



January 2013

IRS Employer Shared Responsibility Rules

The IRS has released additional guidance related to the Affordable Care Act (ACA) employer shared responsibility rules. The guidance includes [proposed regulations](#) published in the Federal Register on Wed. January 2nd, and a series of [questions and answers](#) published on the IRS website. For the most part the new guidance closely follows previous guidance released by the IRS. However, there are a number of clarifications and some important new information for employers to consider.

Background

Beginning in 2014, an “applicable large employer” may be subject to an “assessable payment” (i.e.

penalty) under one of two different circumstances:

1. 4980H(a) liability - Applies if an employer fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage (MEC), and any full-time employee is certified as having received a subsidy (i.e. a premium tax credit or cost sharing reduction) when purchasing individual health insurance through a public Exchange. In this case the employer may be liable for a penalty of \$2000 per year times the total number of full-time employees (not counting the first 30).
2. 4980H(b) liability - Applies if the employer does offer its full-time employees (and their dependents) MEC, but the plan is unaffordable or does not provide minimum value, and at least one full-time employee is certified as having received a subsidy when purchasing individual health insurance through a public Exchange. In this case the employer may be liable for a penalty of \$3000 per year times the number of full-time employees who are certified to receive, and purchase, subsidized individual health insurance through a public Exchange.

An applicable large employer is an employer

that employed an average of at least 50 full-time employees during the preceding calendar year. See below for additional details on how related organizations and corporations under common control will be treated for the purpose of this rule.

Transition Rule

In an important and welcome development, the IRS guidance provides transition relief for non-calendar year plans. Employers who sponsor non-calendar year plans will not be liable for any 4980(H) liability until the first plan year beginning after January 1, 2014.

To be eligible for this transition relief, an employer must have maintained the non-calendar year plan as of December 27, 2012 (the day prior to the initial release of the rule). This provision eliminates the opportunity for an employer to change plan years in an attempt to delay being subject to 4980(H) liability.

Offering Coverage to all Full-time Employees - The 95% Rule

As stated above, an employer faces potential penalties under 4980H(a) if it fails to offer minimum essential coverage to all full-time employees. The IRS has previously commented that the penalty should not apply in the case of an employer that intends to offer coverage to all its full-time employees, but fails to offer coverage to a few full-time employees. IRS Notice 2011-36 initially addressed this issue by indicating that the IRS was contemplating a rule stating that an employer offering coverage to “substantially all” of its full-time employees would not be subject to a 4980H(a) assessable payment. In the new guidance the IRS allows a margin of error regarding this requirement, and has introduced a “95%” standard.

An applicable large employer will be treated as offering coverage to its full-time employees if it offers coverage to all but 5% (or if greater, five) of its full-time employees. This rule alleviates employer fears that a small administrative mistake could trigger

significant employer penalties.

Entities under Common Control

All entities and organizations treated as a single employer under the rules contained in Code §414 are combined in determining if an employer is an “applicable large employer.” Consequently, a number of smaller organizations (that may not each have 50 FTEs) could be subject to 4980(H) liability if they are considered under common control according to §414 rules.

The new IRS guidance defines each company that is part of a control group as an “applicable large employer member” and applies special rules to each separate member of the control group:

- Penalties will apply separately to each member organization of a control group. For example, if one member organization fails to provide MEC to all its full-time employees, the penalty would be based on the number of full-time employees in that particular organization, not the total number of employees in the entire control group.
- In calculating the 4980H(a) liability, the “not counting the first 30 rule” would apply proportionality to each member entity. For example, a member entity that accounts for 50% of the total full-time employees in the control group would pay a penalty of \$2000 per year times the number of full-time employees in that specific entity not counting the first 15 (50% of 30).

Dependent Coverage

To avoid 4980(H) liability, employers must offer coverage to all full-time employees and their dependents. It is important to note that the cost of the dependent coverage is not used in determining the plan’s affordability under 4980(H). Plan affordability for employer penalty purposes is based only on the amount the employee must pay for self-only coverage.

In what was a surprise to many observers, the requirement to offer coverage to dependents does not apply to spouses. The proposed regulations define an

employee’s dependents for purposes of 4980(H) as an employee’s child who is under 26 years of age.

Affordable Coverage Safe Harbors

Employers face potential liability under 4980(H) (b) if the employer coverage is not affordable to an employee.

- Coverage is affordable if the employee’s required contribution for self-only coverage does not exceed 9.5% of the employee’s household income.
- Household income is defined as the modified adjusted gross income of the employee and any members of the employee’s family (including a spouse and tax dependents) who are required to file an income tax return.

Recognizing that employers will generally not know an employee’s household income, the IRS outlined a proposed affordability safe harbor (referred to as the W-2 safe harbor) in prior notices. The proposed regulations provide two additional safe harbors for determining affordability.

1. W-2 Safe Harbor - An employer will not be subject to an assessable payment if the required employee contribution toward the self-only premium for the employer’s lowest cost coverage that provides minimum value, does not exceed 9.5 % of the employee’s W-2 wages.
2. Rate of Pay Safe Harbor - An employer can take the hourly rate of pay for each hourly employee and multiply that rate by 130 hours per month to determine a monthly “rate of pay.” The employee’s monthly contribution amount (for the self-only premium of the employer’s lowest cost coverage that provides minimum value) is affordable if it is equal to or lower than 9.5% of the computed monthly wage estimate. For salaried employees, monthly salary would be used instead of hourly salary multiplied by 130.
3. Federal Poverty Line Safe Harbor - An employer may also rely on a design-based safe harbor using the Federal Poverty Level (FPL) for a single individual. Coverage offered to an employee is

© 2013 Benefit Comply, LLC affordable if the employee's cost for self-only coverage does not exceed 9.5% of the FPL for a single individual. For example, in 2012 affordable coverage under this method would have been set at a monthly contribution in the lower 48 states of \$88.43 for self-only coverage (FPL is slightly higher in Alaska and Hawaii).

Election Changes under Section 125 Plans

Employees enrolled in a non-calendar year Section 125 plan who are eligible on January 1, 2014 for subsidized coverage when purchasing health insurance through a public Exchange may wish to drop the employer plan during the plan year. However, current Section 125 rules would not permit a mid-plan-year election change in this situation.

The proposed regulations allow an employer to amend their Section 125 plan to permit this change. Interestingly, the rules do not require the employer to allow this election change. Some employers may be inclined not to permit such a change if an employee moving to subsidized individual coverage triggers employer liability under the shared responsibility rules.

Additional Guidance on Definition of Full-Time Employees

In August 2012 the IRS released significant guidance on defining an employee's full-time status, including an optional look back measurement period and corresponding stability/eligibility period. The new proposed regulations clarify and expand on a number of issues related to these full-time employee rules.

- The guidance clarifies that that an employer can use the standard look back measurement period each year to determine the full-time status of all ongoing employees. However, for new employees, an initial measurement period can be applied only to "variable hour" and seasonal employees. A plan may not have a waiting period of more than 90 days for all other employees expected to work 30 hours or more per week.
- When determining eligibility for 2014, an

employer who plans to use a 12-month measurement and stability period is allowed to use a shorter measurement period in 2013, which will apply to the 2014 stability period. However the 2013 one-time "short" measurement period must be at least 6 months long and begin no later than July 1, 2013.

- An employee hired to work an average of at least 30 hours per week cannot be treated as a variable hour employee simply because they are hired into a high turnover position. These employees must be treated as full-time employees and can have no more than a 90-day waiting period before being eligible for coverage.

The guidance clarifies how hours of service must be counted toward an employee's full-time status, including a requirement to count all paid leave as hours of service.

Summary

The proposed rules contain other miscellaneous guidance, including rules of special interest to staffing firms. One such set of "anti-abuse" rules is designed to limit an employer's ability to use temporary staffing arrangements to avoid 4980(H) liability.

While the proposed rules are complex, their impact on any particular employer will vary dramatically.

Employers who already offer affordable coverage to most, or all, of their employees working an average of 30 hours per week may find very little to change in their current practices. However, employers who do not offer coverage to all full-time employees, or offer coverage that may not be affordable to a significant number of their employees, will need to study these rules in detail as they develop their benefits strategy for 2014 and beyond.

If the links to the proposed regulations and IRS Q&A provided in the first paragraph do not work, the documents can also be found at:

- IRS Proposed Regulations: <http://www.gpo.gov/fdsys/pkg/FR-2013-01-02/pdf/2012-31269.pdf>
- IRS Q&A: <http://www.irs.gov/uac/Newsroom/Questions-and-Answers-on-Employer-Shared-Responsibility-Provisions-Under-the-Affordable-Care-Act>