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Q&A FROM ASSUREX GLOBAL WEBINAR

PLAN AFFORDABILITY UNDER THE ACA

MAY 26, 2016

Q. 50 FTE or 50 head count?

A. Status as an applicable large employer is always based on average total full-time equivalents (FTEs) from the previous calendar year. So if the employer averaged 50 or more FTEs during 2016, it is necessary for the employer to comply with §4980H offer of coverage requirements and §6056 employer reporting requirements for all of 2017 to avoid potential penalties. In other words, if the employer grows enough during 2016 to average 50 or more FTEs during the 2016 calendar year, the employer would be subject to the rules requiring an offer of minimum value, affordable coverage to full-time employees as of Jan 2017 (but there is generally transition relief until April for an employer that is an applicable large employer for the first time). See FTE calculation details below…

- Step 1: Calculate the number employees with 120 or more hours of service for each calendar month
- Step 2: Aggregate hours of service for each month for any other employees and divide the total by 120
- Step 3: Add the numbers obtained in Steps 1 and 2 for each month
- Step 4: Add up the totals from each month from Step 3 and divide the sum by 12

Q. Are employers expected to select which safe harbor plan they elect at the beginning of the plan year?

A. Employers are not required to select an affordability safe harbor at the beginning of the plan year, but it may be beneficial to use it prior to the beginning of the plan year to assist in setting employer contributions. When doing so, keep in mind that sometimes making coverage affordable for all employees is not necessarily the best option for the employer financially, and allowing coverage to be unaffordable for a handful and potentially paying the $270/month penalty (in 2016) under §4980H(b) is better than making coverage affordable for everyone and ultimately paying more for all who choose to enroll.

On the other hand, if not choosing a safe harbor until the end of the year, it would be beneficial to run the numbers and use the safe harbor that will result in the contribution rate being considered affordable for the largest number of full-time employees.

Q. Are S-Corp owners 2% or more excluded from the FTE calculation?

A. Yes. The term "employee" for purposes of §4980H compliance and employer reporting does not include a sole proprietor, partner in a partnership, a 2% or more shareholder in an S-Corp or a leased employee (independent contractor). Therefore, 2% or more shareholders of an S-Corp are excluded when counting average full-time equivalents (FTEs) for purposes of determining status as an applicable large employer, when determining which employees must be offered coverage to meet §4980H requirements, and also for reporting purposes (unless they are covered under a self-funded plan).

Q. Are there IRS penalties to employers for offering coverage to the employees only (no dependents)?

A. §4980H(a) requires applicable large employers - 50 or more full-time equivalents (FTEs) - to offer minimum essential coverage to 95% or more of all full-time employees and dependent children (but not to spouses).

Q. As an employer, how are you supposed to determine household income for a family?

A. Because an employer is unlikely to ever know an employee's household income, the IRS provided employers with 3 possible safe harbors to use instead (i.e. federal poverty level (FPL), rate of pay, or Form W-2).

Q. Can you use different safe harbors for different employees?

A. So long as the safe harbors are not applied on an employee-by-employee basis, different safe harbors may be chosen for different categories of employees. An employer may choose to apply any of the safe harbors for any reasonable category of employees, provided it does so on a uniform and consistent basis for all employees in a category. Regulations provide that reasonable categories for this purpose generally include specified job categories, nature of compensation (hourly or salary), geographic location, and similar bona fide business criteria.

Q. Could you contribute $270 for family coverage and avoid the penalty "if employee is contributing more than $270" - is this contribution amount referring to employee coverage

A. That's not quite how it works…

Whatever the employee is required to contribute toward the lowest cost minimum value option (for employee-only coverage), if that amount is "unaffordable" for a full-time employee and the employee enrolls in subsidized coverage through a public Exchange, the penalty under §4980H(b) for 2016 is $270/month. Therefore, when considering the employer contribution amount, if it is much more than $270/month (keeping in mind that the penalty amount is not tax-deductible while the employer contribution toward the premium is), then perhaps the employer is better off taking a risk of penalty.

Q. Do i understand this correct the lowest exchange cost for minimum value option is $400 and that is why she is using the $400 for her examples?

A. The $400 in the example was not tied to any particular Exchange plan. The amount was randomly chosen for the example.

Q. Do these affordability mandates apply to both large and small employers?

A. The requirement to offer "affordable" coverage under §4980H applies only to applicable large employers - 50 or more full-time equivalents (FTEs). Smaller employers (less than 50 FTEs) are not required to offer affordable coverage. However smaller employers may still wish to understand what makes coverage affordable, because when an employer makes an offer of minimum value, affordable coverage, any individuals eligible for such coverage are then ineligible for a tax subsidy through a public Exchange.

Q. Do we need to offer coverage to temporary employees?

A. "Maybe. Assuming you are asking on behalf of an applicable large employer (50 or more FTEs) subject to §4980H offer of coverage requirements…In general, there are no special rules/exemptions for short-term or temporary employees. A temporary employee who works full-time hours needs to be treated just like any other full-time employee and offered coverage accordingly to avoid potential penalties under §4980H. This is the case unless the temporary employee may be categorized as "seasonal" and the employer is using the look-back measurement method.

"Seasonal employee" is defined as 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.

If the employer is using the look-back measurement method and these employees meet the definition of seasonal, they will be considered part-time and no offer of coverage is required.

However, if the position does not fit the definition of seasonal, or the employer uses the monthly measurement method, then generally the employee is considered full-time in any month the employee achieves 130 or more hours of service and coverage would need to be offered after the plan waiting period to avoid potential penalties.

Keep in mind that offering to 95% of full-time employees avoids the bigger penalty under §4980H(a). So if these temporary employees make up a small percentage (2-3%) of the total full-time employee count, the employer could choose not to offer coverage and take a risk of penalty under §4980H(b) for any that are enrolled through a public Exchange and receiving a tax subsidy ($270/month for 2016).

Q. Does self funded retiree medical benefits require to be included and have to do reporting for on 1094

A. Yes, reporting would be required via Form 1094 and 1095. An employer that offers any self-funded minimum essential coverage must report on any individuals covered under the self-funded plan, including both employees and non-employees (e.g. COBRA participants, retirees, owners) and their dependents.

Q. Does the employer still have to pay the penalty if the employee fails to enroll during open enrollment and purchases coverage on the Marketplace?

A. Under §4980H rules, applicable large employers are only required to offer minimum value, affordable coverage to full-time employees. If coverage is offered and the employee waives or fails to enroll, there would be no penalty for the employer because an individual that is offered minimum value, affordable coverage is not eligible to receive a tax subsidy and cannot trigger a penalty. Note - the individual could enroll in a public Exchange plan, but would be ineligible for a tax subsidy for such coverage.

Q. If EE waives MEC plan, would they be eligible for tax subsidy and would the ER be penalized?

A. Potentially yes…if a ***full-time employee*** is not offered minimum value, affordable coverage, but rather is offered a plan meeting only minimum essential coverage requirements, if the employee waives the coverage and instead enrolls through a public Exchange and qualifies for a tax subsidy, the employer would owe a penalty under §4980H(b) - $270/month in 2016.

Q. If the employer is an part of the aggregate group are all members of the aggregate group subject to penalty if one of the members is being penalized?

A. Although all entities within a controlled group/affiliated service group under §414 rules are combined for purposes of averaging full-time equivalents (FTEs) and ultimately determining status as an applicable large employer, each employer is individually responsible for meeting §4980H offer of coverage requirements as well as §6056 employer reporting requirements. And the penalty is also applied on an individual basis to each entity rather than applying across the whole controlled group, except that the waiver (for purposes of calculating penalty 4980H(a)) is applied on a prorate basis. See example below:

Example: Controlled group with 50 full-time employees (Company A - 40, Company B – 35, Company C – 45); Company A and B offer coverage to all full-time employees; Company C chooses not to offer any coverage

- Company A – no penalty
- Company B – no penalty
- Company C –
  - » .375*30 = 11 waived
  - » 4980H(a) penalty in 2016 – (45 - 11)*$2160 = $73,440 ($6,120/month)

Q. If using the hourly rate of pay, how does it work if you pay a minimal amount for an employee to be on-call (common at various hospitals)?

A. On-call employees are a good example of a position for which the rate of pay safe harbor may not provide the employer with much protection, because if the employer is required to use the lowest hourly rate of pay, it would be difficult to set the employee contributions at a place in which the coverage would be considered affordable based on the hourly rate paid for on-call time. Instead, for such employees, the employer would probably be better off using the Form W-2 safe harbor.

Q. If your plan year is not a calendar year do you choose the % for subsidy eligibility for the year in which the plan year begins and use that for the entire year?

A. The regulations increasing the percentages state the percentages apply "for plan years beginning in…" (2015, 2016, and 2017). Therefore, it appears the percentages would apply on a plan year basis. That being said, the guidance could be more clear in regard to how this actually plays out, especially since reporting is handled on a calendar year basis and Form W-2 instructions indicate that calculations are handled on a calendar year basis. Without further guidance indicating otherwise, the conservative approach would be to use 9.56% for the entire 2015 plan year, 9.66% for the 2016 plan year and 9.69% for the 2017 plan year. But also keep in mind that for most employers this probably won't make much difference, especially when the percentage changes only .03% from one year to the next.

Q. Is there a disincentive for employers to offer coverage to <30-hr employees because affordability is based on annual income?

A. For employers that choose to offer minimum value, affordable coverage beyond what is required (e.g. to part-time employees), it is important to consider that such offer causes those employees and their eligible dependents to be ineligible for subsidized coverage through a public Exchange. However, perhaps the level of coverage and cost of the employer's plan is more attractive anyway.

Q. So, Penalty A is applicable to all FT employees if just one applies for coverage in the marketplace; however, Penalty B only applies to those employees who actually receive the subsidy?

A. That's correct.

§4980H(a) penalty applies if employer does not offer minimum essential coverage (MEC) to 95% (70% in 2015) of full-time employees & at least one full-time employee purchases subsidized coverage through a public Exchange.

- Calculated for 2016 as $180.00/mo. ($2160/yr) times number of full-time employees not counting the first 30.

§4980H(b) penalty applies if employer offers coverage to substantially all full-time employees and their dependent children, but coverage is not offered to some full-time employees or coverage is "unaffordable" or fails to provide "minimum value".

- Calculated for 2016 as $270/mo. ($3240/yr) for each full-time employee who purchases subsidized coverage through a public Exchange.

Q. Tax subsidies and individual mandates requirements don't affect the employers, right?

A. Employers don't have to worry about the individual mandate, but it is important to understand tax subsidy eligibility as that is ultimately how a penalty under §4980H is triggered. If an employer fails to offer coverage to full-time employees as required under §4980H, the penalty generally applies based on such full-time employees enrolling through a public Exchange and qualifying for a tax subsidy.

Q. If the coverage is unaffordable, is it up to the employee to provide proof?

A. Not exactly. If an individual applies for coverage through a public Exchange, the individual will be asked about whether the individual is eligible for minimum value, affordable coverage available through an employer-sponsored plan and the individual's answer is accepted as provided. But ultimately verification of whether affordable coverage was available will be reconciled either between the employer and the public Exchange via the appeal process, between the employer and the IRS via the employer reporting (Forms 1094/1095) and/or based on the individual's personal tax return.

Q. What does an employer or employee do to show all 12 months of coverage if the plan year crosses over years?

A. Reporting via Forms 1094 and 1095 is handled on a calendar year basis. When there is a non-calendar year involved, coverage will be reported on Form 1095 for covered individuals using information from two different partial plan years.

Q. What happens if you lose your job in the middle of the year and Cobra and other available plans now exceed your ongoing income?

A. If the cost of coverage available exceeds 8.13% (in 2016) of the individual's household income, the individual may qualify for an exemption under the individual mandate and then would not owe a penalty for failure to have minimum essential coverage.

Q. When will employers who have under 50 employees be affected by all of this?

A. Employers with less than 50 full-time equivalents (FTEs) are not subject to §4980H offer of coverage requirements and are not expected to be going forward unless there is a change in legislation.

Q. I did have one question come up on the Sec 4980H(a) Penalty – it is calculated by $180/mo times the number of full-time employees not counting the first 30 for 2016 (80 for 2015). Based on everything I've read – it's only the full time employees its calculated on, not full time (including full time equivalents). You see full time and full time equivalents everywhere when you read about the ACA but I believe this is only to determine whether the employer is an ALE.

A. Yes, that's correct. An employer must consider hours of service from all employees and calculate average total full-time equivalents (FTEs) for purposes of determining status as an applicable large employers. But under §4980H rules, coverage is only required to be offered to full-time employees (those averaging 30 or more hours of service per week), and the penalty calculations, if applicable, are also based off full-time employees (not FTEs).

Q. Do employers with less than 50 employees have to offer insurance to less than 40 hr per week employees?

A. Generally, no. The definition of full-time as averaging 30 hours of service or more per week is part of §4980H requirements, which apply only to applicable large employers (50 or more FTEs). Small employers (less than 50 FTEs) are not required to offer coverage at all, and therefore may define eligibility as desired unless required otherwise under applicable state law.

Q. How do you determine if a plan offers minimum essential coverage?

A. Most employer-sponsored group health plans will be considered minimum essential coverage (MEC) plans as there is very little guidance or specific requirements. As of today, even plans sometimes referred to as "limited medical", preventive-only or gap coverage will meet this requirement. The definition includes any coverage under an "eligible employer-sponsored plan"—a term that means a group health plan or group health insurance coverage offered by an employer to an employee that is (a) a governmental plan, or (b) any other plan or coverage offered in a state's small or large group market. In addition, IRS regulations clarify that self-funded employer coverage qualifies as an eligible employer-sponsored plan.

It is unlikely without further regulation and guidance indicating otherwise, that most employer-sponsored medical plan offerings would fail to meet the definition of MEC (which is enough to satisfy both the individual mandate and the requirements under Section 4980H(a)).

Q. Question of affordability. If an employer simply each week withholds 9.66% of employees gross pay as their health deduction, can this be deemed that they meet an offer of affordable coverage?

A. Yes, charging 9.66% of a full-time employee's salary or wages would meet affordability requirements and won't typically cause any issues so long as there is no cap. If the employer is charging 9.66% up to $X amount, then those that make more are paying a lower percentage of their salary, which may result in discrimination under Section 105(h) or Section 125 rules. Under a self-funded plan, Section 105(h) rules prohibit offering benefits in a way that favors the highly compensated individuals. Fully-insured plans are subject to "similar" rules under the ACA, but such rules are not being enforced until further guidance is provided. And regardless of whether the plan is self-funded or fully-insured, if the premiums are being handled on a pre-tax basis through a cafeteria plan, Section 125 nondiscrimination rules may also need to be considered.

Q. Does the dependent's income count in the affordability determination

A. Maybe. Affordability for purposes of the individual mandate exemption, subsidy eligibility for coverage through a public Exchange and possible penalties under §4980H is based off household income. Household income considers the individual's modified adjusted gross income (MAGI). So ultimately it will depend on how taxes are filed and whose income is included in the individual's personal tax return.

Q. What is the best safe harbor to use if the Employer pays 100% of the employee only coverage?

A. If the employer is paying 100% and the employee contribution is $0, the employer may use the federal poverty level (FPL) safe harbor, which guarantees the coverage is affordable for all employees. The FPL safe harbor applies in 2016 if the employee contribution for single coverage is $95.63/month or less (the amount is higher for Alaska and Hawaii).

Q. The wellness incentives would not reduce the monthly cost of coverage only if they were outcome based or were health contingent. If the wellness incentive was "participatory" it could be used to reduce the monthly cost of coverage, correct?

A. For purposes of affordability, the guidance in regard to wellness incentives/penalties does not differentiate between health-contingent and participatory programs. If the wellness program is not tobacco-related, the non-wellness rate must be used for purposes of determining affordability, even for participatory programs; for tobacco-related programs, the non-tobacco (non-smoker) rate may be used.

Q. What if, thanks to the new EEOC rules, and employer moves someone from salaried to hourly. How will the rate of pay safe harbor work before/after the change?

A. Unfortunately there isn't any guidance or examples that specifically address the scenario that we're aware of…so the conservative approach would be to use the Form W-2 safe harbor for such positions.

Q. Most of our employees have mass health and reject our health insurance when they are eligible. We have them sign a waiver does that protect us from the fines

A. Yes, so long as the employer is offering coverage to 95% or more of full-time employees and their dependent children, the employer avoids the bigger penalty under §4980H(a), regardless of whether the employee actually enrolls in or waives the coverage. And if the offer meets minimum value and affordability requirements, the employer will avoid any potential penalties under §4980H(b) as well.

§4980H rules do not set forth any particular process or documentation requirements outside of requiring that an opportunity is provided, at least annually, to accept or decline coverage. However, the employer will want to have something to prove that coverage was offered. A signed enrollment form/waiver form would provide a good method of proof, but there are certainly other options so long as the employer has a reasonable method to show that coverage was offered. Therefore, if the employer feels confident that the communication being provided is reaching all eligible employees and makes it clear how the eligible employees can obtain coverage, and the employer can provide proof of this communication, the employer should be okay."

Q. For hourly employees - would using the lowest rate of pay for an employee across the company be okay to use?

A. "Yes, that would guarantee the coverage would be affordable for all employees. But keep in mind…

- Coverage does not need to be affordable for part-time employees. So if part-time employees are sometimes paid less than full-time, it would be necessary only to consider the lowest hourly rate for full-time employees.
- Sometimes making the coverage affordable for all employees is not the best decision financially. For example, if most full-time employees make $12/hour or more, but there are a few that make as low as $9/hour, it may be better to take a possible penalty risk under §4980H(b) of $270/month (in 2016) for those making $9-11/hour rather than contributing more for everyone's coverage.

Q. Our plan is $113.64 per month. This would not qualify in the example on page 19, correct?

A. $113.64/month would not be affordable under the rate of pay safe harbor for those making $9/hour or less. However, it would be affordable for anyone making more than $9/hour and may also be affordable under the Form W-2 safe harbor.


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