees after a short period of absence, the final regulations clarify that under the monthly measurement method, an employee must be treated as a continuing employee, rather than a new hire, unless the employee has had a period of at least 13 weeks during which no hours of service were credited (26 weeks for an employee of an employer that is an educational organization).
- At the employer's option, the employee may be treated as a new hire if the employee is not credited with any hours of service during a period that is both at least four consecutive weeks' duration and longer than the employee's immediately preceding period of employment.
- For a description of the rehire rules, see section VII.E of this preamble.

Monthly Measurement Method

- In determining how an employer should treat periods during which an employee is not credited with hours of service, the final regulations clarify that under the monthly measurement method, the special unpaid leave and employment break period rules do not apply.
- That is because determinations under the monthly measurement method are based on hours of service during that particular calendar month and are not based on averaging over a prior measurement period.
- For a description of the special unpaid leave and employment break period rules see section VII.E.2 of this preamble.

Monthly Measurement Method

- Commenters requested that the monthly measurement method be applied in a manner that approximated or otherwise took into account payroll periods.
- To provide additional flexibility and reduce administrative burden on employers, the final regulations allow an employer to determine an employee's full-time employee status for a calendar month under the monthly measurement method based on the hours of service over successive one-week periods.
- Under this optional method, referred to as the weekly rule, full-time employee status for certain calendar months is based on hours of service over four-week periods and for certain other calendar months on hours of service over five-week periods.

Monthly Measurement Method

- In general, the period measured for the month must contain either the week that includes the first day of the month or the week that includes the last day of the month, but not both.
- For this purpose, week means any period of seven consecutive calendar days applied consistently by the applicable large employer member for each calendar month of the year.
- For calendar months calculated using four week periods, an employee with at least 120 hours of service is a full-time employee, and for calendar months calculated using five week periods, an employee with at least 150 hours of service is a full-time employee.
- However, for purposes of coordination with both the **premium tax credit** and the section 5000A individual shared responsibility provisions, which are applied on a calendar month basis, an applicable large **employer is only treated as having offered coverage under section 4980H for a calendar month if it offers coverage to a full-time employee for the entire calendar month, regardless of whether the employer uses the weekly rule.**

Look-Back Measurement Method

- The proposed regulations provide a method, referred to as the look-back measurement method, under which employers may determine the status of an employee as a full-time employee during a future period (referred to as the stability period), based upon the hours of service of the employee in a prior period (referred to as the measurement period).
- **The look-back measurement method for identifying full-time employees is available only for purposes of determining and computing liability under section 4980H and not for purposes of determining status as an applicable large employer.**

Look-Back Measurement Method

- Under the look-back measurement method for ongoing employees, an applicable large employer member determines each ongoing employee's full-time employee status by looking back at a standard measurement period of at least three months but not more than 12 months, as determined by the employer.
- The applicable large employer member determines the months in which the standard measurement period starts and ends, provided that the determination must be made on a uniform and consistent basis for all employees in the same category.
- If the applicable large employer member determines that an employee was employed on average at least 30 hours of service per week during the standard measurement period, then the applicable large employer member treats the employee as a full-time employee during a subsequent stability period, regardless of the employee's number of hours of service during the stability period, so long as the worker remains an employee.

Look-Back Measurement Method

- The proposed regulations also provide look-back measurement method rules for new employees, including rules for employees who are reasonably expected to be full-time employees at the start date, and those who are variable hour employees or seasonal employees.
- A variable hour employee or seasonal employee will have his or her status as a full-time employee determined after an initial measurement period.
- The proposed regulations then provide transition guidance under which a new employee transitions into having his or her status as a full-time employee determined under the look-back measurement method rules applicable to ongoing employees.

Look-Back Measurement Method

- Although some commenters suggested that the look-back measurement method of identifying full-time employees be eliminated, other commenters requested that it be retained.
- The look-back measurement method is intended as a method of crediting employees with hours of service they earn (during a measurement period) while also providing employers predictability in being able to identify full-time employees before the beginning of a potential coverage period (during a stability period).
- After reviewing the comments, the Treasury Department and the IRS have concluded that this method provides a practical and fair method for determining average hours of service that will facilitate compliance with section 4980H. Accordingly, the final regulations continue to permit a look-back measurement method as an optional method for identifying full-time employees.

Reasonable Expectations With Respect to a New Employee

- Under both the proposed regulations and the final regulations, the application of the look-back measurement method to a new employee depends on the employer's reasonable expectations with respect to the status of the new employee at his or her start date.
- Under the final regulations, if a new employee who is reasonably expected to be a full-time employee at his or her start date is offered coverage by the first day of the month immediately following the conclusion of the employee's initial three full calendar months of employment (and if the employee was otherwise eligible for an offer of coverage during those three months), the employer is not subject to a section 4980H assessable payment for those initial three full calendar months of employment (or for the period prior to the initial three full calendar months of employment), provided that to avoid liability under section 4980H(b) for the initial three full calendar months, the coverage offered after the initial three full calendar months of employment must provide MV.
- Otherwise, with respect to a new employee who is reasonably expected to be a full-time employee at his or her start date, the employer may be subject to a section 4980H assessable payment beginning with the first full calendar month in which an employee is a full-time employee.

Reasonable Expectations With Respect to a New Employee

- Commenters requested further guidance on the circumstances under which an employer may reasonably expect a new hire to be a full-time employee.
- In response to these comments, the final regulations provide that whether an employer's determination that a new hire is not a full-time employee (or is a full-time employee) is reasonable is based on the facts and circumstances.
- Factors to consider include, but are not limited to, 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.

Reasonable Expectations With Respect to a New Employee

- Commenters also requested that employers that are educational organizations be prohibited from taking potential employment break periods into account in determining their expectations of future hours of service.
- For a description of the employment break period rule, see section VII.E.2 of this preamble.
- The final regulations clarify that educational organization employers cannot take into account the potential for, or likelihood of, an employment break period in determining their expectations of future hours of service.

Administrative Period

- Under the proposed and final regulations, an applicable large employer member using the look-back measurement method may, at its option, elect to add an administrative period of no longer than 90 days between the measurement period and the stability period.
- Under the proposed regulations, the term administrative period is defined as an optional period, selected by an applicable large employer member, of no longer than 90 days beginning immediately following the end of a measurement period and ending immediately before the start of the associated stability period.

Administrative Period

- However, the proposed regulations also provide that the period between a variable hour or seasonal employee's start date and the beginning of the initial measurement period must be taken into account in determining the administrative period.
- The definition of administrative period in the final regulations is revised to reflect that it also includes periods before the initial measurement period.
- Thus, the combined length of the period before the start of the initial measurement period and the period beginning immediately after the end of the initial measurement period and ending immediately before the beginning of the associated stability period is subject to an overall limit of 90 days.

Administrative Period

- **Commenters requested that the maximum permissible administrative period be extended from 90 days to three full calendar months.**
- The proposed regulations regarding the administrative period in these circumstances were intended to allow employers to structure their plans to coordinate with section 2708 of the PHS Act (relating to the application of the 90-day limitation on waiting periods) in all circumstances. For this reason, the final regulations do not adopt this suggestion.

Stability Periods That Are Longer Than the Measurement Periods

- In general, under the proposed regulations, the minimum length of a measurement period is three months but the minimum length of a stability period for an employee who is a full-time employee based on hours of service in a measurement period is six months.
- **Commenters requested that a three-month stability period be permitted if the employer uses a three-month measurement period** and the employee is determined to be a full-time employee during the measurement period.
- The Treasury Department and the IRS remain concerned that permitting stability periods as short as three months for employees who are full-time employees based on hours of service in the measurement period could lead to employees moving in and out of employer coverage (and potentially Exchange coverage) multiple times during the year, which would be undesirable from both the employee's and employer's perspective, and could also create administrative challenges for the Exchanges. Accordingly, **this suggestion is not adopted**.

Stability Periods That Are Longer Than the Measurement Periods

- Commenters also asked for clarification of the measurement period that may be used for the subsequent six-month stability period in cases in which a less-than-six month measurement period is used (such as a three-month measurement period) and the employee averages at least 30 hours of service per week during the measurement period, so that a stability period of at least six months must be applied.
- The final regulations clarify that the stability period refers to the period immediately following the measurement period and any associated administrative period.
- Therefore, for employees who average at least 30 hours of service per week during a measurement period, who thus must be treated as full-time employees during an associated six-month stability period, the next measurement period begins at a date during the stability period that is the latest date that will not result in any period between the end of that stability period and the beginning of the next stability period associated with the next measurement period.

Stability Periods That Are Longer Than the Measurement Periods

- **For example:** Suppose an employer uses a three-month measurement period consisting of January through March of Year 1, followed by a one month administrative period consisting of April of Year 1.
- In this example, employees who average 30 hours of service per week during the measurement period consisting of January through March of Year 1 must be treated as full-time employees during a six-month stability period consisting of May through October of Year 1.
- The next measurement period would be July through September of Year 1, the associated administrative period would be October of Year 1, and the next associated stability period would begin immediately at the end of the administrative period.
- Thus, the stability period for employees determined to be full-time employees during the measurement period consisting of July through September of Year 1 would consist of November of Year 1 through April of Year 2 and there would be no period between the end of the first stability period (October 31 of Year 1) and the beginning of the next stability period (November 1 of Year 1).
- For ongoing employees that do not average at least 30 hours of service per week during a measurement period, the length of the stability period cannot exceed the length of the measurement period.

EE Categories with Different Measurement and Stability Periods

- The proposed regulations permit an employer to use measurement periods and stability periods that differ either in length or in their starting and ending dates for different categories of employees specified in the regulations, provided that the employees within each category are treated consistently.
- The categories specified in the proposed regulations are salaried employees and hourly employees, employees whose primary places of employment are in different states, collectively bargained employees and non-collectively bargained employees, and each group of collectively bargained employees covered by a separate collective bargaining arrangement.
- Commenters requested that these categories be expanded to, for example, any category established in good faith and consistent with business practices, any category of hourly employees based on payroll classifications, any category of employees of employers in an industry that demonstrates higher turnover than other industries, and any category of employees with turnover that is higher than other categories. The final regulations do not adopt these requests because of the associated administrative difficulties.

EE Categories with Different Measurement and Stability Periods

- Notice 2012-58 had also included employees of different entities as a separate category of employees. The preamble to the proposed regulations provides that because section 4980H generally is applied on an applicable large employer member-by-member basis, including the method of identifying full-time employees, there is no need for a distinct category for employees of different entities, as each such member is a separate entity.
- However, comments to the proposed regulations requested that the final regulations confirm that different applicable large employer members may use different starting and ending dates and lengths of measurement and stability periods.
- In response, the final regulations include this confirmation as well as confirmation that different applicable large employer members may use different measurement methods (the look-back measurement method or the monthly measurement method).

Variable Hour Employees

- As described in the preamble to the proposed regulations, with respect to certain positions of employment, employers have indicated that they could not determine at the start date whether the employee would be a full-time employee because an employee's hours of service in that position may vary significantly.
- Particularly in the hospitality and retail industries, employers requested that they be permitted to determine full-time employee status for employees whose hours may vary significantly by first considering hours of service for a period of time after the start date.
- In response to these comments made to the notices published before the proposed regulations, the proposed regulations generally provide that with respect to these employees, referred to as variable hour employees, an employer could use an initial measurement period, in combination with any administrative period, that did not extend beyond the last day of the first calendar month beginning on or after the first anniversary of the employee's start date.

Variable Hour Employees

- The proposed regulations treat an employee as a variable hour employee if, based on the facts and circumstances at the employee's start date, the applicable large employer member 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 of service are variable or otherwise uncertain.
- For this purpose, the applicable large employer member may not take into account the likelihood that the employee may terminate employment with the applicable large employer (including any member of the applicable large employer) before the end of the initial measurement period.

Variable Hour Employees

- Commenters, generally representing employee organizations, suggested that the treatment provided to variable hour employees be removed.
- In general, these commenters suggested that employers would categorize an excessive number of employees as variable hour employees in order to take advantage of the ability to avoid section 4980H liability while not offering coverage during the first year of employment.
- These final regulations retain the treatment of variable hour employees because with respect to certain positions of employment involving variable hours, it is not reasonable to require that an employer assume what those hours will be.
- In response to the comments, however, the final regulations explicitly set forth certain factors to take into account in determining whether the employer, at the employee's start date, could not determine whether the employee was reasonably expected to be employed on average at least 30 hours of service per week during the initial measurement period. These factors are described in section VII.C.2 of this preamble and are set forth at § 54.4980H-1(a)(49).

Temporary Staffing Firms

- The preamble to the proposed regulations notes that the application of section 4980H may be particularly challenging for temporary staffing firms and requested comments on certain specific areas relevant to temporary staffing firms, including whether new employees of a temporary staffing firm should be deemed or presumed to be variable hour employees for purposes of the look-back measurement method as well as whether special rules should apply to temporary staffing firms for purposes of determining when an employee has separated from service and the application of the rehire rules when an employee returns after a break in service.
- See section VII.E of the preamble for a discussion of the rehire rules.

Temporary Staffing Firms

- Some commenters requested that new employees of a temporary staffing firm be deemed, or alternatively presumed, to be variable hour employees rather than full-time employees for purposes of the look-back measurement method.
- Other commenters opposed the use of any presumption that employees of temporary staffing firms are variable hour employees, arguing that some of these employees will work predictable schedules averaging at least 30 hours of service per week.
- Temporary staffing firms vary widely in the types of assignments they fill for their clients and in the anticipated assignments that a new employee will be offered. Accordingly, the final regulations do not adopt a generally applicable presumption.

Temporary Staffing Firms

- To accommodate these variations and provide additional guidance, the final regulations set forth additional factors relevant to the determination of whether a new employee of a temporary staffing firm intended to be placed on temporary assignments at client organizations is a variable hour employee.
- These factors generally relate to the typical experience of an employee in the position with the temporary staffing firm that hires the new employee (assuming the temporary staffing firm employer has no reason to anticipate that the new employee's experience will differ) and include whether employees in the same position with the temporary staffing firm retain as part of their continuing employment the right to reject temporary placements that the employer temporary staffing firm offers the employee, whether employees in the same position with the temporary staffing firm typically have periods during which no offer of temporary placement is made, whether employees in the same position with the temporary staffing firm typically are offered temporary placements for differing periods of time, and whether employees in the same position with the temporary staffing firm typically are offered temporary placements that do not extend beyond 13 weeks.

Temporary Staffing Firms

- As demonstrated in the modified and additional examples related to temporary staffing firms, no factor is determinative.
- In addition, the determination of whether an employee is a variable hour employee is made on the basis of the temporary staffing firm's reasonable expectations at the start date.
- An employee may accordingly be classified as a variable hour employee if this categorization was appropriate based on the employer's reasonable expectations at the start date, even if the employee in fact averages 30 or more hours of service per week over the initial measurement period.

Temporary Staffing Firms

- Commenters suggested that the rehire rules should be adjusted for employees of temporary staffing firms by reducing the length of the break in service required before an employee can be treated as a new hire from 26 weeks to 4 weeks or some other duration.
- The final regulations do not adopt this suggestion in part because the adoption of such a rule may encourage employers to use temporary staffing firms to provide firm employees to perform certain services in order to attempt to improperly avoid offering coverage or incurring liability for assessable payments under section 4980H.
- For a discussion of the reduction of the break-in-service period under the rehire rules from 26 weeks to 13 weeks for all employers that are not educational organizations see section VII.E of this preamble.

Temporary Staffing Firms

- Commenters requested additional guidance on when a temporary staffing firm may treat an employee who is not working on assignments as having separated from service with the firm.
- Separation from service is relevant in a number of contexts beyond section 4980H, such as eligibility to receive a distribution from a qualified plan (see, for example, section 401(k)(2)(B)(i)(I)) and the requirement to provide a notice of continuation coverage under COBRA (see section 4980B), and temporary staffing firm employers generally have developed various means of determining when an employee has separated from service with the firm for these purposes.

Temporary Staffing Firms

- Accordingly, until further guidance is issued, temporary staffing firms, like all employers generally, may determine when an employee has separated from service by considering all available facts and circumstances and by using a reasonable method that is consistent with the employer's general practices for other purposes, such as the qualified plan rules, COBRA, and applicable State law.
- For a discussion of the rehire rules that apply under section 4980H, see section VII.E of this preamble.

Temporary Staffing Firms

- Section II.D.3 of the preamble to the proposed regulations addresses two arrangements under which a client employer may use a temporary staffing firm to attempt to evade application of section 4980H.
- In one arrangement, the client employer purports to employ an employee for only part of a week, such as 20 hours, and to hire that same individual through a temporary staffing firm for the remaining hours of the week, and then claim that the individual was not a full-time employee of either the client employer or the temporary staffing firm.
- In the other arrangement, one temporary staffing firm purports to supply a client an individual as a worker for only part of a week, such as 20 hours, while a second temporary staffing firm purports to supply the same client the same individual for the remainder of the week, and then claim that the individual was not a full-time employee of the client or either of the temporary staffing firms.

Temporary Staffing Firms

- For these reasons and the reasons set forth in section II.D.3 of the preamble to the proposed regulations, the Treasury Department and the IRS continue to be concerned about these arrangements and anticipate that future guidance of general applicability, published in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(b)), will address them.

Seasonal Employees

- Under the proposed and final regulations, the look-back measurement method, including the use of the initial measurement period for a newly hired employee, may be applied by an employer to its seasonal employees in the same manner in which the rules apply to variable hour employees.
- The proposed regulations do not provide a definition of the term seasonal employee but rather reserve on the issue. Section II.C.2.b of the preamble to the proposed regulations indicates that employers are permitted through 2014 to use a reasonable, good faith interpretation of the term seasonal employee for purposes of section 4980H.
- The preamble further states that the Treasury Department and the IRS contemplated that the final regulations would add to the definition of seasonal employee a specific time limit in the form of a defined period, citing the final sentence of § 1.105-11(c)(2)(iii)(C) as an example that could be adapted for purposes of section 4980H. The Treasury Department and the IRS specifically requested comments on this approach.

Seasonal Employees

- Commenters generally supported the proposed treatment of seasonal employees, but had varying notions of the appropriate time limit for a recurring period of service for a seasonal employee, ranging from 45 days to ten months.
- Consistent with the proposed regulations, the final regulations continue to provide for seasonal employees to be treated under the same rules applicable to variable hour employees.
- For this purpose, **the final regulations provide that a seasonal employee means an employee in a position for which the customary annual employment is six months or less.**
- The reference to customary means that by the nature of the position an employee in this position typically works for a period of six months or less, and that period should begin each calendar year in approximately the same part of the year, such as summer or winter.

Seasonal Employees

- In certain unusual instances, the employee can still be considered a seasonal employee even if the seasonal employment is extended in a particular year beyond its customary duration (regardless of whether the customary duration is six months or is less than six months).
- For example, if ski instructors at a resort have a customary period of annual employment of six months, but are asked in a particular year to work an additional month because of an unusually long or heavy snow season, they would still be considered seasonal employees.

Seasonal Employees

- An employee in a seasonal position might be promoted or transferred to a permanent position. For example, a ski instructor might be moved to the position of grounds manager, which is anticipated to work year round.
- Under the final regulations, in general, if a seasonal employee experiences a change in employment status before the end of the initial measurement period in such a way that, if the employee had begun employment in the new position or status, the employee would not have been a seasonal employee (and would have reasonably been expected to be employed on average at least 30 hours of service per week), the employer has until the first day of the fourth month following the change in employment status, or, if earlier, the first day of the first month following the end of the initial measurement period (plus any applicable administrative period) if the employee averaged 30 hours of service per week or more during the initial measurement period, to treat the employee as a full-time employee.

Modification of Measurement Periods or Stability Periods

- Commenters requested that the initial measurement period be modified to account for plan designs that consolidate employees into particular entry dates, such as the first day of a pay period, the first day of the month, etc.
- Specifically these commenters requested that the initial measurement period be permitted to begin on the employee's start date in a period, such as a calendar quarter, but end on a common date, such as 12 months after the beginning of the calendar quarter, and employers be allowed to couple this approach with a uniform stability period.
- This proposed structure would often result in a stability period significantly longer than the associated measurement period.
- In this example, all employees starting during the calendar quarter would have a 12 month stability period, whether they started in the first month of the quarter or the last month of the quarter.

Modification of Measurement Periods or Stability Periods

- With respect to an employee who does not have sufficient hours of service to be classified as a full-time employee, the Treasury Department and the IRS have consistently stated that it is not appropriate to apply that status for a longer period than the measurement period.
- In addition, the proposed approach would add considerable complexity to the rules governing the look-back measurement method.

Modification of Measurement Periods or Stability Periods

- However, consistent with the proposed regulations, the final regulations provide that the initial measurement period for a new variable hour employee or new seasonal employee may begin on the employee's start date or any date after that up to and including 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).
- Effectively, this allows employers to group new hires into 12 groups throughout the year for purposes of determining the initial measurement period. For these reasons, the final regulations retain the rule in the proposed regulations and do not adopt the commenters' suggestion.

Change in Employment Status

- The proposed regulations for the look-back measurement method contain a change in employment status rule for a variable hour or seasonal employee who experiences a change in employment status during the initial measurement period such that, if the employee had begun employment in the new position or status, the employee would have reasonably been expected to be employed on average at least 30 hours of service per week.
- With respect to such an employee, in general, the employer will not be subject to an assessable payment for such an employee until the first day of the fourth full calendar month following the change in employment status if the employer provides coverage at the end of that period (and to avoid liability under section 4980H(b) the coverage provides MV) or, if earlier and the employee is a full-time employee based on the initial measurement period, the first day of the first month following the end of the initial measurement period (including any optional administrative period associated with the initial measurement period).

Change in Employment Status

- Under the final regulations, this rule is revised to also apply to an employee who has a change in employment status from part-time employee to full-time employee during the initial measurement period. For a description of the requirement that the employee be otherwise eligible for an offer of coverage during the period described in this paragraph, see section VII.D of this preamble.

Change in Employment Status

- Commenters to the proposed regulations requested additional rules for how the look-back measurement method applies when an employee experiences various changes in employment status. As described in this section VII.C.10 of the preamble, the final regulations revise the change in employment status rule that applies during the initial measurement period for new employees who experience a change in employment status resulting in full-time employee status.

Change in Employment Status

- The final regulations also provide a special rule, discussed in section VII.G of this preamble, that applies when an employee experiences a change in employment status from full-time employee status to part-time employee status; the employer is allowed to apply the monthly measurement method to such an employee within three months of the change if the employee actually averages less than 30 hours of service per week for each of the three months following the change in employment status and if the employer has offered the employee continuous coverage that provides MV from at least the fourth month of the employee's employment.
- Otherwise, under the look-back measurement method, full-time employee status in a stability period is based on hours of service in the prior applicable measurement period, regardless of whether the employee experiences a change in employment status either during the measurement period or during the stability period. Under the look-back measurement method, each employee's hours of service are measured (not just variable hour employees and seasonal employees) during the measurement period.
- In general, under the look-back measurement method, if the change in employment status results in a change in hours of service, that change is captured in a subsequent stability period.
- For a description of the rules regarding the use of the look-back measurement method for only some of an employer's employees, see section VII.G of this preamble.

New EEs Who Are Neither Variable Hour Employees nor Seasonal

- Under the proposed and final regulations, an ongoing employee is an employee who has been employed by an applicable large employer member for at least one complete standard measurement period.
- The proposed regulations provide rules for application of the look-back measurement method to new employees who are variable hour employees and seasonal employees but the proposed rules do not fully explain how full-time employee status is determined for other new employees.
- The final regulations clarify how an applicable large employer member determines full-time employee status of its new employees who are not variable hour employees or seasonal employees, for the period before the rules for ongoing employees apply (that is, for the period before the employee has been employed for a complete standard measurement period).

New EEs Who Are Neither Variable Hour Employees nor Seasonal

- In general, before becoming an ongoing employee, full-time employee status for a new employee who is reasonably expected at the employee's start date to be a full-time employee (and who is not a seasonal employee) is based on that employee's hours of service each calendar month (but note that an employer will not be subject to a section 4980H(a) assessable payment for the initial three full months of employment if the employee is otherwise eligible for an offer of coverage during those three months and is offered coverage by the first day following those three months (and the employer will not be subject to a section 4980H(b) assessable payment for those months if the coverage offered provides MV).

New EEs Who Are Neither Variable Hour Employees nor Seasonal

- A definition of part-time employee is added to the final regulations for a new employee who is reasonably expected at the employee's start date not to be a full-time employee (and who is not a variable hour employee or a seasonal employee).
- The same rules that apply to new variable hour employees and new seasonal employees apply to new part-time employees.
- In the normal case, an employer's categorization of a new employee as a part-time employee or variable hour employee does not affect the way the look-back measurement method applies (because the initial measurement period is available to both types of employees).

Initial Measurement Period

- The final regulations clarify that an applicable large employer member may apply the payroll period rule set forth in § 54.4980H-3(d)(1)(ii) for purposes of determining an initial measurement period, provided that an initial measurement period must begin on the start date or any date between the start date and the later of the first day of the first calendar month following the employee's start date and the first day of the first payroll period that starts after the employee's start date.

Initial Measurement Period

- The proposed regulations define the initial measurement period, in part, as a period of at least three consecutive calendar months but not more than 12 consecutive calendar months.
- The final regulations clarify that the initial measurement period need not be based on calendar months but instead may be based on months, defined as either a calendar month or as the period that begins on any date following the first day of the calendar month and that ends on the immediately preceding date in the immediately following calendar month (for example, from March 15 to April 14).
- In contrast, a stability period must be based on calendar months.
- The final regulations, consistent with the proposed regulations, also allow an employer to base measurement periods on one week, two week, or semi-monthly payroll periods.

Periods of Time Between Stability Periods

- Commenters noted that, in certain circumstances, there may 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 generally 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.

Periods of Time Between Stability Periods

- For example, suppose an employer uses 12-month measurement and stability periods for both its new variable hour employees and its ongoing employees, with the standard measurement period for ongoing employees running from October 15 of one year to the following October 14, the administrative period for ongoing employees running from October 15 through December 31 and with the calendar year as the stability period for ongoing employees.
- If a new variable hour employee, Employee A, is hired on October 25, 2015, and the employer chooses to begin the initial measurement period for new variable hour employees on the first day of the first calendar month beginning after the start date, the initial measurement period for Employee A will run from November 1, 2015, through October 31, 2016.

Periods of Time Between Stability Periods

- If Employee A averages at least 30 hours of service per week during the initial measurement period, the employer must treat Employee A as a full-time employee for a period of at least 12 months beginning no later than December 1, 2016 (the first day of the 14th calendar month after hire).
- If that period begins on December 1, 2016, the period for which Employee A must be treated as a full-time employee will end no earlier than November 30, 2017.

Periods of Time Between Stability Periods

- The first standard measurement period applicable to Employee A is the period from October 15, 2016, through October 14, 2017.
- If Employee A averages 30 hours of service per week during this standard measurement period, the employer must treat Employee A as a full-time employee for the stability period that is co-extensive with the 2018 calendar year.
- However, this would leave a period of time between the end of the stability period associated with Employee A's initial measurement period (November 30, 2017) and the beginning of the stability period associated with the first standard measurement period applicable to Employee A (January 1, 2018).

Periods of Time Between Stability Periods

- The final regulations clarify that in circumstances in which there is 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 new employee is employed, the treatment as a full-time employee or not full-time employee that applies during the stability period associated with the initial measurement period continues to apply until the beginning of the stability period associated with the first full standard measurement period during which the employee is employed.
- If the employee is being treated as a full-time employee during the initial stability period, that treatment must be extended until the first day of the stability period associated with the first full standard measurement period during which the employee is employed, and if the employee is being treated as not a full-time employee during the initial stability period, that treatment may be extended until the first day of the stability period associated with the first full standard measurement period during which the employee is employed.
- Thus, in the example in the preceding paragraphs, Employee A is a full-time employee for the month of December 2017.

Periods of Time Between Stability Periods

- Further, the final regulations also clarify that for a variable hour employee or seasonal employee who does not average at least 30 hours of service per week during the initial measurement period, the maximum length for a stability period associated with the initial measurement period is the end of the first full standard measurement period (plus any associated administrative period) during which the new employee was employed (rather than at the end of the standard measurement period (plus any associated administrative period) in which the initial measurement period ends), which was the rule contained in the proposed regulations.

Periods During Which Section 4980H Liability Does Not Apply

- In various circumstances, the final regulations provide that an employer will not be subject to an assessable payment under section 4980H for a certain period of time and the term limited non-assessment period for certain employees is added to the final regulations to describe these periods.
- In particular, the final regulations provide, consistent with the proposed regulations, that section 4980H liability does not apply with respect to an employee who is in the initial measurement period (or the associated administrative period), for a period of time after an employee experiences a change to full-time employee status during the initial measurement period, or with respect to a new employee who is reasonably expected to be a full-time employee and to whom coverage is offered on the first of the month following the employee's initial three full calendar months of employment.

Periods During Which Section 4980H Liability Does Not Apply

- The final regulations add a rule under the monthly measurement method under which an employer will not be subject to a section 4980H assessable payment with respect to an employee for the first full calendar month in which an employee is first otherwise eligible for an offer of coverage and the immediately subsequent two calendar months.
- Further, the final regulations provide that with respect to an employee who was not offered coverage by the employer at any point during the prior calendar year, if an employee is offered coverage by an applicable large employer, for the first time, on or before April 1 of the first calendar year for which the employer is an applicable large employer, the employer will not be subject to an assessable payment under section 4980H by reason of its failure to offer coverage to the employee for January through March of that year.

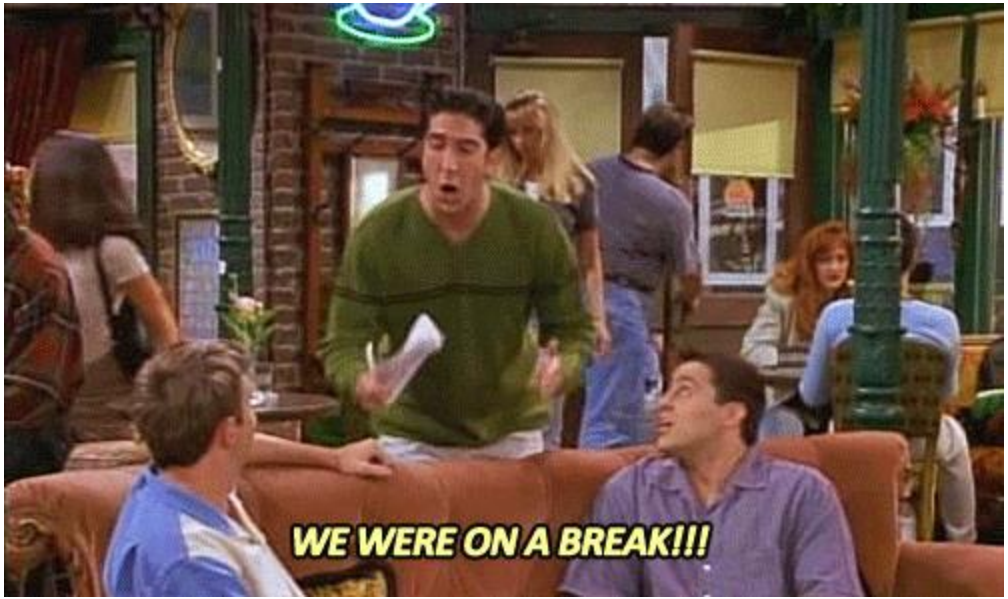
Periods During Which Section 4980H Liability Does Not Apply

- The final regulations clarify that each of these rules is only available if the employee is offered coverage by the first day of the month following the end of the applicable period, and for an employer to not be subject to an assessable payment under section 4980H(b) the employer must offer coverage that provides MV at the end of the period.
- In addition, the final regulations clarify that these rules only apply with respect to a calendar month if during the calendar month during the relevant period the employee is otherwise eligible for an offer of coverage (except that this rule does not apply with respect to the rule regarding an employer that is an applicable large employer for the first time, as described in section V.F of this preamble). For purposes of these rules, an employee is otherwise eligible to be offered coverage under a group health plan for a calendar month if, pursuant to the terms of the plan as in effect for that calendar month, the employee meets all conditions to be offered coverage under the plan for that calendar month, other than the completion of a waiting period, within the meaning of § 54.9801-2.

Periods During Which Section 4980H Liability Does Not Apply

- The final regulations also clarify that an employer will not be subject to an assessable payment with respect to an employee for the first month of an employee's employment with the employer, if the employee's first day of employment is a day other than the first day of the calendar month.
- Note that the relief from the section 4980H assessable payment provided by the rules described in this section does not affect an employee's eligibility for a premium tax credit. For example, an employee or related individual is not eligible for coverage under the employer's plan (and therefore may be eligible for a premium tax credit or cost-sharing reduction through an Exchange) during any period when coverage is not actually offered to the employee by the employer, including any measurement period or administrative period, even if the employer is not subject to an assessable payment under section 4980H for this period.

Rehire Rules and Break-in-Service Rules for Continuing EEs



Rehire Rules

- The proposed regulations provide that, solely for purposes of section 4980H, an employee who resumes providing service to an applicable large employer after a period during which the employee was not credited with any hours of service may be treated as having terminated employment and having been rehired, and therefore may be treated as a new employee upon the resumption of services, only if the employee did not have an hour of service for the applicable large employer for a period of at least 26 consecutive weeks immediately preceding the resumption of services.

Rehire Rules

- In addition, the proposed regulations permit an employer to apply a parity rule, under which an employee may be treated as rehired after a shorter period of at least four consecutive weeks during which no hours of service were credited if that period exceeded the number of weeks of that employee's period of employment with the applicable large employer immediately preceding the period during which the employee was not credited with any hours of service.
- For example, if an employee started employment and worked for six weeks, then had a period of eight weeks during which no hours of service were credited, the employer could treat the employee as a rehired employee, subject to the rules for new employees under these regulations, if the employee resumed providing services after the eight-week break.

Rehire Rules

- Comments were received on these rehire rules. Several employers and employer groups commented that the rehire rules in general, and the rule of parity in particular, are difficult to implement because they require the employer to maintain records of service of former employees across the employer's controlled group (the group of applicable large employer members that together are treated as an applicable large employer).
- Commenters requested that employers be permitted to determine, using any reasonable good-faith method, whether an employee resuming services after a break in service constitutes a new employee or a continuing employee.
- Other commenters requested that the length of the break in service required before a returning employee may be treated as a new employee be reduced from 26 weeks to some shorter length, such as four or ten weeks.

Rehire Rules

- The Treasury Department and the IRS believe that it would be inequitable to employees who had become eligible for coverage prior to the break in service to be subjected to a new period of exclusion from the plan (which can be over a year for variable hour employees) based upon a brief break in service.
- The Treasury Department and the IRS also remain concerned that without an objective standard for determining when an employee who returns after a break in service may be treated as a new employee, there is a potential for an employer to attempt to evade the requirements of section 4980H through a pattern of terminating and rehiring employees and then treating the returning employees as new employees.

Rehire Rules

- However, the Treasury Department and the IRS agree with the commenters suggesting that a break-in-service period shorter than 26 weeks would be sufficient to curtail the potential for abuse.
- Accordingly, the final regulations retain the rehire rules contained in the proposed regulations but reduce the length of the break in service required before a returning employee may be treated as a new employee from 26 weeks to 13 weeks (except for educational organization employers as described in this section of the preamble).
- This break-in-service period applies for both the look-back measurement method and the monthly measurement method.

Rehire Rules

- To avoid the treatment of employees of educational organizations as new employees resuming services after a scheduled academic break, however, the final regulations provide that for employees of educational organizations, the 26-week break-in-service period under the rehire rules provided in the proposed regulations continues to apply.
- The final regulations also retain the rule of parity, which, as under the proposed regulations, is optional on the part of the employer and need not be used if the employer does not maintain sufficient records of the periods of service of former employees or prefers not to use it for other reasons.

Break-in-Service Rules for Continuing Employees

- For purposes of applying the look-back measurement method to a returning employee not treated as a new employee, the proposed regulations provide an averaging method for special unpaid leave that is applicable to all employers choosing to use the look-back measurement method.
- For this purpose special unpaid leave is unpaid leave subject to the Family and Medical Leave Act of 1993 (FMLA), 103, 29 U.S.C. 2601 et seq., or to the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 103, 38 U.S.C. 4301 et seq., or on account of jury duty.
- Comments were received on the averaging rules for special unpaid leave, and those comments generally favored the approach provided in the proposed regulations.

Break-in-Service Rules for Continuing Employees

- The proposed regulations also provide an averaging method for employment break periods that is applicable to educational organizations that use the look-back measurement method.
- For this purpose, an employment break period is a period of at least four consecutive weeks (disregarding special unpaid leave), measured in weeks, during which an employee is not credited with hours of service.

Break-in-Service Rules for Continuing Employees

- Under the proposed averaging method, in the case of an employee returning from absence who would be treated as a continuing employee (that is, an employee whose break in service was shorter than one resulting in treatment as a rehired employee), the employer would determine the employee's average hours of service for a measurement period by computing the average after excluding any special unpaid leave (and in the case of an educational organization, also excluding any employment break period) during that measurement period and by using that average as the average for the entire measurement period.

Break-in-Service Rules for Continuing Employees

- Alternatively, the employer could treat the employee as credited with hours of service for any periods of special unpaid leave (and, in the case of an educational organization, any employment break period) during that measurement period 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 part of a period of special unpaid leave (or, in the case of an educational organization, an employment break period).
- The two alternative methods were intended to be different expressions of an equivalent calculation, therefore having the same results. In no case, however, would the employer be required to exclude (or credit) more than 501 hours of service during employment break periods in a calendar year (however no such limit applies for special unpaid leave).

Break-in-Service Rules for Continuing Employees

- In the preamble to the proposed regulations, the Treasury Department and the IRS specifically requested comments on whether the employment break period rules should be applied to all employers, including employers that were not educational organizations.
- With respect to the averaging rules for employment break periods, commenters differed in their responses to the proposed regulations.

Break-in-Service Rules for Continuing Employees

- Some employers stated that the rules should be eliminated because they were complicated and required administrative recordkeeping that employers do not currently undertake.
- Some employers and employer groups also requested that the employment break period rules not be extended to employers that are not educational organizations.
- Other commenters requested clarification on whether the employment break period rules apply to employers that are not educational organizations but that provide services to educational organizations, such as school bus operators.
- In contrast, some employee organizations supported the employment break period rule, stating that it more accurately reflected positions intended to be full-time employee positions and assisted in curbing potential employer actions to prevent employees from attaining full-time employee status.
- However, some employers and employees also suggested that the employment break period rule would not result in an expansion of coverage to employees not currently offered coverage, but rather in limiting hours to ensure that those employees were not classified as full-time employees.

Break-in-Service Rules for Continuing Employees

- The final regulations retain the averaging rules for special unpaid leave and employment break periods as provided in the proposed regulations (that is, for purposes of applying the look-back measurement method to an employee who is not treated as a new employee under the rehire rules described in section VII.E.1 of this preamble).
- The commenters did not identify a compelling reason to extend the employment break period rule to employers that are not educational organizations.

Break-in-Service Rules for Continuing Employees

- However, the final regulations provide that with respect to the determination of full-time employee status, the Commissioner may prescribe additional guidance of general applicability, published in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(b)), which may include extension of the employment break period to other industries.
- In addition, the reduction in the break-in-service period under the rehire rule from 26 to 13 weeks in the final regulations (for employers that are not educational organizations) shortens the periods for which an individual may be credited with no hours of service that can be included in a measurement period (thereby lowering the average hours of service per week), addressing in part the issue that the employment break period also is intended to address.
- The employment break period rule continues to apply only to educational organizations, and the break-in-service period for employees of educational organizations continues to be 26 weeks.
- Neither the special unpaid leave rule nor the employment break period rule apply under the monthly measurement method, regardless of whether the employer is an educational organization.

Short-Term Employees

- In the preamble to the proposed regulations, the Treasury Department and the IRS requested comments on the treatment of short-term employees, meaning employees who are reasonably expected to average at least 30 hours of service per week and are hired into positions expected to continue for less than 12 months (but not including seasonal employees, who are employees in positions that also last a certain limited period but are expected to recur on an annual basis).

Short-Term Employees

- A short-term employee with a tenure of under three months generally should not raise issues under section 4980H as the employer generally would not be subject to liability under section 4980H with respect to those employees provided the employer sponsors a group health plan for which the employee would have been eligible had the employee continued working beyond the three months.
- The Treasury Department and the IRS continue to be concerned about the potential for abuse of any exception for short-term employees through the use of initial training period positions or other methods intended to artificially divide the tenure of an employee into one or more short-term employment positions in order to avoid application of section 4980H.
- For these reasons, **the final regulations do not adopt any special provisions applicable to short-term employees.**

Employees in High-Turnover Positions

- In the proposed regulations, the Treasury Department and the IRS requested comments on the treatment of employees in high-turnover positions, meaning positions in which a significant percentage of employees can be expected to terminate employment over a reasonably short period of time (for example, over a six-month period).

Employees in High-Turnover Positions

- Two categories of potentially high-turnover employees are already addressed in the final regulations.
- First, failure to offer coverage to full-time employees who do not continue in employment through the first day of the fourth month following the start date generally will not result in a potential payment under section 4980H if coverage would have been offered no later than the first day of the fourth month of employment. See § 54.4980H-3(c)(2) and § 54.4980H-3(d)(2)(iii).
- Second, failure to offer coverage to employees that are variable hour employees generally will not result in a section 4980H assessable payment under the look-back measurement method until after the last day of the first calendar month beginning on or after the first anniversary of the employee's start date, though the likelihood of the employee failing to continue employment through the initial measurement period may not be taken into account in determining whether the employee is a variable hour employee.

Employees in High-Turnover Positions

- This leaves at issue positions in which employees are reasonably expected to average 30 hours of service or more per week, and in which a significant portion of new hires are expected to continue in employment beyond three months but not for a significant period beyond three months.

Employees in High-Turnover Positions

- As discussed in the preamble to the proposed regulations, the Treasury Department and the IRS have concerns about the formulation and application of a special rule in this area.
- Specifically, the discussion in section II.C.6 of the preamble to the proposed regulations noted that "high-turnover" is a category that would require a complex definition that could be subject to manipulation.
- In addition, any special treatment that is provided for employees hired into a high-turnover position could provide an incentive for employers to terminate employees to ensure that the position remains a high-turnover position under whatever standard was used to make that determination.
- Because many high-turnover positions may also be filled by variable hour employees for whom the rules governing variable hour employees would address the churning concerns, and because of the concerns regarding the complexity and potential manipulation of any special rules in this area, **the final regulations do not adopt any special provisions addressing high-turnover positions**.

Employers Using Different Methods of Identifying Full-Time EEs

- Commenters requested clarification as to whether an employer must use the look-back measurement method for all employees if it chooses to use it for some employees or if an employer may use the look-back measurement method for some employees and the monthly measurement method for other employees.
- Commenters requested that employers have the ability to use the look-back measurement method for employees with variable work schedules and the monthly measurement method for employees with more predictable work schedules.

Employers Using Different Methods of Identifying Full-Time EEs

- According to these commenters, an employer's use of the look-back measurement method for its employees with fixed-hour schedules will produce the result that the employer is required to treat an employee as a full-time employee for a stability period if the fixed-hour full-time employee changes to a fixed-hour non-full-time schedule.
- They noted that such an employee may have been hired as a full-time employee and may have been provided coverage upon hire (or within three months), unlike variable hour employees for whom the employer generally has until the end of the first calendar month after the first anniversary of the employee's start date to offer coverage..

Employers Using Different Methods of Identifying Full-Time EEs

- The final regulations clarify that with respect to each of the enumerated categories of employees for which an employer may use measurement and stability periods that differ either in length or in their starting and ending dates, the employer may apply either the look-back measurement method or the monthly measurement method.
- See section VII.C.5 of this preamble regarding the permissible employee category rule.
- **The final regulations neither expand the number of categories of employees nor permit employers to develop their own customized categories.**
- In particular, the final regulations do not permit an employer to adopt the look-back measurement method for variable hour and seasonal employees while using the monthly measurement method for employees with more predictable hours of service.

Employers Using Different Methods of Identifying Full-Time EEs

- Under the look-back measurement method, the identification of a variable hour employee at the start date is based upon the employer's reasonable expectations.
- If classified as a variable hour employee, the employer is permitted to wait through the initial measurement period to determine whether the employee is a full-time employee; however, for every subsequent year of that employee's employment the identification of whether the employee is a full-time employee is based upon the employee's hours of service in the prior measurement period, without any application of the employer's reasonable expectations.

Employers Using Different Methods of Identifying Full-Time EEs

- If employers were permitted to subdivide the permitted categories between variable hour employees and non-variable hour employees (for example, applying the look-back measurement method to variable hour salaried employees and the monthly measurement method to non-variable hour salaried employees), the employer would be required to apply its reasonable expectations at the beginning of every measurement period to determine whether a salaried employee was a variable hour employee.
- While the treatment of a new hire who does not have previous hours of service is necessary to address how to determine whether a new variable hour employee is a full-time employee, the Treasury Department and the IRS have determined that permitting employees in the same objective category to move between measurement methods based solely on the employer's reasonable expectations brings an excessive level of subjectivity into the determination of an employee's classification as a full-time employee that is not warranted by any lack of information.

Employers Using Different Methods of Identifying Full-Time EEs

- The final regulations also provide rules addressing an employee who experiences a change in employment status from a position for which the look-back measurement method is used to a position for which the monthly measurement method is used (or vice versa).
- In general, these rules are intended to protect an employee's status as a full-time employee during the transition period.
- Accordingly, these rules require that an employee transferring from a position for which the employer is using the look-back measurement method to a position for which the employer is using the monthly measurement method and who at the date of transfer is in a stability period during which the employee is treated as a full-time employee must continue to be treated as a full-time employee during the remainder of the stability period.
- If the employee is in a stability period for which the employee is not treated as a full-time employee, the employer may continue to treat the employee as not a full-time employee during the remainder of the stability period.

Employers Using Different Methods of Identifying Full-Time EEs

- With respect to the stability period that immediately follows the stability period during which the employee transferred, the employee must be treated as a full-time employee for any calendar month during which the employee would be a full-time employee under either the previously applicable look-back measurement method (and thus not lose the hours of service accumulated during the measurement period during which the transfer occurs) or the applicable monthly measurement method.
- After that immediately following stability period, the employer may determine the employee's status solely through application of the monthly measurement method.

Employers Using Different Methods of Identifying Full-Time EEs

- For an employee transferring from a category of employment to which the monthly measurement method applies to a position to which the look-back measurement method applies, the rules generally require that the employer recreate the stability periods that would apply based upon the employee's hours of service before the transfer.
- However, consistent with the previously described rules, for the stability period immediately subsequent to the transfer, the employee must be treated as a full-time employee for any calendar month that the employee would be a full-time employee under either the previously applicable monthly measurement method or the applicable look-back measurement method.
- The final regulations provide several examples to illustrate the application of these rules.

Employers Using Different Methods of Identifying Full-Time EEs

- In addition, the final regulations allow an employer, in certain limited circumstances, to begin applying the monthly measurement method to an employee to whom the look-back measurement method has been applied sooner than required under the standard rules governing changes in methods.
- This rule is intended to address the concern raised by commenters that employers that offer coverage to an employee continuously from within three months of an employee's start date should not be required to continue to treat that employee as a full-time employee for many months after that employee experiences a change in employment status to a position in which the employee will average less than 30 hours of service per week.
- Examples include a circumstance in which an employee who has been a full-time employee for ten years, and who was offered coverage within three months of the start date, changes from a position of employment to another position requiring fewer hours of service either as part of a phased-retirement program or to care for a family member.

Employers Using Different Methods of Identifying Full-Time EEs

- The final regulations allow an applicable large employer member to begin to apply the monthly measurement method in lieu of the otherwise applicable stability period beginning on the first day of the fourth full calendar month following the change in employment status.
- This rule applies only with respect to an employee to whom the applicable large employer member offered MV coverage from at least the first day of the month following the employee's initial three full calendar months of employment through the month in which the change in employment status occurs, and this rule applies only if during each of the three full calendar months following the change in employment status the employee has on average less than 30 hours of service per week.

Employers Using Different Methods of Identifying Full-Time EEs

- Under this rule, an employer may apply the monthly measurement method to an employee even if the employer does not apply the monthly measurement method to employees in the same category (for example, an employer could apply the monthly measurement method to an hourly employee, even if the employer uses the look-back measurement method to determine full-time employee status of all other hourly employees). The employer may continue to apply the monthly measurement method through the end of the first full measurement period (and any associated administrative period) that would have applied had the employee remained under the applicable look-back measurement method.

Employers Using Different Methods of Identifying Full-Time EEs

- The Treasury Department and the IRS anticipate that the rules with respect to a transfer from a position to which one look-back measurement method applies to a position to which another look-back measurement method applies will require complex rules because the methods may differ not only in the length of the applicable measurement and stability periods, but also the starting dates of the measurement periods (for example, the use of a calendar year for one measurement period but a non-calendar year period for another measurement period).
- To provide for these rules in the most comprehensible format, as well as to ensure flexibility to address situations that arise that have not currently been contemplated, the final regulations provide that with respect to the determination of full-time employee status, the Commissioner may prescribe additional guidance of general applicability, published in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(b)).

VIII. AFFORDABILITY AND AFFORDABILITY SAFE HARBORS

Affordability Safe Harbors

- Liability under section 4980H only arises if at least one full-time employee of the applicable large employer member receives a premium tax credit.
- Even if the applicable large employer member offers coverage to 95 percent or more of its full-time employees (and their dependents), thereby avoiding liability under section 4980H(a), the applicable large employer member may be subject to an assessable payment under section 4980H(b) if one or more full-time employees obtain a premium tax credit.
- Affordability under section 36B is determined by reference to the taxpayer's household income. Because an employer generally will not know the taxpayer employee's household income, the proposed regulations under section 4980H set forth three separate safe harbors under which an employer could determine affordability based on information that is readily available to the employer.
- These safe harbors are all optional. An employer may choose to use one or more of these safe harbors for all of its employees or for any reasonable category of employees, provided it does so on a uniform and consistent basis for all employees in a category.
- Reasonable categories generally include specified job categories, nature of compensation (for example, salaried or hourly), geographic location, and similar bona fide business criteria. However, an enumeration of employees by name would not be considered a reasonable category.

Form W-2 Wages Safe Harbor

- Under the Form W-2 wages safe harbor, the employer may calculate the affordability of the coverage based solely on the wages paid to the employee by that employer (and any other member of the same applicable large employer that also pays wages to that employee), as reported in Box 1 of the Form(s) W-2.
- Commenters requested that reductions in Form W-2 wages due to salary reduction elections under a section 401(k) plan or a cafeteria plan under section 125 be disregarded for purposes of the safe harbor. To be consistent with section 36B, under which an employee's household income (and thus the affordability of an offer of coverage) is determined without adding back those reductions, this suggestion is not adopted in the final regulations under section 4980H.

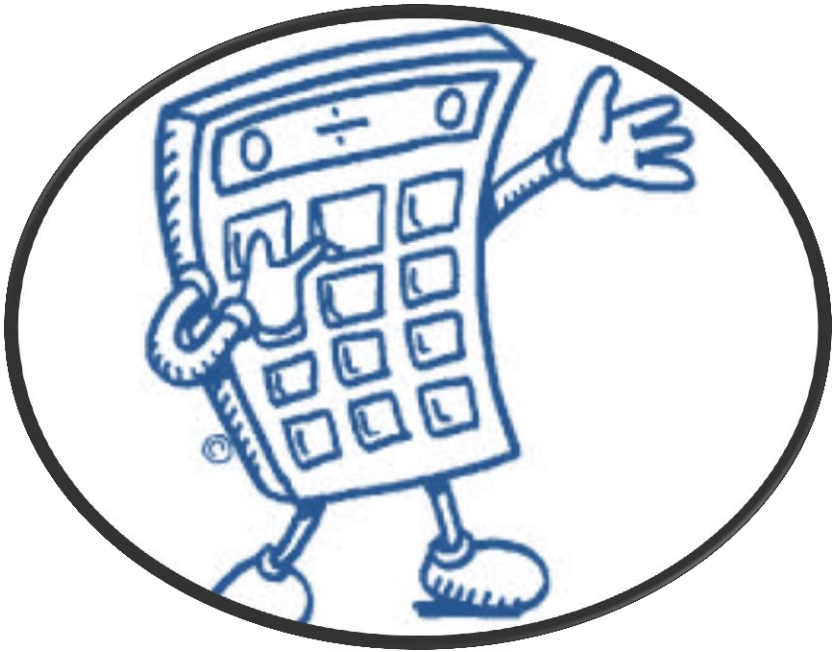
Rate of Pay Safe Harbor

- Under the rate of pay safe harbor in the final regulations, an applicable large employer member's offer of coverage to an hourly employee is treated as affordable for a calendar month if the employee's required contribution for the calendar month for the lowest cost self-only coverage that provides MV does not exceed 9.5 percent of an amount equal to 130 hours multiplied by the lower of the employee's hourly rate of pay as of the first day of the coverage period (generally the first day of the plan year) or the employee's lowest hourly rate of pay during the calendar month.
- The final regulations, unlike the proposed regulations, permit an employer to use the rate of pay safe harbor even if an hourly employee's hourly rate of pay is reduced during the year.
- In this situation, the rate of pay is applied separately to each calendar month, rather than to the entire year and the employee's required contribution may be treated as affordable if it is affordable based on the lowest rate of pay for the calendar month multiplied by 130 hours.
- The rate of pay safe harbor cannot be used, as a practical matter, for tipped employees or for employees who are compensated solely on the basis of commissions.

Federal Poverty Line Safe Harbor

- Under the federal poverty line safe harbor, an applicable large employer member's offer of coverage to an employee is treated as affordable if the employee's required contribution for the calendar month for the lowest cost self-only coverage that provides MV does not exceed 9.5 percent of a monthly amount determined as the federal poverty line for a single individual for the applicable calendar year, divided by 12.
- This safe harbor is intended to provide employers a predetermined maximum amount of employee contribution that in all cases will result in the coverage being deemed affordable.

SAFE HARBOR CALCULATOR



IX. OFFERS OF COVERAGE

Overview

- For an employee to be treated as having been offered coverage for a month (or any day in that month), the coverage offered, if accepted, must be applicable for that month (or that day).
- For purposes of section 4980H(a), the proposed and final regulations provide that **an applicable large employer member is treated as offering coverage to its full-time employees (and their dependents) for a calendar month if, for that month, it offers coverage to all but five percent or, if greater, five of its full-time employees** (provided that an employee is treated as having been offered coverage only if the employer also offered coverage to that employee's dependents as applicable).
- If an employee has not been offered an effective **opportunity to accept or decline coverage**, the employee will not be treated as having been offered the coverage for purposes of section 4980H.
- The final regulations provide that **an effective opportunity to decline is not required for an offer of coverage that provides MV** and is offered either at no cost to the employee or at a cost, for any calendar month, of no more than 9.5 percent of a monthly amount determined as the federal poverty line for a single individual for the applicable calendar year, divided by 12. [9] Thus, an employer may not render an employee ineligible for a premium tax credit by providing an employee with mandatory coverage (that is, coverage which the employee is not offered an effective opportunity to decline) that does not meet MV or that may not be affordable.

Overview

- Commenters requested that employers not be subject to an assessable payment for failure to offer coverage to full-time employees who have coverage from other sources, such as Medicare, Medicaid or a spouse's employer. The final regulations do not adopt this comment because it is not consistent with section 4980H and would require that the employer verify alternative coverage in a manner not contemplated by the statute (for example, obligating an employer to question its employees as to Medicaid eligibility or a spouse's eligibility for and purchase of employer-sponsored coverage).
- However, an employee who is eligible for Medicare or Medicaid is not eligible for a premium tax credit, and in cases in which no full-time employee receives a premium tax credit (for example, because all of an employer's full-time employees are eligible for Medicare or Medicaid), the employer will not be subject to an assessable payment under section 4980H. In addition, for an employer that satisfies the requirements to avoid a payment under section 4980H(a), the employer will not be subject to a payment under section 4980H(b) with respect to those employees (because they are not eligible for a premium tax credit). requirement.

Overview

- Commenters expressed concern about potential liability under section 4980H in the case of an applicable large employer that cannot obtain or maintain coverage for its employees because the employer cannot satisfy a health insurance issuer's minimum participation requirements.
- In the large group market, a minimum participation requirement cannot be used to deny guaranteed issue.
- For small employers, such as relatively small applicable large employers, final regulations issued by HHS provide that an issuer must guarantee issue coverage to a small employer during an annual, month-long open enrollment period regardless of whether the small employer satisfies any minimum participation requirement.

Application to MEWAs and Other Similar Arrangements

- For purposes of section 4980H, an offer of coverage includes an offer of coverage made on behalf of an employer, and that this would include an offer made by a multiemployer or single employer Taft-Hartley plan or a MEWA to an employee on behalf of a contributing employer of that employee.

X. ASSESSMENT AND PAYMENT OF SECTION 4980H LIABILITY

Assessment and Payment of Employer Mandate

- Each applicable large employer member is liable for its section 4980H assessable payment, and is not liable for the section 4980H assessable payment of any other entity in the controlled group comprising the applicable large employer.
- The IRS will adopt procedures that ensure employers receive certification, pursuant to regulations issued by HHS, that one or more employees have received a premium tax credit or cost-sharing reduction.

Assessment and Payment of Employer Mandate

- The IRS will contact employers to inform them of their potential liability and provide them an opportunity to respond before any liability is assessed or notice and demand for payment is made.

Assessment and Payment of Employer Mandate

- **The contact for a given calendar year will not occur until after employees' individual tax returns are due** for that year claiming premium tax credits **and after the due date for employers that meet the 50 full-time employee (plus FTE) threshold to file the information returns** identifying their full-time employees and describing the coverage that was offered (if any).
- With respect to a full-time employee who performs services for two or more applicable large employer members during the same calendar month, the member for whom the employee has the greatest number of hours of service for that calendar month is the member that treats that employee as a full-time employee for purposes of assessable payment determinations under section 4980H(a) and (b). This rule modifies the rule in the proposed regulations.
- Pursuant to section 275(a)(6) regarding the non-deductibility of certain excise taxes, including those under chapter 43, an assessable **payment imposed under section 4980H is not deductible**.

XI. DEFINITION OF DEPENDENT

Definition of Dependent

- In order to avoid a potential assessable payment under section 4980H, an applicable large employer must offer coverage to its full-time employees and the full-time employees' dependents.
- The proposed regulations define the term **dependent to mean a child of an employee who has not attained age 26**.

Does Not Include Spouse

- For this purpose, a dependent **does not include the spouse of an employee**. This definition of dependent applies only for purposes of section 4980H.

Foster Children and Stepchildren

- By incorporating section 152(f)(1), the definition of dependent in the proposed regulations includes biological children, stepchildren, adopted children, and foster children. **The final regulations exclude both foster children and stepchildren from the definition of dependent for purposes of section 4980H only.**

Treatment During Month in Which Dependent Attains Age 26

- For purposes of section 4980H, a child is a dependent for the entire calendar month during which he or she attains age 26.

Citizens or Nationals of Other Countries

- The final regulations modify the definition of dependent to incorporate the rules under section 152(b)(3). Accordingly, the final regulations exclude a child who is not a U.S. citizen or national from the definition of dependent, unless that child is a resident of a country contiguous to the United States or is within the exception for adopted children described in section 152(b)(3)(B).

XII. WORKER CLASSIFICATION AND SECTION 4980H

Worker Classification

- These final regulations define an employee for purposes of section 4980H as an individual who is an employee under the common law standard, and as not including a leased employee (as defined in section 414(n)(2)), a sole proprietor, a partner in a partnership, a 2-percent S corporation shareholder, or a worker described in section 3508 (this last category is added to the list of exclusions in the final regulations).

Worker Classification

- Commenters expressed concerns about the consequences under section 4980H of an IRS examination in which workers providing services to a service recipient entity are reclassified as employees of that entity.
- Specifically, commenters pointed out that if a worker who was not treated as an employee by the service recipient and was not offered health coverage by the service recipient is reclassified as an employee of the service recipient for past periods, and that worker had sufficient hours of service to be a full-time employee for such past periods, the reclassification may impact whether the service recipient employer had offered coverage to no less than 95 percent of its full-time employees for a particular calendar month (and therefore whether an assessable amount was payable under section 4980H(a)).

Worker Classification

- In addition, one commenter noted that, even if the reclassification did not result in liability for an assessable payment under section 4980H(a), the service recipient could still be liable for an assessable payment under section 4980H(b) if the reclassified full-time employee had received a premium tax credit.
- The Treasury Department and the IRS are concerned that offering relief on these points would serve to increase the potential for worker misclassification by significantly increasing the benefit of having an employee treated as an independent contractor. Accordingly, the final regulations do not adopt this suggestion.

XIII. PARTICULAR POSITIONS OF EMPLOYMENT

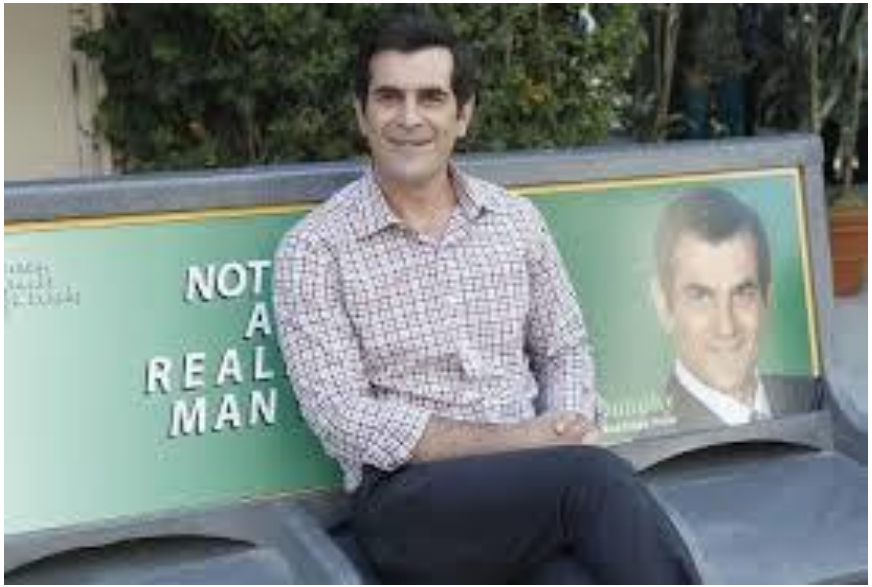
Home Care Workers

- Section 4980H applies to all applicable large employers and does not provide an exception, either for employers in a particular industry such as the home care industry, or for employers with more difficulty adjusting revenue streams.
- Section 4980H applies, however, only with respect to an applicable large employer, and in some circumstances the service recipient rather than a home care agency may be the common law employer of the health care provider.

Home Care Workers

- For example, if the service recipient has the right to direct and control the home care provider as to how they perform the services, including the ability to choose the home care provider, select the services to be performed, and set the hours of the home care provider, these facts would indicate that the service recipient is the employer under the common law standard. In that case, the agency that placed the home care provider would not be subject to section 4980H with respect to that particular provider, and the service recipient employer generally would not be subject to section 4980H with respect to any employee because the service recipient is unlikely to employ 50 full-time employees (including FTEs).

Section 3508 Employees



- Because section 3508 provides that the identified categories of workers (that is, real estate agents and direct sellers) are not treated as employees for any purpose of the Code, the final regulations clarify that workers identified in section 3508 do not constitute employees for purposes of section 4980H (and, therefore, do not constitute full-time employees for any purpose, and their hours of service are not taken into account in determining the number of an employer's FTEs).

XIV. INTERNATIONAL ISSUES

Foreign States and International Organizations

- Due to applicable U.S. laws and treaty obligations, certain operations of foreign states and certain international organizations would not be subject to assessable payments under section 4980H. Accordingly, the final regulations do not explicitly address this matter. See section 894(a)(1).

Employees Holding H-2A and H-2B Visas

- Commenters, generally representing employers in the agricultural industry, requested that holders of H-2A and H-2B visas be exempted from the definition of employee for purposes of section 4980H. The commenters suggested that such employees are generally seasonal workers.
- The final regulations do not adopt the suggestion that holders of H-2A and H-2B visas be generally exempted from the definition of employee for purposes of section 4980H.

Employees Holding H-2A and H-2B Visas

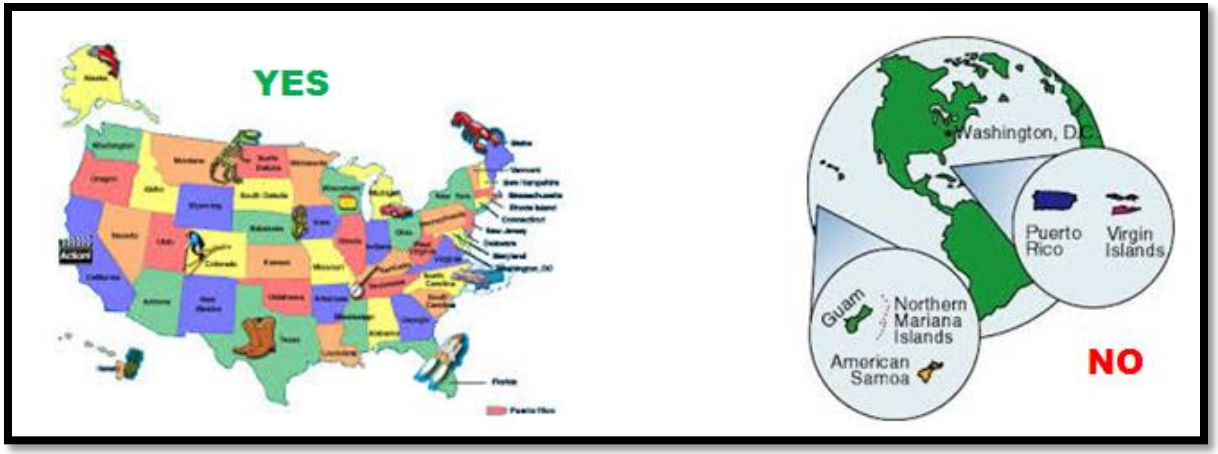
- The final regulations also do not adopt a special rule with respect to these workers' status as seasonal employees. The definition of seasonal employee is different from the definition of seasonal worker, and is relevant to the determination of a worker's status as a full-time employee for reasons other than the entity's determination of status as an applicable large employer. In applying the definition of seasonal employee, whether the employee holds any particular visa is not relevant.

Employees Performing Services on Cruise Ships

- Representatives of the cruise ship industry requested that services performed on a cruise ship be treated as services performed outside the United States, meaning that those services would not count as hours of service for purposes of identifying an employer as an applicable large employer, or an employee as a full-time employee.
- The final regulations clarify that this rule applies to transportation employees such as employees of cruise ships by specifically stating that hours of service do not include hours of service to the extent the compensation for such hours of service constitutes income from sources without the United States as determined under section 863.

Modifications to the Definition of Hours of Service

- The final regulations exclude from the definition of hours of service those hours the compensation for which constitutes income from sources without the United States (within the meaning of sections 861 through 863 and the regulations thereunder).
- For this purpose, the term United States means United States as defined in section 7701(a)(9), which includes only the States and the District of Columbia and does not include the U.S. territories.



EEs Transferring Between a Domestic and Foreign Employer

- The final regulations provide that, for both the look-back measurement method and the monthly measurement method, an employee who transfers employment from a domestic applicable large employer member to a foreign applicable large employer member may be treated as having terminated employment, but only if the position is anticipated to continue indefinitely or for at least 12 months and if substantially all of the compensation received following the transfer is treated as foreign-source income.
- With respect to an employee who transfers from a foreign applicable large employer member at which the employee's services had not resulted in hours of service to a domestic applicable large employer member, if the employee had no prior hours of service with the applicable large employer (because, for example, the employee had only received non-U.S. source income in connection with services performed for the foreign applicable large employer member), the employee is treated as a newly hired employee by the domestic applicable large employer member.
- If the same transfer occurs with respect to an employee who had prior hours of service with the applicable large employer, the period at the foreign applicable large employer member may be treated as a period for which no hours of service are earned under the rehire rules (if the employee did not receive U.S. source income with respect to that period), so that if that period is at least 13 weeks in length, the employee is treated as a newly hired employee of the domestic applicable large employer member.

XV. TRANSITION RELIEF AND INTERIM GUIDANCE

Transition Guidance in the Proposed Regulations

The preamble to the proposed regulations includes transition guidance addressing

1. the application of section 4980H to applicable large employers with non-calendar year plans,
2. salary reduction elections for accident and health plans provided through cafeteria plans with non-calendar year plan years beginning in 2013,
3. for purposes of determining full-time employee status, measurement periods for stability periods starting in 2014,
4. the application of section 4980H to applicable large employer members participating in multiemployer plans,
5. the determination of applicable large employer status for 2014,
6. the application of section 4980H to an offer of coverage to a full-time employee's dependents, and
7. for purposes of determining full-time employee status, the variable hour employee definition.

The transition guidance in the preamble to the proposed regulations generally applies for 2014 or for the plan year beginning in 2014.

Transition Guidance for 2014—Notice 2013-45

- Section 4980H applies to months after December 31, 2013; however, Notice 2013-45, issued on July 9, 2013, provides as transition relief that no assessable payments under section 4980H will apply for 2014.
- Transition relief was also provided for the section 6056 information reporting requirements for applicable large employers and the section 6055 information reporting requirements for issuers of MEC.
- Notice 2013-45 provides that the employer shared responsibility provisions under section 4980H (and the information reporting provisions) will become effective for 2015.

Section 125 Non-Calendar Year Guidance

- The proposed regulations provides transition relief that allows flexibility for individuals to make changes in salary reduction elections for accident and health plans provided through section 125 cafeteria plans for non-calendar cafeteria plan years beginning in 2013.
- Generally, the rules allowing employees to change their employer health plan elections under a section 125 cafeteria plan do not allow midyear changes.
- Temporary relief was needed because generally the section 5000A requirement to maintain coverage is first effective on January 1, 2014, and enrollment in qualified health plans on an Exchange is first available for 2014.
- The relief allowed employers to amend their plans to permit employees who had not enrolled in an employer's plan with a non-calendar plan year that began in 2013 to enroll in the middle of the plan year in order for the employees to maintain coverage for 2014 or if the employees wished to enroll in an Exchange plan, to drop enrollment in the employer's plan with a non-calendar plan year that began in 2013 in the middle of the plan year.
- Both the implementation of section 5000A and the initial availability of the qualified health plans on an Exchange were one-time events at the beginning of 2014 only affecting employee decisions during 2013 non-calendar plan years. Consequently, these rules are not extended for non-calendar cafeteria plan years beginning in 2014.

Transition Guidance for 2015

Non-Calendar Year Plans

- The following three pieces of transition guidance apply for the period before the first day of the first non-calendar year plan year beginning in 2015 (the 2015 plan year) for employers that maintained non-calendar year plans as of December 27, 2012, if the plan year was not modified after December 27, 2012, to begin at a later calendar date.
- The first two pieces (pre-2015 eligibility transition guidance and significant percentage transition guidance (all employees)) are extensions of the rules provided in section IX.A of the preamble to the proposed regulations. A new option (significant percentage transition guidance (full-time employees)) is added in this preamble.
- In essence, this guidance provides transition relief for the period before the first day of the 2015 plan year with respect to all employees who, under the eligibility terms of the plan as in effect on February 9, 2014, are eligible as of the first day of the 2015 plan year for coverage under a non-calendar year plan, and who are offered, no later than the first day of the 2015 plan year, affordable coverage that provides MV.
- Also, in general, unless the employees described in the preceding sentence comprise an insufficient percentage of all the employer's employees, this guidance also provides relief with respect to all other employees of the employer who are offered affordable coverage that provides MV as of the first day of the 2015 plan year.

Non-Calendar Year Plans

a. Pre-2015 Eligibility Transition Guidance

- If an applicable large employer member maintained a non-calendar year plan as of December 27, 2012, and the plan year was not modified after December 27, 2012 to begin at a later calendar date, this rule applies with respect to employees of the applicable large employer member (whenever hired) who would be eligible for coverage effective beginning on the first day of the 2015 plan year under the eligibility terms of the plan as in effect on February 9, 2014.
- If an employee described in the preceding sentence is offered affordable coverage that provides MV no later than the first day of the 2015 plan year, no section 4980H assessable payment will be due with respect to that employee for the period prior to the first day of the 2015 plan year.
- To provide relief with respect to employees who are not offered coverage during one or more calendar months in 2015 solely because they terminate employment before the beginning of the 2015 plan year, this relief also applies with respect to an employee who would be eligible for coverage effective beginning on the first day of the 2015 plan year under the eligibility terms of the plan as in effect on February 9, 2014, but for the fact that the employee terminated employment (and was not rehired) prior to the first day of the 2015 plan year.
- This relief only applies with respect to employees who would not have been eligible for coverage under any group health plan maintained by an applicable large employer member as of February 9, 2014, that has a calendar year plan year.
- An applicable large employer member may be subject to an assessable payment under section 4980H(a) if it does not offer coverage to all but five percent (or, if greater, five) of its full-time employees (and their dependents) (or, if the transition relief set forth in section XV.D.7 of this preamble applies, if it does not offer coverage to all but 30 percent of its full-time employees (and their dependents)) as of the first day of the 2015 plan year.
- If an applicable large employer member does not do so, an assessable payment under section 4980H(a) may be due for any calendar month in 2015 under the section 4980H(a) rules as applied without regard to the above relief.

Non-Calendar Year Plans

b. Significant Percentage Transition Guidance (All Employees)

- Additional transition guidance is also provided for employers that maintained a non-calendar year plan as of December 27, 2012, if the plan year of the non-calendar year plan was not modified to begin after December 27, 2012, at a later calendar date after December 27, 2012, and that either—

    1. had, as of any date in the 12 months ending on February 9, 2014, at least one quarter of its employees covered under those non-calendar year plans, or
    2. offered coverage under those plans to one third or more of its employees during the open enrollment period that ended most recently before February 9, 2014.

- No assessable payment under section 4980H will be due for any month prior to the first day of the 2015 plan year with respect to employees who (1) are offered affordable coverage that provides MV no later than the first day of the 2015 plan year, and (2) would not have been eligible for coverage under any group health plan maintained by the applicable large employer member as of February 9, 2014, that has a calendar year plan year.

- If an applicable large employer member does not offer coverage to all but five percent (or, if greater, five) of its full-time employees (and their dependents) (or, if the transition relief set forth in section XV.D.7 of this preamble applies, if it does not offer coverage to all but 30 percent of its full-time employees (and their dependents)) as of the first day of the 2015 plan year, an assessable payment under section 4980H(a) may be due for any calendar month in 2015 under the section 4980H(a) rules as applied without regard to the relief set forth in this section.

- A detailed example is provided in the final rules.

Non-Calendar Year Plans

c. Significant Percentage Transition Guidance (Full-Time Employees)

- Additional transition guidance is provided for employers that, as of December 27, 2012, maintained a non-calendar year plan (or two or more such plans that, as of that date, have the same plan year) if the plan year was not modified to begin after that date to begin at a later calendar date, and if the employer either—
    1. had, as of any date in the 12 months ending on February 9, 2014, at least one third of its full-time employees covered under those non-calendar year plans, or
    2. offered coverage under those plans to one half or more of its full-time employees during the open enrollment period that ended most recently before February 9, 2014.
- Under this additional transition guidance, no payment under section 4980H will be due for any month prior to the first day of the 2015 plan year with respect to full-time employees who
    1. are offered affordable coverage that provides MV no later than the first day of the 2015 plan year, and
    2. would not have been eligible for coverage under any group health plan maintained by the applicable large employer member as of February 9, 2014, that has a calendar year plan year.
- If an applicable large employer member does not offer coverage to all but five percent (or, if greater, five) of its full-time employees (and their dependents) (or, if the transition relief set forth in section XV.D.7 of this preamble applies, if it does not offer coverage to all but 30 percent of its full-time employees (and their dependents)) as of the first day of the 2015 plan year, an assessable payment under section 4980H(a) may be due for any calendar month in 2015 under the section 4980H(a) rules as applied without regard to the relief set forth in this section

Non-Calendar Year Plans

d. Requirement of No Change to Plan Year

- The transition guidance for applicable large employer members sponsoring non-calendar year plans are available for a non-calendar year plan only if that plan's plan year was not modified after December 27, 2012, to begin at a later calendar date.
- For example, if, as of December 27, 2012, an applicable large employer member sponsored a non-calendar year plan with a plan year starting on July 1 and later changed the start of the plan year to December 1, the transition guidance for applicable large employer members sponsoring non-calendar year plans would not apply.

Non-Calendar Year Plans

e. Section 6056 Reporting for 2015 Transition Period for Non-Calendar Year Plans

- Employers eligible for the transition guidance for plans with non-calendar year plan years remain subject to the reporting requirements under section 6056 for the entire 2015 calendar year.
- Because no section 4980H liability applies whether or not a full-time employee is offered coverage during the portion of the 2014 plan year falling in 2015, the applicable large employer may determine the full-time employees for that period for purposes of the section 6056 reporting requirements after the period has ended, using actual service data or using the look-back measurement method, and use those determinations for the reporting required for the period during 2015 that precedes the start of the 2015 plan year.
- In addition, the employer should be able to determine whether the coverage offered provides MV and the employee portion of the applicable premium in time to complete the required reporting for 2015 (that is, for section 6056 returns furnished to employees and filed with the IRS in 2016).
- 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 section 4980H liability will not apply by reason of the transition guidance for non-calendar year plan years. The section 6056 return instructions will provide additional information on how to report for 2015.

Shorter Measurement Periods for Stability Period During 2015

- The final regulations include an optional alternative method to determine full-time employee status (for purposes other than determining applicable large employer status) referred to as the look-back measurement method.
- For purposes of stability periods beginning in 2015, employers may adopt a transition measurement period that is shorter than 12 consecutive months but that is no less than 6 consecutive months and that begins no later than July 1, 2014, and ends no earlier than 90 days before the first day of the plan year beginning on or after January 1, 2015 (90 days being the maximum permissible administrative period). For example, an employer with a calendar year plan may use a measurement period from April 15, 2014, through October 14, 2014 (six months), followed by an administrative period ending on December 31, 2014.
- An employer with a plan year beginning April 1 that also elected to implement a 90-day administrative period may use a measurement period from July 1, 2014, through December 31, 2014 (six months), followed by an administrative period ending on March 31, 2015. However, an employer with a plan year beginning on July 1 must use a measurement period that is longer than 6 months to comply with the requirement that the measurement period begin no later than July 1, 2014, and end no earlier than 90 days before the stability period. For example, the employer may have a 10-month measurement period from June 15, 2014, through April 14, 2015, followed by an administrative period from April 15, 2015, through June 30, 2015.
- This transition guidance applies to a stability period beginning in 2015 through the end of that stability period (including any portion of the stability period falling in 2016), and applies to individuals who are employees as of the first day of the transition measurement period.

Shorter Period for Determining Large Employer Status for 2015

- For the 2015 calendar year, an employer may determine its status as an applicable large employer by reference to a period of at least six consecutive calendar months, as chosen by the employer, during the 2014 calendar year (rather than the entire 2014 calendar year).
- Thus, an employer may determine whether it is an applicable large employer for 2015 by determining whether it employed an average of at least 50 full-time employees (including FTEs) on business days during any consecutive six-month period in 2014.
- Whether an employer meets the requirements of the seasonal worker exception, as described in section V.C of this preamble, for purposes of determining applicable large employer status for 2015 is based on the calendar year, rather than on the calendar months chosen by the employer under the 2015 applicable large employer transition guidance, if applicable.

Shorter Period for Determining Large Employer Status for 2015

- This guidance allows employers to choose to use either a period to prepare to count their employees or a period afterward to ascertain and implement the results of the determination, or both. For example, an employer could use at least six months through August 2014 to determine its applicable large employer status and, if it is an applicable large employer, the period from September through December 2014 to make any needed adjustments to its plan (or to establish a plan).
- Commenters noted that, under the transition guidance for applicable large employer status in 2014, the hours of service (or lack of hours of service) during the summer season could be taken into account by schools in determining applicable large employer status even though, during the summer, employees may provide no formal, in-school service. These commenters expressed concern that this would affect the educational employer's total number of full-time employees and status as an applicable large employer by overweighting the summer period in relation to the non-summer academic year. The Treasury Department and the IRS understand this concern and have considered various options for addressing these comments in developing this transition guidance, but have concluded that the options for addressing this concern (such as basing the rule on non-consecutive months or applying an employee-by-employee rule such as the employment break period rule set forth in § 54.4980H-3(d)(6)(ii)(B)) would add more complexity and administrative burden than is justified for a rule that applies only for 2015.

Offer of Coverage for January 2015

- The final regulations provide, in general, that if an applicable large employer 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. See § 54.4980H-4(c).
- The Treasury Department and the IRS understand that many employers offer coverage for a new year effective as of the first day of the first pay period beginning on or after the first day of the year, and that questions have arisen as to whether a full-time employee will be treated as having been offered coverage for the first month to which section 4980H applies if the offer of coverage applies no later than the first day of the first payroll period that begins in that month.
- Solely for purposes of January 2015, if an applicable large employer 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. This transition guidance, which was not contained in the preamble to the proposed regulations, applies only for January 2015.

Coverage for Dependents

- In order to avoid a potential assessable payment under section 4980H, an applicable large employer member must offer coverage to its full-time employees and the full-time employees' dependents. To provide employers sufficient time to expand their health plans to add dependent coverage, proposed regulations provide that any employer that takes steps during its plan year that begins in 2014 (2014 plan year) toward satisfying the section 4980H provisions relating to offering coverage to full-time employees' dependents will not be liable for any assessable payment under section 4980H solely on account of a failure to offer coverage to the dependents for that plan year.
- This relief is extended to plan years that begin in 2015 (2015 plan years). It applies to employers for the 2015 plan year with respect to plans under which
- dependent coverage is not offered,
- dependent coverage that does not constitute MEC is offered, or
- dependent coverage is offered for some, but not all, dependents.
- The relief is not available to the extent the employer offered dependent coverage during either the plan year that begins in 2013 (2013 plan year) or the 2014 plan year (meaning the relief is not available to the extent the employer had offered dependent coverage during either of those plan years and subsequently dropped that offer of coverage).

2015 Transition Relief for Employers With Fewer Than 100 FTEs

a. Eligibility Conditions for Transition Relief

- An employer is eligible for the transition relief described in this section XV.D.6 if it satisfies the following conditions:

2015 Transition Relief for Employers With Fewer Than 100 FTEs

a. Eligibility Conditions for Transition Relief

- An employer is eligible for the transition relief described in this section XV.D.6 if it satisfies the following conditions:

- **Limited Workforce Size.** The employer employs on average at least 50 full-time employees (including FTEs) but fewer than 100 full-time employees (including FTEs) on business days during 2014. For this purpose, the determination of the number of full-time employees (including FTEs) is made in accordance with the otherwise applicable rules for determining status as an applicable large employer.

2015 Transition Relief for Employers With Fewer Than 100 FTEs

a. Eligibility Conditions for Transition Relief

- An employer is eligible for the transition relief described in this section XV.D.6 if it satisfies the following conditions:

- **Maintenance of Workforce and Aggregate Hours of Service.** During the period beginning on February 9, 2014, and ending on December 31, 2014, the employer does not reduce the size of its workforce or the overall hours of service of its employees in order to satisfy the workforce size condition set forth in paragraph (1) of this section XV.D.6. A reduction in workforce size or overall hours of service for bona fide business reasons will not be considered to have been made in order to satisfy the workforce size condition. For example, reductions of workforce size or overall hours of service because of business activity such as the sale of a division, changes in the economic marketplace in which the employer operates, terminations of employment for poor performance, or other similar changes unrelated to eligibility for the transition relief provided in this section XV.D.6 are for bona fide business reasons and will not affect eligibility for that transition relief.

2015 Transition Relief for Employers With Fewer Than 100 FTEs

a. Eligibility Conditions for Transition Relief

- An employer is eligible for the transition relief described in this section XV.D.6 if it satisfies the following conditions:
- **Maintenance of Previously Offered Health Coverage.** Except as otherwise provided in this paragraph (3), during the coverage maintenance period the employer does not eliminate or materially reduce the health coverage, if any, it offered as of February 9, 2014. For purposes of this paragraph (3), in no event will an employer be treated as eliminating or materially reducing health coverage if (i) it continues to offer each employee who is eligible for coverage during the coverage maintenance period an employer contribution toward the cost of employee-only coverage that either (A) is at least 95 percent of the dollar amount of the contribution toward such coverage that the employer was offering on February 9, 2014, or (B) is the same (or a higher) percentage of the cost of coverage that the employer was offering to contribute toward coverage on February 9, 2014; (ii) in the event there is a change in benefits under the employee-only coverage offered, that coverage provides minimum value after the change; and (iii) the employer does not alter the terms of its group health plans to narrow or reduce the class or classes of employees (or the employees' dependents) to whom coverage under those plans was offered on February 9, 2014. For purposes of this paragraph, the term coverage maintenance period means (1) for an employer with a calendar year plan, the period beginning on February 9, 2014, and ending on December 31, 2015, and (2) for an employer with a non-calendar year plan, the period beginning on February 9, 2014, and ending on the last day of the plan year that begins in 2015.

2015 Transition Relief for Employers With Fewer Than 100 FTEs

a. Eligibility Conditions for Transition Relief

- An employer is eligible for the transition relief described in this section XV.D.6 if it satisfies the following conditions:

- **Maintenance of Previously Offered Health Coverage.** For example, if on February 9, 2014, an employer was contributing $300 per month for coverage that costs $400 per month for employee-only coverage, and the employer continues to offer to contribute $300 per month after the cost of employee-only coverage increases to $425 per month for the plan year beginning on July 1, 2014, the increase in cost to the employee will not be treated for this purpose as an elimination or material reduction of health coverage offered.

2015 Transition Relief for Employers With Fewer Than 100 FTEs

a. Eligibility Conditions for Transition Relief

- An employer is eligible for the transition relief described in this section XV.D.6 if it satisfies the following conditions:

- **Certification of Eligibility for Transition Relief.** The applicable large employer certifies on a prescribed form that it meets the eligibility requirements set forth in paragraphs (1) through (3). The forthcoming final regulations under section 6056 are expected to provide that an applicable large employer, or an applicable large employer member, that otherwise qualifies for the transition relief described in this section XV.D.6 will provide this certification as part of the transmittal form it is required to file with the IRS under the section 6056 regulations, in accordance with the instructions to that transmittal form. See section III of the preamble regarding section 6056.

2015 Transition Relief for Employers With Fewer Than 100 FTEs

b. Application of Transition Relief to Non-Calendar Year Plans

- The transition relief described in this section XV.D.6 applies to all calendar months of 2015 plus any calendar months of 2016 that fall within the 2015 plan year.
- It is not available for an employer that modifies the plan year of its plan after February 9, 2014, to begin on a later calendar date (for example, changing the start date of the plan year from January 1 to December 1).

2015 Transition Relief for Employers With Fewer Than 100 FTEs

c. Application of Transition Relief to New Employers

- An employer that was not in existence on any day of the previous calendar year may be an applicable large employer for the current calendar year if the employer is reasonably expected to employ an average of at least 50 full-time employees (including FTEs) on business days during the current calendar year and it actually employs an average of at least 50 full-time employees (including FTEs) on business days during the calendar year.
- For employers first coming into existence in 2015 that are applicable large employers under the standard in the preceding sentence, the relief described in this section XV.D.6 applies if

  1. the employer reasonably expects to employ and actually employs fewer than 100 full-time employees (including FTEs) on business days during 2015,
  2. the employer reasonably expects to meet and actually meets the maintenance standards described in paragraphs (2) and (3) above, as measured from the date the employer is first in existence, and
  3. the employer certifies in the manner described in paragraph (4) above.

2015 Transition Relief for Employers With Fewer Than 100 FTEs

d. Coordination With Other Transition Relief

- For periods on or after January 1, 2016 (or, if applicable, for any period after the last day of the 2015 plan year), the transition relief set forth in section XV.D.1 (non-calendar plan years), section XV.D.2 (shorter measurement periods permitted for stability period starting during 2015), section XV.D.4 (offer of coverage for January 2015), section XV.D.5 (coverage for dependents), and section XV.D.7 (limited 2015 section 4980H(a) transition relief) of the preamble will not be available.
- The transition relief listed in the prior sentence is available only with respect to 2015 or, if applicable, the 2015 plan year and does not apply to an applicable large employer that is eligible for the relief described in this section XV.D.6 because that eligible employer will first become subject to a potential assessable payment under section 4980H after 2015 or, if applicable, after the 2015 plan year and, accordingly, already will have had the benefit of an extra year to plan for and implement changes.
- However, an employer may use the rule set forth in section XV.D.3 of the preamble (shorter period in 2014 permitted for determining applicable large employer status for 2015) in determining applicable large employer status and full-time employee count for 2015 (but not for any subsequent year).

2015 Transition Relief for Employers With Fewer Than 100 FTEs

e. Example

- The following example illustrates the transition relief described in this section XV.D.6 of the preamble:
- Facts. As of February 9, 2014, Employer A sponsors a group health plan with a calendar year plan year under which 40 of its full-time employees are offered coverage with an employer contribution of $300 per month for employee-only coverage. The offer of coverage is affordable with respect to some, but not all, of Employer A's full-time employees. During the period from February 9, 2014, through December 31, 2014, two of Employer A's employees voluntarily terminate employment and Employer A terminates three employees because of the non-renewal of a customer contract but does not otherwise reduce the size of its workforce or reduce any employee's hours of service. Had those five employees continued in employment throughout 2014, the employer would have had an average of 100 full-time employees (including FTEs) on business days in 2014. However, as a result of the terminations, it had an average of only 97 full-time employees (including FTEs) for business days in 2014. During the coverage maintenance period, Employer A does not change the eligibility requirements for the group health plan (including not amending it to eliminate its existing health coverage for dependents) and continues to make an employer contribution of $300 per month toward the cost of employee-only coverage that provides minimum valve. Employer A certifies in a timely manner as to its eligibility for the transition relief.
- Conclusion. Employer A will not be subject to an assessable payment under section 4980H(a) or (b) for 2015.

Limited 2015 Section 4980H(a) Transition Relief

a. Offers of Coverage to at Least 70 Percent (Rather Than 95 Percent) of Full-Time Employees (and Their Dependents)

- For purposes of section 4980H(a), the final regulations provide that an applicable large employer member is treated as offering coverage to its full-time employees (and their dependents) for a month if, for that month, it offers coverage to all but five percent or, if greater, five, of its full-time employees.
- As further transition relief, for each calendar month during 2015 and any calendar months during the 2015 plan year that fall in 2016, an applicable large employer member that offers coverage to at least 70 percent (or that fails to offer to no more than 30 percent) of its full-time employees (and, to the extent required under § 54.4980H-4(a) and the transition relief in section XV.D.5 of this preamble, their dependents) will not be subject to an assessable payment under section 4980H(a). Applicable large employer members qualifying for the transition relief set forth in this section XV.D.7.a continue to be subject to a potential assessable payment under section 4980H(b).

Limited 2015 Section 4980H(a) Transition Relief

b. Calculation of Assessable Payments Under Section 4980H(a) for Applicable Large Employers With 100 or More Full-Time Employees (Including FTEs) for 2015

- For purposes of the liability calculation under section 4980H(a), with respect to each calendar month, an applicable large employer member's number of full-time employees is reduced by that member's allocable share of 30.
- Accordingly, an applicable large employer with 50 full-time employees that is subject to an assessable payment under section 4980H(a) may be subject to an assessable payment based on 20 employees (that is, 50 minus 30) times one-twelfth of $2,000 for each calendar month.
- An applicable large employer member's allocation is equal to 30 allocated ratably among all members of the applicable large employer on the basis of the number of full-time employees employed by each applicable large employer member during the calendar month.
- For 2015 plus any calendar months of 2016 that fall within the employer's 2015 plan year, if an applicable large employer with 100 or more full-time employees (including FTEs) on business days during 2014 (or an applicable large employer member that is part of such an applicable large employer) is subject to an assessable payment under section 4980H(a), the assessable payment under section 4980H(a) with respect to the transition relief period will be calculated by reducing an applicable large employer member's number of full-time employees by that member's allocable share of 80 rather than 30.

For Example

100 Full-Time EEs – 80 = 20

20 x $2,000 = $40,000 (not tax deductible)

BUT

- 99 FTEs – all are full-time
- Cancel coverage after 12/27/2012
- No transition relief

99 Full-Time EEs – 30 = 69

69 x $2,000 = $138,000 (not tax deductible)

Limited 2015 Section 4980H(a) Transition Relief

c. Application to Non-Calendar Year Plans

- The transition relief described in this section XV.D.7 applies to all calendar months of 2015 plus any calendar months of 2016 that fall within the employer's 2015 plan year, and is available for an employer only if it did not modify the plan year of its plan after February 9, 2014, to begin on a later calendar date (for example, changing the start date of the plan year from January 1 to December 1).

Limited 2015 Section 4980H(a) Transition Relief

d. Coordination With Other Transition Relief

- The relief described in this section XV.D.7 of the preamble applies in addition to the forms of transition relief described in section XV.D.1 (non-calendar plan years), section XV.D.2 (shorter measurement periods permitted for stability period starting during 2015), section XV.D.3 (shorter period permitted in 2014 for determining applicable large employer status for 2015), section XV.D.4 (offer of coverage for January 2015), and section XV.D.5 (coverage for dependents) of this preamble.

Interim Guidance With Respect to Multiemployer Arrangements\

- Employers may rely on the interim guidance described in this section XV.E. This interim guidance is intended to continue the transition guidance originally set forth in section IX.D of the preamble to the proposed regulations, as corrected, and as clarified in this preamble. Any future guidance that limits the scope of the interim guidance will be applied prospectively and will apply no earlier than January 1 of the calendar year beginning at least six months after the date of issuance of the guidance.

XVI. EFFECTIVE DATES AND RELIANCE

Effective Dates and Reliance

- Section 4980H applies to months beginning after December 31, 2013; however, Notice 2013-45 provides transition relief from section 4980H for 2014.
- These final regulations are effective February 12, 2014. These final regulations are applicable for periods after December 31, 2014. Employers may rely on these final regulations for periods before January 1, 2015.
- If and to the extent an employer has relied on Notice 2012-58 (relating to look-back and measurement periods), the employer may continue to rely on Notice 2012-58 to the extent reliance is provided in section IV of that notice.

Employer Mandate

ANY QUESTIONS?