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Employee Benefits in Mergers & Acquisitions

The Employer Shared Responsibility Penalty's Implications Including in Mergers & Acquisitions

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Caveat: These materials do not constitute legal advice. These materials merely summarizes some of the key features of several pieces of guidance regarding the shared-responsibility penalties and the reporting required of employers related to such penalties under the Patient Protection and Affordable Care Act ("ACA"). This is not intended to be a complete explanation of all details in every piece of guidance on the shared responsibility penalty tax or the related reporting requirements. No person should take any action based upon the contents of this article, chart and flowcharts without first reviewing the guidance or consulting their own personal legal advisor or reviewing all of the applicable guidance. The guidance is complex and not every aspect is addressed in these materials.

I. Background on the Shared Responsibility Penalty and Related Reporting Requirements[1]

When an entity acquires another employer it must consider not only the penalties it may be assuming with respect to noncompliance in the operations or terms of the employer's group health plan, but also must consider the penalties associated with whether the entity offers or fails to offer health coverage, whether the acquisition may bring an employer not previously subject to the shared responsibility penalty into being assessable for such penalty and whether an acquisition may change its status as being subject to assessment for the penalty in subsequent years. Thus, the liabilities may be ones that currently exist, that may be triggered by the acquisition or that may fall in future years on the combined entities. The penalties become assessable when the "controlled group" exceeds a certain number of full-time employees and full-time equivalent employees. Read on for further background on the shared responsibility penalty tax and how it applies which must be understood before its application in the context of mergers and acquisitions can be considered. The shared responsibility tax applies to controlled groups of entities that constitute applicable large employers.[2]

When two entities combine or one entity or business operation is acquired by another, the continuing or surviving entity must also consider the impact of the transaction on the entity's status as an ALE and the liabilities which flow from such status. While no official guidance has been issued on the shared responsibility penalty in the context of mergers and acquisitions, some of the analytical framework being considered by the Internal Revenue Service (the "Service") is contained in the current guidance and has been discussed as a potential analytical framework for determining how the shared responsibility penalty tax will apply in corporate transactions. Such framework is discussed where relevant herein.

If an applicable large employer's ("ALE") health plan provides minimum value[3] and is affordable and is offered to all full-time employees, the ALE may not be assessed a shared responsibility penalty they will be obligated to pay, but the ALE must be able to demonstrate how it meets all of these requirements to be able to defend itself against assessment of the shared

[1] All references to the regulations or preambles to the regulations herein include the subsequent corrections and changes issued through April 30, 2014; however the footnotes are not updated to incorporate such subsequent changes issued at 79 Fed. Reg. 24331 (April 30, 2014), which modified the reporting requirements under Code section 6056.

[2] Code § 4980H.

[3] 45 CFR § 156.145(a)(1)-(3).

responsibility penalty. This article considers how an employee is determined by the employer to be a full-time employee who may trigger the shared responsibility tax if they obtain coverage on an exchange and receive cost sharing reductions or premium tax credits and the employer does not offer affordable coverage or provide minimum value. This is solely for purposes of comparing and contrasting the guidance for determining which employees are treated as full-time employees for the shared responsibility tax and not for any other purposes under health reform. The flow charts are to assist in analyzing different aspects of the employer shared responsibility penalties and are general guides and do not address all the nuances of the penalty determination.

For employers in states not electing the Medicaid expansion, the employers must include employees who obtain coverage on an exchange and for whom the employer may be required to pay a shared responsibility penalty, individuals who earn between $11,490 to $15,282 in 2014, and for employees with families electing family coverage who may obtain coverage on an exchange and for whom they may be required to pay a shared responsibility penalty, employees with a family of four who earn between $23,550 to $31,322 in 2014. If the state has instead elected the Medicaid expansion, these groups would have been covered by the Medicaid expansion and the ALE would not be subject to the shared responsibility penalty for these persons. Instead, Medicaid would cover these individuals and families and thus the ALE would not be potentially subject to the shared responsibility tax for such individuals.

For employers in states electing the Medicaid expansion, Medicaid will cover any employee earning up to $15,282 with individual coverage and employees earning up to $31,322 with a family of four and since Medicaid will cover such persons, the ALE would not be potentially subject to the shared responsibility tax for such individuals in 2014.[4]

The shared responsibility penalty can be triggered either by an ALE not offering coverage under Code § 4980H(a), or by an ALE who offered coverage that was either not affordable to an employee, or did not provide minimum value, and the employee (and 30 others) went to an exchange and purchased coverage and received cost reductions or a premium credit, the Code § 4980H(b) penalty. The second part of the penalty or the (b) penalty requires consideration of all of these factors to determine if the penalty is triggered by a full-time employee obtaining health coverage on an exchange/marketplace and getting a premium tax credit or cost sharing reduction.

II. 4980H Overview

In order to encourage ALEs to continue to offer health coverage to employees, the Patient Protection and Affordable Care Act (the "ACA") included a penalty structure which it called the Shared Responsibility Penalty. An ALE is measured on a controlled group basis considering all of the full-time employees in all of the controlled U.S. entities and all the full-time equivalent employees in the controlled group in U.S. entities.[5] An ALE is an employer with 50 or more full-time employees or full-time equivalent employees. Services performed outside of the U.S. are not counted for determining full-time status.[6] If an employer is a member of a controlled

[4] *See* http://www.obamacarefacts.com/federal-poverty-level.php.
[5] Treas. Reg. § 54.4980H-1(a)(4) and (5) and § 54.4980H-2.
[6] Treas. Reg. 54.4980H-1(a)(24)(ii)(C).

group under Code § 414(b) or (c) of an "ALE" on any day in the month, they are a member of that ALE for that month (an "ALE Member").[7] Controlled groups are determined according to Code § 414(b) and (c) under Code § 1563 and Code § 1563(b) determines controlled group status on December 31 each year. If controlled group status determination strictly adheres to the Code § 1563(b) requirements, then questions arise regarding when one includes a mid-year acquisition because a full year inclusion would extend an acquiring ALE's liability to periods potentially prior to the mid-year acquisition which seems inappropriate, or at least will need to be considered in the negotiation of the purchase price, escrow, and indemnification provisions. Presumably the month to month assessment may require a month to month controlled group determination using principles similar to Code § 1563. This would also impact the liability for the shared responsibility tax, related reporting and the records an entity must obtain when acquiring a business.

An employer determines whether it is potentially an ALE and subject to the shared responsibility penalty tax by determining how many full-time employees working on the average 30 or more hours per week it had in the prior calendar year, and then adding up all of the hours of all other employees for the month (other than hours performed outside of the U.S., hours of bona fide volunteers, hours worked in a work study program[8]) and dividing them by (120) to determine how many full-time equivalent employees the employer has in each month. The number of full-time employees is added to the number of full-time equivalent employees for each month to determine if the employer had 50 or more full-time employees and full-time equivalent employees on more than half of the business days in the preceding calendar year and if it does, then it is an ALE for the next calendar year.[9] This is calculated on a month by month basis.

For 2015, an employer may determine its ALE status based on its full-time employees or full-time equivalent employees for a period of at least six consecutive months chosen by the employer (instead of on business days in the preceding calendar year). During the 2014 calendar year, six consecutive months may be used to determine the number of full-time employees and full-time equivalent employees instead of the full 2014 calendar year.

The determination of the number of full-time employees excludes seasonal workers during the full 2014 calendar year; however, even if the six month period is used to determine ALE status, seasonal workers status is determined based on the full 2014 calendar year, and not the six months designated period for ALE status.[10] Employees counted for the ALE determination and the assessment of the penalty tax include all "common law" employees of the employer and the employer considers all employers in the controlled group under Code § 414(b), (c), (m) or (o).[11] A member entity within a controlled group that is determined to be an ALE is referred to as an ALE Member.

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[7] Treas. Reg. § 54.4980H-1(a)(5).
[8] Treas. Reg. § 54.4980H-1(a)(24)(ii).
[9] Code § 4980H(a) and (c)(2)(E); Treas. Reg. 54.4980H-1(a)(4), (5), and (24) and § 54.4980H-2.
[10] 79 Fed. Reg. 8544, 8573 § XV.D.3. (Feb. 12, 2014.)
[11] Treas. Reg. 54.4980H-1(a)(15) and (16).

A. Overview of Two Alternative Penalties

Some refer to this shared responsibility penalty as the pay or play penalty because there are two separate penalties which apply in two separate instances. One applies if the ALE Member does not offer coverage to its full-time employees, but there is a safe harbor from this penalty if the ALE offers coverage to 95% of all full-time employees of the ALE Member, or the ALE Member does not offer coverage to the greater of 5% of the ALE Member's full-time employees, or 5 full-time employees, whichever is greater.[12] For ALEs with 50 to 99 full-time employees, the (a) penalty will not apply in 2015 but will apply in 2016.[13]

The second penalty applies if the ALE Member offers health coverage to its full-time employees, but one of its full-time employee goes to the insurance marketplace and obtains a premium tax credit or a cost sharing reduction from the insurance marketplace and the ALE Member's coverage is either not affordable to the full-time employee or it does not provide minimum value.[14] The regulations clarify that an ALE Member is not subject to both of the penalties in the same month.[15] The Code § 4980H penalty is calculated for each month and by each individual full-time employee and not by full-time equivalent employees. Full-time employees ("FTE") are individuals who on the average work 30 or more hours per week[16] and how full-time status is determined for employees who (1) work variable hours, (2) work as a seasonal employee, or (3) who work intermittently or with breaks in employment such as teachers, is discussed below.

Note seasonal employees are different from seasonal workers. Seasonal workers are persons who provide migrant agricultural work or who are retail workers employed exclusively during the holiday season.[17] If a seasonal worker is hired for the holiday season and does well and subsequently offered an ongoing position, it is not clear when the seasonal worker status ends and the individual must be counted in determining ALE status. Seasonal employees are persons hired into a position for which the customary employment is six months or less.[18] Seasonal workers are included in the FTE count used to determine if the employer is an ALE subject to the shared responsibility penalty,[19] and there is a special exception to the calculation related to seasonal workers employed fewer than 120 days which permits exclusion of such seasonal workers from the determination of whether the employer is an ALE, but there is nothing which excludes seasonal workers or seasoned employees totally from the penalty if the employer is an ALE.[20]

B. Employer Offers Coverage

If the ALE decides to play and offer coverage to its FTEs, but some of its FTEs (and their dependents) go to the exchange to obtain coverage and are entitled to either a premium tax

[12] Treas. Reg. § 54.4980H-4(a).
[13] 79 Fed. Reg. 8544, 8574, § XV.D.6. (Feb. 12, 2014).
[14] Code § 4980H(b).
[15] Treas. Reg. § 54.4980H-5(d).
[16] Code § 4980H(c)(4).
[17] Treas. Reg. § 54.4980H-1(a)(39) and 29 CFR § 500.20(s)1).
[18] Treas. Reg. § 54.4980H-1(a)(38).
[19] Treas. Reg. § 54.4980H-2(b)(1).
[20] Treas. Reg. § 54.4980H-1(b)(2).

credit (Code § 36B) or cost sharing reduction (under § 1402 of the Patient Protection and Affordable Care Act) or an advance payment of such credits or cost sharing reduction under § 1412 of ACA, due to the level of their household income and the coverage the employer offers does not provide minimum value or is not affordable (9.5% of the employee's household income), such an employee can trigger the penalty tax for the ALE Member for whom it works. The penalty is imposed on a month by month basis for each month in which an employee who obtains the subsidized coverage on the exchange and the assessable penalty that is imposed for a month is 1/12 times $3,000 per FTE or dependent who obtains the subsidized coverage), but this penalty for any month cannot be more than 1/12 times $2,000 times the number of FTEs employed during such month (less the 30 freebies).[21] The calculation of this penalty is explained below. However, in no event will this penalty exceed the amount that would have been assessed on the ALE Member under the penalty for not offering coverage for any month of $2,000 x 1/12 x (the number of FTEs less 30 or the ALE Member's share of 30).

C. Employer Decides to Not Offer Coverage that is Affordable or Provides Minimum Value and Employee Gets Health Care Tax Credit or Cost-Sharing Reduction on a Marketplace

If the ALE Member instead decides to not offer health coverage to its FTE (and their dependents), then it faces the "pay" part of the pay or play penalty provisions. In this case the ALE Member must pay a penalty for each month in which it does not offer its FTEs and their dependents the opportunity to enroll in minimum essential coverage and at least one FTE goes to an exchange to purchase coverage and is certified as eligible for a premium tax credit and such amount is allowed or paid for such employee. Then the ALE must pay an assessable penalty equal to 1/12 times $2,000 times the number of FTEs during the month less the 30 freebies under Code § 4980H(c)(2)(D)(i)(II) (the 30 free FTEs are allocated among the ALE Members pro-rata based upon the number of FTEs of each entity).

The 30 freebies are allowed once per ALE and when a controlled group of employers is involved, the 30 freebies are allocated among the entities in the controlled group ratably on the basis of the number of FTEs.[22] If an ALE Member allocation is not a whole number, it is rounded to the next highest whole number.[23] Here the penalty is only imposed with respect to those persons determined to be FTEs who work on the average 30 or more hours per week and who go to the exchange and obtain a premium tax credit (collectively "subsidized coverage").

For both penalties, the offer of affordable coverage providing minimum value must be offered at least one time per plan year to avoid the penalty for failing to offer coverage.[24] This means an annual offer to employees during open enrollment or at initial eligibility is sufficient for the plan year for which coverage is offered. This also means if an annual offer to switch from PRN status (employees who choose to work a shift periodically as needed and are not regularly scheduled) to a position with benefits is made at open enrollment, the PRN employees would be treated as having been offered coverage for the plan year so the failure to offer coverage penalty would not apply. This may apply to other workers who only work in a status where they only work on an

[21] Code section 4980H(c)(2)(D)((i)(II).
[22] Treas. Reg. § 54.4980H-4(e).
[23] Treas. Reg. § 54-4980H-4(e).
[24] Treas. Reg. § 54.4980H-4(b)(1).

as needed and when they choose to work provided they are annually offered affordable coverage with minimum value.

Minimum essential coverage is defined in Code § 5000A(f)(2) as an eligible employer sponsored plan which may or may not be grandfathered, but which does not include excepted benefits, such as stand-alone vision or dental, health flexible spending accounts, or benefits described in § 2791(c)(1) of the PHSA.[25] Any plan offered on the marketplace to the small or large employers in the state constitutes minimum essential coverage and must provide at least Minimum Value. Minimum value is different from minimum essential coverage.

The IRS issued guidance regarding what constitutes minimum value and the Department of Health and Human Services has issued guidance regarding what must be considered for the coverage to constitute minimum value.[26] Coverage of Minimum Value considers what percentage of projected costs of Essential Health Benefits will be covered, and to provide Minimum Value coverage must cover at least 60% of such projected costs in order for the coverage to provide minimum value. An employer sponsored plan, even if it is grandfathered and has only some of the ACA provisions applicable, qualifies as MEC.[27] An individual is not eligible to obtain a premium tax credit under Code § 36B if the individual has employer coverage available that is affordable and provides minimum value.

Coverage is affordable if the premium cost to the employee is less than 9.5% of the individual's household income and the coverage also provides minimum value which is the lowest cost bronze plan standard (60% of the projected costs).[28] So if an ALE Member offers coverage that is affordable to all of its full-time employees and dependents and such coverage meets the minimum value requirements,[29] the ALE Member's full-time employees should not be eligible for the premium tax credit and thus should not be able to trigger the shared responsibility penalty for purchasing coverage on the marketplace with a premium tax credit. For this purpose the term dependents includes a child as defined in Code § 152(f)(1), but does not include stepchildren, or an eligible foster child. A child who qualifies as a dependent remains a dependent to age 26. A spouse is not a dependent.[30] This means a health plan may exclude coverage for spouses, stepchildren and foster children without incurring a tax penalty for violation of the shared responsibility employer tax. However, there may be consequences outside of the tax law for such exclusions.

Some vendors are recommending employers offer an even lower value plan to low-income employees, some have referred to this as "bronze plated plan." Since these are new benefit packages and plan designs for the most part these are not grandfathered plans and still must comply with all of the applicable ACA requirements. This is a plan that considers the benefits it must offer to meet the ACA mandated benefit requirements, including the out-of-pocket maximum limitation and the preventive care mandates, clinical trial coverage, dependent

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[25] *See* IRS Notice 2013-54 regarding whether certain accounts are "excepted benefits" or not.
[26] 45 CFR § 156.145(a)(1)-(3); IRS Notice 2012-31, 2012-20 IRB 906..
[27] Code § 5000A(f).
[28] Code section 36B(c)(2)(C).
[29] 45 CFR § 156.145(a)(1)-(3).
[30] Treas. Reg. § 54.4980H-1(a)(12).

coverage to age 26, the prohibition on annual dollar limits and lifetime dollar limits, but covers so few other benefits that it cannot meet the 60% of costs standard to be deemed to provide minimum value. The plan considers the cost of such mandates in the total benefits costs and considers other limits, but then severely limits the other benefits it covers so that it provides enough coverage to constitute minimum essential coverage for the individual to avoid the individual mandate penalty and yet is low enough cost for low wage employees to purchase so that they do not go to an exchange for subsidized coverage and thus trigger the shared responsibility penalty being imposed on the ALE. However, if a low wage employee suffers a catastrophe claim and goes to the exchange to obtain more complete coverage, such individual will be able to trigger the employer penalty because offering "bronze plated coverage" does not constitute offering minimum value coverage.

Under Code § 5000A employer sponsored coverage qualifies as minimum essential coverage for the employee to avoid the individual mandate penalty.[31] Some vendors have marketed bare bones benefit plans which cover few services other than the mandated preventive care and clinical trials (a/k/a "bronze plated plans"), to offer a plan which constitutes minimum essential coverage so the employee is not subject to the individual mandate penalty, but since it does not provide minimum value because it does not cover 60% of projected health care costs, the ALE is not protected from being assessed the shared responsibility penalty if an employee purchases coverage on a marketplace and obtains the tax credit or cost sharing reductions. The fact this type of coverage does not provide minimum value must be disclosed in a new category of disclosures on the summary of benefits and coverage beginning in 2014.[32] While these bronze plated plans may work for a self-insured plan (if the actuaries can make it work, and it is carefully drafted); there are a number of issues to consider prior to implementing such a plan design because the employer is not protected from the shared responsibility penalty by offering such bronze plated plan coverage because it does not provide minimum value. Thus, cost savings in the plan may be offset by an increased penalty tax exposure or potential liability.

D. Other Uses of the Full-Time Employee Status Definition in the Shared Responsibility Final Regulations Penalty Administrative Scheme

The final shared responsibility penalty tax regulation is just one piece of the puzzle, but it is a key piece for employers because it establishes the meaning of some of the defined terms that are used in the reporting requirements related to health plan coverage offered under the employer's plan to full-time employees and dependents[33] and thus, it provides the definition of the parameters of the testing to determine the records an employer must maintain to defend against the assessment of the shared responsibility penalty. Employers must know who is a full-time employee and the dependents of such employee to know on whom they must report to the IRS regarding to whom coverage was offered and provided.[34] Some of the reporting requirements only apply to those employees who are full-time employees as defined for the shared

[31] Code § 5000A(f).
[32] U.S. Department of Labor, ACA FAQs XIV, Q&A 1-3.
[33] Treas. Reg. § 54.4980H-4(a).
[34] Prop. Treas. Reg. § 301.6056 and § 6055-1.

responsibility penalty.[35] There are penalties for failing to file complete reports or reporting inaccurately on these reporting requirements are $100 per form up to $1,500,000 per year (there is a report sent to the IRS and a form for each FTE).[36] These are penalties that a company can assume if the company purchases the stock of an entity with a history of reporting violations.

There are also reporting requirements for coverage requiring a plan sponsor provided coverage which requires reporting to the primary insured and also requires a plan sponsor to report the taxpayer identification number of each primary insured and each individual covered under the policy, but there is no reporting of this data with respect to those who do not enroll.[37] Thus on one portion of the report (Form 1095-C) the employer may show the full-time employee and her dependent children who were offered coverage and on another portion of the same form, if the employer's plan is self-insured the employer must report for the same employee showing the full-time employee, her spouse and her dependent children and step-children and the months each had coverage along with each of their federal tax identification numbers. This may result in an employer reporting on coverage of individuals for whom they are not subject to the shared responsibility tax if the employer offers coverage to persons who do not meet the final regulation's determination of being a "full-time employee" or a dependent which is not defined to cover many persons frequently covered by group health plans as dependents, such as spouses. If an employer reports coverage under Code § 6056 for persons in excess of the full-time employees, the employer may be subject to penalties for filing Form 1095-C and including incorrect information unless the employer is using the 98% reporting alternative.[38]

The IRS provided some relief to facilitate employers who elect to over report on all employees, their spouses and their dependents.[39] Over reporting will increase the burden on the IRS and on employers later to address which of the over reported employees is a full-time employee (as such term is defined by these rules) for which a shared responsibility penalty is assessable. This reporting will be used by the IRS to determine on which employees, spouses or dependents the IRS will assess a penalty on the employer and over reporting will cause the IRS to investigate additional employees that are not full-time employees.[40] This reporting is also used by the IRS to determine which individuals might be entitled to a health care tax credit claimed by that individual on their income tax return or at the marketplace. Thus, these definitions and the related reporting will impact many persons and functions implementing the ACA.

The definition and determination of who is a FTE in these regulations will have implications for (1) an employer's record capture and retention to enable an employer to defend against pay or play penalty assessments and (2) an the employer's ability to comply with the reporting requirements and avoid penalties for incomplete or inaccurate reporting.

This means that the employer must also know which employees are FTEs (as defined by these regulations) and the name and tax identification number of each dependent covered by such

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[35] Prop. Treas. Reg. § 301.6056-1(a)(5), (d) and (g) requiring reporting by ALE on full-time employees as defined in Code § 4980H.
[36] Code § 6721.
[37] Prop. Treas. Reg. § 1.6055-1.
[38] Code § 6721(a)(2)(B).
[39] See the 98% Alternative on Reporting below.
[40] Code §§ 6055, 6056 and 6721.

employee's election of coverage for each month of the year beginning in 2014 for measurement periods starting in 2014, or for December 2014 if the employer uses the monthly facts and circumstances test,[41] in order for the employer to know on whom it must report to the IRS regarding whether affordable coverage was offered for any particular month in a calendar year to such full-time employee, and how much such coverage cost and potentially also the dependents and spouses names and Social Security Numbers.[42] The determination of full-time status must be made for all employees including members of collective bargaining units that mandate coverage of all members because this is for penalty calculation and there is no exception to the penalty or to the reporting requirements for collective bargaining unit members even if all have coverage contractually.

The definition and determination of who is an FTE in the 4980H final regulations will have implications for (1) an employer's record capture and retention to enable an employer to defend against pay or play penalty assessments[43] and (2) an the employer's ability to comply with the reporting requirements and avoid penalties for incomplete or inaccurate reporting.

E. Effective Date Delayed

The penalty was originally set to be effective as of January 1, 2014, with transition rules for fiscal year plans. Notice 2013-45 provided transition relief for employers from application of the penalty under Code § 4980H and from the employer's information reporting requirement (coverage months for each individual, et al) under Code § 6056 until 2015. Notice 2013-45 clearly stated both Code § 4980H and 6056 will be fully effective for 2015. Such transition relief did not impact an employee's access to the premium tax credit and it does not delay an employer's obligation to comply with the coverage or insurance reform mandates or for any other portion of the ACA. Notice 2013-45 did not delay the individual mandate penalty or any other portion of the ACA. Notice 2013-45 did not address how this will impact the transition rules for fiscal year plans contained in Part IX of the preamble to the proposed Code § 4980H. The individual mandate penalty was delayed to not be effective until 2015. The employer mandate penalty for ALEs with 50 to 99 full-time employees or full-time equivalent employees are not subject to the tax until 2016.[44]

III. Determination of Whether An Entity is Subject to the Pay or Play Penalty as an ALE

The penalty regulations do clarify a number of items. First, the penalty applies only to "applicable large employers" or an "ALE".[45] Determining if an entity is an ALE requires counting the full-time employees and full-time equivalent employees of that employer and considering all such employees of the commonly controlled entities as members of the controlled group and as one employer of all of the respective entities' employees in the prior calendar year.[46] Thus, all entities which are members of the controlled group must first be identified to

[41] Treas. Reg. § 54.4980H-3(c); Treas. Reg. § 301.6056-1(f).
[42] Code §§ 6055 and 6056.
[43] Treas. Reg. § 301.6056-1(b)(6).
[44] 79 Fed. Reg. 8544, 8576 § XV.D.6. (Feb. 12, 2014).
[45] Treas. Reg. § 54.4980H-1(a)(4) and 54.4980H-2.
[46] Treas. Reg. § 54.4980H-1(a)(4) and § 54.4980H-2.

identify which full-time employees must be included in the count to determine if the number of full-time employees and full-time equivalent employees exceeds 50. When a company acquires another entity so that it becomes part of the controlled group in year 1, such acquisition can only cause the combined entities to become an ALE because while ALE status is determined based upon the number of full-time employees in the prior calendar year, if the acquiring entity is the successor employer, the acquired entity may be immediately part of an ALE. If an acquired entity becomes part of a new entity, the new entity becomes an ALE using the ALE rules for whether a new entity is an ALE provide the applicable analysis based on early indications from Service personnel. However, when an ALE acquires an entity that was not previously an ALE Member, currently no transition relief is provided.

In determining ALE status, all employers are considered except as described above. All common law employees must be considered, so the employer needs to review independent contractors to determine the status of such persons and who is the employer with respect to each.[47]

Employers using staffing agencies will continue to live in ambiguity under these regulations regarding whether staff or leasing company employees working for the employer are his employees on or if the coverage provided by the staff leasing company satisfies the employer's responsibility to offer coverage. Leased employees under Code § 414(n), sole proprietors, partners in partnership, 2% S-corporation shareholders and certain real estate agents and direct sellers under Code § 3508 are not employees and are not included in the count of full-time employees.[48]

An employer must identify which employees are *full-time employees* ("FTEs"), and these are employees who are employed on the average at least 30 hours per week with that employer (using the controlled group or ALE definition of the employer and not just the common law employing entity) and who is not a seasonal worker.[49]

If an employer uses the monthly measurement method to determine an employee's full-time status, it must maintain documentation of each of these monthly determinations for each employee to defend against the assessable penalty.

A. Transition Rule on ALE Status

If the potential ALE's sum of their FTEs and FTEEs exceeds 50 for 120 days or less in the prior calendar year and if the employees in excess of the 50 who were employed during the period were employed for no more than 120 days are seasonal workers, the employer is not considered to employ more than 50 full-time employees and the employer is not an ALE.[50] However, if the employer reasonably expects the number of its FTE and FTEEs for the current calendar year will exceed 50 for 120 days or less and the employees in excess of 50 will be employed no more than

[47] Treas. Reg. § 54.4980H-1(a)(15).
[48] *Id.*
[49] Treas. Reg. § 54.4980H-2(b)(2).
[50] Treas. Reg. § 54.4980H-2(b)(2).

120 days and will be seasonal workers, the employer is not an ALE.[51] This may present challenges in identifying who is full-time where an employee's services are allocated among more than one entity in a controlled group and may require employers to identify such shared employees as a separate group, consolidate payroll records for such shared persons and test those shared employees considering services to all entities combined to determine if they are FTEs of the controlled group if the controlled group is close on determining if it is an ALE. The number of FTEs then must be added with the number of full-time equivalent employees, and compared to the 50 threshold. An entity may not use the lookback measurement/stability period to determine which employees are full-time employees for purposes of determining whether the employer or its controlled group are an ALE.[52]

B. New Entities and the Potential Analytical Framework for Determining ALE Status in Corporate Transactions

If an employer was not in existence throughout the preceding calendar year, then its ALE status is determined under a special rule. An employer that was not in existence throughout the preceding calendar year is an ALE if such employer is reasonably expected to employ an average of at least 50 full-time employees (considering full-time equivalent employees) on business days during the current calendar year.[53] However, this rule only applies if the employer was not in existence on any business day in the prior calendar year.[54]

If the employer was not in existence on any business day in the preceding calendar year and employs seasonal workers (not seasonal employees) and if the employer's full-time employees and full-time equivalent employees exceed 50 for 120 days or less in the preceding calendar year and if the employees in excess of 50 were employed no more than 120 days as seasonal workers, then the employer is not an ALE for the current calendar year.[55] For measuring the 120 day limit for this special rule four calendar months may be treated as equivalent to 120 days.[56]

The new employer rule is important because it may be the analytical framework to apply in corporate transactions to determine ALE status where a new entity results from the transaction. The analysis of whether a new entity is an ALE is being considered by the Service for use in analyzing whether in mergers and acquisitions or dispositions the transaction will result in a new entity that is an ALE. For example, if a new joint venture entity is created that is outside of the founding entities' controlled groups and that new entity was not in existence in the prior calendar year, then if such new entity does not reasonably expect to employer 50 or more full-time employees on business days in the current year, it is not an ALE for the current year. If the new entity will have 50 or more full-time employees or full-time employee equivalents in its initial year of existence, then it will be an ALE from the outset. The use of this analytical framework for corporate transactions has been utilized by different governmental agency representatives in presentations.

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[51] Treas. Reg. § 54.4980H-2(b)(22).
[52] Treas. Reg. § 54.4980H-1(a)(21)(i).
[53] Treas. Reg. § 54.4980H-2(b)(3).
[54] *Id.*
[55] Treas. Reg. § 54.4980H-2(b)(2).
[56] *Id.*

If an existing ALE entity acquires the assets of another business and hires its employees, those employees' status as full-time must be determined from the date of hire forward because they will potentially immediately trigger the shared responsibility tax which means to minimize the shared responsibility tax the ALE must be ready to immediately offer coverage to the full-time employees acquired and begin keeping the necessary records to report on such employees.

If instead an ALE acquires an entity through a stock acquisition resulting in a new ALE Member, the new ALE member will be responsible for the potential Code § 4980H penalties with respect to its continuing employees and it will be responsible for reporting on such full-time employees. This addition of a new entity to the ALE also means there is one more ALE Member for that year among which certain limits or freebies related to ALE Member status will be allocated potentially impacting the tax liability of the other ALE Members in the controlled group. This of course assumes that any guidance on mergers and acquisitions under Code § 4980H continues to use the new entity rules as the basis for analyzing liability.

It is not clear how these rules will determine which entity is an ALE when an ALE spins off a portion of its business into a separate entity and moves it outside of the controlled group, unless the entity receiving the business spun-off is a new entity. It also does not address if the entity spinning off a business can cease to be an ALE if after a spin-off or a sale it drops to fewer than 50 full-time employees, but under existing guidance it would appear such entity would continue as an ALE for a calendar year until its status is measured at the lower level of employees.

C. Calculating Hours Worked for ALE Determination and for Full-Time Status Determination

Full-time equivalent employees ("FTEEs") are determined by considering how many hours the other employees who are not regularly scheduled to work 30 hours per week actually work in total in a month (disregarding hours in excess of 120 hours in a month by any individual) and dividing that total number of hours by 120 hours per month to determine how many worked more than 30 hours per week on the average in the particular month.[57]

Hours worked include hours paid or for which the employee is entitled to payment for services or entitled to payment for periods in which no duties are performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence. There is no clarification regarding whether the hours an employee is not working but is receiving payment due to one of the above specified reasons, with the payment coming from a third party (e.g., payments for a union member during layoff from the union, or payment of disability benefits from an insurance company from whom the disability insurance was purchased by the employer or with a combination of employee and employer contributions) are included in the hours for which the employee is entitled to payment for period in which no services were performed or if those do not count because the payment is not from the employer.[58] There is also no clarification as to whether hours that an individual is off due to a layoff or furlough during which the employee may receive payment from the union are counted since there is no payment from the

[57] Treas. Reg. § 54.4980H-1(a)(22).
[58] Treas. Reg. § 54.4980H-1(a)(24).

employer.[59] Payments from third parties for hours not worked would present additional challenges for employers because they may not have timely or any records of such payments when the hours must be used to make the full-time status determination. There are specified equivalencies which can be used to attribute hours to employees for which there are no hours worked records to determine full-time status as long as the equivalencies do not understate the hours worked.[60]

Hours worked as a bona fide volunteer do not count and hours worked by students on certain work-study programs do not count. Hours worked outside the United States do not count if the compensation constitutes income from sources outside of the U.S. Hours worked by an individual whose work is done under a vow of poverty do not count toward treating the member[61] of the order as a full-time employee (e.g., sisters or nuns working under a vow of poverty at a hospital or school).

The Treasury Department is still considering difficult groups such as commissioned sales people and airline employees with layover hours and on-call hours, and adjunct faculty, and until guidance is issued on these categories, employers may use a reasonable method of crediting hours.[62] The final regulations include methods for imputing hours when an employee is on certain unpaid leaves (FMLA, USERRA and jury duty) and for bridging breaks in service with rules regarding whether or not prior service must be counted.[63]

Once an employee is determined to be a FTE and the employer is determined to be an ALE based on employment in the prior calendar year, the effective date of the pay or play penalty is determined for the ALE. The next step is for the members of the ALE to determine which employees are FTEs (under the rules for the pay or play penalty) and on which individuals the penalty might be assessable. These are not eligibility rules. These are rules regarding to whom a penalty may apply if either coverage is not offered or if the coverage offered is not affordable or does not provide minimum value and the individual obtains a premium tax credit in the marketplace. The full-time status determines on which employees the employer must report under Code § 6056, but another reporting requirement applies for all employees actually covered and their covered family members. The employer must be able to prove why the penalty does not apply to each FTE and why each person is not an FTE, if the safe harbors do not preclude application of the penalty. The employer must retain records reflecting how they determined each individual is not subject to the penalty. The key here is the shared responsibility penalty regulation is <u>not</u> a determination of eligibility, it is a determination of for whom the ALE must maintain records that can be used to defend the employer against the assessment of a shared responsibility penalty and the first step in for whom the employer will have reporting obligations to the IRS and for whom there may be penalties for such reporting.

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[59] 79 Fed. Reg. 8544, 8568 § XIII, XIV and XV (Feb. 12, 2014).
[60] Treas. Reg. § 54.4980H-1(a)(21).
[61] Treas. Reg. § 54.4980H-1(a)(24)(ii).
[62] 79 Fed. Reg. 8544, 8551, VI.B. and C. (Feb. 12, 2014).
[63] Treas. Reg. § 54.4980H-3(c)(4) and (d).

IV. Determination of Who is a Full-Time Employee or FTE for Whom an Employer May Need to Pay the Shared Responsibility Penalty

A. Choice of Testing Method Determines Records to Maintain and For Whom Records are Maintained

An employer may determine if an employee is a full-time employee using either the monthly review of hours worked in the prior month or the lookback measurement/stability period method.[64] The monthly method can be used for both determining if the employer is an ALE and for determining the employer's liability for a tax assessed under the shared responsibility tax (except it does not apply with respect to the weekly rule). While the measurement/stability period method may only be used to determine the employer's liability for a tax assessed under the shared responsibility tax, and it may not be used to determine how many full-time employees exist for determining if the employer is an ALE.[65]

The method of measuring full-time status of employees determines whether the employer tests all employees and makes a determination each month, or whether the employer starts by carving out those employees who are in positions expected to work 30 or more hours per week and who are not seasonal employees, variable hour employees or part time employees (the "SEVPTE") are carved out and tested by the applicable measurement/stability period method. The employer then tests the SEVPTE using the lookback measurement/stability period to determine which may be in full-time status. Employers with workforces with a group of employees who are in positions that are scheduled to regularly work 30 or more hours per week and who are not SEVPTEs will carve this group of full-time employees out as automatically full-time and only test the SEVPTE. The method used to determine FTE status may vary by the member entities within the ALE and may also vary within a particular entity by certain categories of employees.[66]

Nonhourly employees must have their hours calculated under both the monthly measurement and lookback measurement method by using either: (a) actual hours worked (if there are records), or (b) using a days worked equivalency, or (c) a weeks worked equivalency.[67] Different methods can be applied for different categories of nonhourly workers.[68] An employer may determine if an employee is a full-time employee using either the monthly review of hours worked in the prior month or the measurement/stability period method.[69] The monthly method can be used for both determining if the employer is an ALE and for determining the employer's liability for a tax assessed under the shared responsibility tax (except it does not apply with respect to the weekly rule), while the measurement/stability period method may only be used to determine the employer's liability for a tax assessed under the shared responsibility tax, and it may not be used to determine how many full-time employees exist for determining if the employer is an ALE.[70]

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[64] Treas. Reg. § 54.4980H-1(a)(21)(i) and § 54.4980H-3(a).
[65] Treas. Reg. § 54.4980H-3(a).
[66] Treas. Reg. § 54.4980H-3(b)(3)(ii).
[67] Treas. Reg. § 54.4980H-3(b).
[68] *Id.*
[69] Treas. Reg. § 54.4980H-1(a)(23)(i) and § 54.4980H-3(a).
[70] Treas. Reg. § 54.4980H-3(a).

However if employees change between positions using different methods, there are transition rules related to the change in the method of determining FTE status.[71]

B. Overview of Monthly Measurement Method

Under the monthly measurement period there is no initial split between full-time vs. not full-time employees as under the lookback measurement/stability period method, instead it is a monthly determination of hours worked and a related monthly offer of coverage.[72] Instead all employees' status are tested each month for full-time status. Under the monthly method, records must be developed and maintained to document each monthly testing.

While the monthly measurement period sounds simple, because life is not simple or uniform and it takes time to gather and analyze data and implement changes in status, this simple rule has many nuances. The monthly method can result in an individual moving in and out of needing to receive an offer of coverage on a monthly basis and for each move in and out of eligibility (assuming employers use these rules for eligibility to limit the number of ways systems must be programmed) for the employer offered coverage lost due to a reduction in hours worked in the prior month, the loss of the employer sponsored coverage would trigger an eligibility for COBRA continuation coverage due to a loss of coverage due to a reduction of hours.[73] To permit time to assess eligibility for enrollment, the monthly measurement period provides that an employer is not subject to being assessed a penalty for failing to offer coverage[74] for each calendar month during the period of three full calendar months beginning with the first full calendar month in which the employee is otherwise eligible to be offered coverage under the group health plan, provided, the employee is offered coverage no later than the first day of the first calendar month immediately following such three full calendar month period if the employee is still employed on such date and the coverage the individual is eligible for provides minimum value.[75] This permits the employer to still comply with the ACA limitation of waiting periods to ninety days which is only counted after the individual is eligible.[76] If an employer meets the first day of the month following the three calendar month requirement and the coverage offered provides minimum value, then the employer is also out of the second type of penalty for offering coverage not taken or because it was either not affordable or did not provide minimum value.[77]

An employer is not subject to an assessable penalty under Code § 4980H(a) or (b) during the first three consecutive full calendar months after the employee is determined to be eligible for an offer of coverage if the employee is offered coverage that is effective no later than the first day of the first calendar month following the three consecutive full calendar months if the employee is still employed on such last day. The employer is only protected from the Code § 4980H(b)

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[71] Treas. Reg. § 54.4980H-3(b)(3)(ii).
[72] Treas. Reg. § 54.4980H-3(a) and (c)(1).
[73] Code section 4980B(f)(2)(B)(i)(I); Treas. Reg. § 54.4980B of Q&A 1(b).
[74] Code § 4980H(a).
[75] Treas. Reg. § 54.4980H-3(c)(2).
[76] Treas. Reg. § 54.9815-2708(a), (b) and (c).
[77] Treas. Reg. § 54.4980H-3(c)(2).

penalty if the coverage provided on such date provides minimum value.[78] A special rule addresses calculations using weekly instead of monthly periods.

If an employer uses the monthly measurement method it must maintain documentation of each of these monthly determinations for each employee to defend against the assessable penalty.

1. *Rehire Rules for the Monthly Method*

The above special rules for the initial determination of eligibility and offer of coverage may only be used once per "period of employment." A period of employment ends when an employee's employment terminates, but if an employee terminates and then returns in a way the regulations determines constitutes a rehire, then the monthly method determination may apply again to the rehire to determine again if the individual is a full-time employee.[79] An employee who terminates employment and has no hours of service with the ALE for at least 13 consecutive weeks immediately before he resumes service and then resumes employment (other than a teacher working for an education organization),[80] is treated as being a new employee when he is rehired.[81] Since such employee is treated as a new employee and not a continuing employee, he must satisfy the test to be a full-time employee again. If an individual is employed by an education organization, the employee must not provide any services to the education organization for 26 consecutive weeks before he is rehired to be treated as a new hire and not a continuing employee.[82] Even if an employee is a continuing employee, he still must be a continuing full-time employee in order for the tax to be potentially applicable to him. If an employee is absent from work due to an unpaid FMLA leave, USERRA leave or jury duty, the averaging method which imputes hours during such unpaid leaves, does not apply if an employer uses the monthly measurement period.[83]

The fact that a returning employee is treated as a continuing employee and not as a new employee means the employee is tested as if they were first eligible under the monthly measurement method and as if he had not suffered a period during which he had no hours of service worked. A continuing employee is treated as being offered coverage upon resumption of services, if such continuing employee is offered coverage as of the first day that employee is credited with an hour of service, or as soon as administratively practicable.[84]

2. *Rule of Parity for Rehires*

A special "rule of parity" was provided for employers who wanted to disregard earlier service, but wanted to do so earlier than after 13 weeks with no service. The rule permits the employer to select a period during which no services are provided of 4 to 12 weeks as the threshold from when the employee is treated as a new hire, but if an employer elects this method, and if the employee's number of weeks before the period without service is less than the duration of the

[78] Treas. Reg. § 54.4980H-3(c)(2).
[79] Treas. Reg. § 54.4980H-3(c)(2).
[80] Treas. Reg. § 54.4980H-1(a)(13).
[81] Treas. Reg. § 54.4980H-3(c)(4).
[82] Treas. Reg. § 54.4980H-3(c)(4)(ii).
[83] Treas. Reg. § 54.4980H-3(c)(4)(iii).
[84] Treas. Reg. § 54.4980H-3(c)(4)(iv).

period without any hours of service, then the employee is a new hire. If the period before the break is 13 weeks or longer for non-education organization employees or 26 weeks or longer for education organization employees, then the employee is treated as a continuing employee.[85]

3. *Expatriates*

For purposes of calculating the Code § 4980H penalty, if an employee is transferred to another member of the ALE or within the ALE to a position that is anticipated to continue for at least 12 months or expected to be indefinite and substantially all of the employee's compensation in such position will be income from sources outside of the U.S., then the ALE may treat that expatriate's employment as terminated when calculating the Code § 4980H penalty. This means such expatriates will need to be coded as not employed or not subject to Code § 4980H as an expatriate outside the U.S. if they are employed by an entity subject to Code 4980H and their employment is not transferred to a non-U.S. entity.[86]

4. *Inpatriates*

For an individual who formerly was an expatriate as explained above who transfers to a position with an ALE that is within the U.S. and with respect to which the income will be income from U.S. sources, the ALE may treat this inbound individual as a new hire "to the extent consistent with the rules related to rehired individuals."[87]

C. Lookback Measurement/Stability Period Method

The *second* option for testing for full-time status is to use the lookback measurement/stability period method of testing for full-time status. This method determines a person's full-time status by looking back at their hours worked during a lookback measurement period chosen by the employer. This is followed by the administrative period during which the employer determines if the individual met the requirements for full-time status during the lookback period and then offers coverage to be effective at the beginning of the stability period. The stability period is the period during which the individual is deemed to stay in the status determined for them by the administrative period, and if such status was full-time, the individual must be offered coverage by the full stability period, unless they terminate employment.

Under the lookback measurement/stability period, there is an initial split between those hired in a position expected to work at least 30 hours per week and those who are seasonal employees, variable hour employees, and part time employees.[88] Any employee who is hired into a position in which the individual is expected to work 30 or more hours per week, and who is not a seasonal employee, variable hour employee or part-time employee (a "SEVPTE"), is automatically counted as an FTEs unless they are excluded for another reason such as being an expatriate.[89] The full-time employees are not subject to further testing as long as their position does not

[85] Treas. Reg. § 54.4980H-3(c)(4)(v).
[86] Treas. Reg. § 54.4980H-3(c)(4)(vi).
[87] Treas. Reg. § 54.4980H-3(c)(4)(vi).
[88] Treas. Reg. § 54.4980H-3(d)(2).
[89] Treas. Reg. § 54.4980H-3(d)(2).

change. The full-time status is decided based on the facts and circumstances at the time the individual is hired. The lookback measurement/stability period testing then applies to the SEVPTEs.[90] This is an important clarification because it makes it clear that even a SEVPTE who may work 30 or more hours per week for a limited period is still subject to being tested to determine if the individual is an FTE. When one is determined to be a FTE, this status interacts with the ACA requirement that waiting periods not exceed 90 days.[91] The final regulations on the 90-day waiting period were released February 21, 2014.[92]

For the SEVPTEs, those individuals are not outside of the testing to determine if the individual is a FTE, but instead they are tested using the lookback measurement/stability period testing.[93] A seasonal employee is someone hired into a position for which the customary annual employment is six months or less, e.g., lifeguards working at outdoor pools or beaches in Michigan.[94] The SEVPTEs and their dependents are not automatically required to be offered health coverage, but it is for the SEVPTEs that an employer must maintain records as to when they meet the full-time status definition during the initial lookback period or during subsequent lookback periods and could subject the employer to a shared responsibility penalty.

For both of the testing options for determining PTE status, the hours worked are calculated using the hours for which payment is made or due for hourly employees as explained above. For employees paid on a non-hourly basis, a day's worked equivalency can be used with 8 hours per each day worked credited or a week worked method crediting 40 hours for each week in which any work was performed.[95]

The equivalencies can be used as long as the equivalency does not result in crediting the individual with fewer hours than those actually worked. An employer can use different equivalency methods for different categories of non-hourly employees as long as the categories are reasonable and consistently applied (and provided their IT department can program the classification codes for the categories and different equivalency rules). The regulations did not include any special rule with respect to certain industries in which the hours worked are regulated by federal safety laws or regulations.[96]

1. *Hours Worked*

For both of the testing options for determining FTE status, the hours worked are calculated using the hours for which payment is made or due for hourly employees as explained above. For employees paid on a non-hourly basis, a day's worked equivalency can be used with 8 hours per each day worked credited or a weeks worked method crediting 40 hours for each week in which any work was performed.[97] The equivalencies can be used as long as the equivalency does not result in crediting the individual with fewer hours than those actually worked. An employer can

[90] Treas. Reg. § 54.4980H-3(d)(2).
[91] *See* Treas. Reg. § 54.9815-2708.
[92] 79 Fed. Reg. 10296 (Feb. 24, 2014).
[93] Treas. Reg. § 54.4980H-3(d)(2) and (3).
[94] Treas. Reg. § 54.4980H-1(a)(38).
[95] Treas. Reg. § 54.4980H-3(b)(3) and § 54.4980H-1(a)(21) and (24).
[96] Treas. Reg. § 54.4980H-3(b).
[97] Treas. Reg. § 54.4980H-3(b)(3) and § 54.4980H-1(a)(21) and (24).

use different equivalency methods for different categories of non-hourly employees as long as the categories are reasonable and consistently applied (and provided your IT department can program the classification codes for the categories and different equivalency rules). The regulations did not include any special rule with respect to certain industries in which the hours worked are regulated by federal safety laws or regulations.[98]

2. *Initial Measurement/Stability Period for New Employees*

The lookback measurement/stability period new employee analysis begins by determining whether a new employee is a SEVPTE or is a FTE for whom the employer may potentially be subject to the penalty. Any person hired into a position to work 30 or more hours per week is a FTE and who is not a SEVPTE must be offered coverage that will be effective no later than the first day of the fourth full calendar month after their date of hire to avoid a penalty and avoid violating the 90-day limit on waiting periods.[99] A new employee is determined to be a FTE or a SEVPTE based upon the facts and circumstances at the time of hire.

SEVPTEs are initially segregated for additional testing under the lookback measurement/stability period testing. When an education organization makes the determination of which employees are seasonal employees, part time or variable hour employees, it cannot take into account the employment break period (summer) in determining its expected hours.[100] Once a new employee who is not a SEVPTE is determined to be in full-time status during the initial lookback measurement period, he becomes an ongoing employee and is subject to the ongoing employee retesting of full-time status with the frequency of such testing determined by the employer's selection of the lookback measurement and stability periods.[101] For testing the SEVPTEs, the employer designates a period over which the individual will be measured from initial employment for the related initial eligibility, and then there is a related period during which the determination made based on hours worked in the measurement period, the administrative period, and then the determination of the full-time status is applied and must remain in effect, during the stability period. The initial measurement period must be at least 3 months and not more than 12 months. The stability period for an individual following their initial measurement period must be at least as long as the stability period would be for ongoing employees and it also must be at least six months and no more than twelve months;[102] however if the SEVPTE is not determined to be a FTE after the initial measurement period, such individual's stability period must not be more than one month longer than their initial measurement period and cannot extend beyond the first standard measurement period and any related administrative period.[103] The stability period is required to immediately follow the measurement and any administrative period. Different administrative periods may also be used for different categories of employees. Employers can track the lookback measurement and stability period using the payroll periods provided certain requirements are met.[104]

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[98] Treas. Reg. § 54.4980H-3(b).
[99] Treas. Reg. § 54.4980H-3(d)(2); Treas. Reg. § 54.9815-2708.
[100] Treas. Reg. § 54.4980H-3(d)(2)(ii).
[101] Treas. Reg. § 54.4980H-3(d)(2)(i) and -3(d)(6)(iii).
[102] Treas. Reg. § 54.4980H-3(d)(2)(iii).
[103] Treas. Reg. § 54.4980H-3(d)(2)(iii).
[104] Treas. Reg. § 54.4980H-3(d)(3)(ii).

3. *New SEVPTE – Initial Lookback Measurement Stability Period*

Employers may designate the lookback measurement and stability periods for new hires that are not FTEs as long as the initial lookback period is at least three months and no more than 12 months and the related stability period is at least 6 months and no more than 12 months.[105] However, there are limits on the duration of the combined lookback and administrative period that may apply to new SEVPTEs and such combined periods cannot last longer than the last day of the first calendar month beginning on or after the first anniversary of the employee's start date. For example, if a new SEVPTE starts on January 15, 2014 and his lookback period begins on the first day of the next month and the employer uses a 12 month lookback period, so the lookback period ends on January 31, 2015 but the combined lookback and administrative period cannot extend beyond the last day of the first calendar month beginning on or after the first anniversary of the employee's start date. The first anniversary of this employee's start date is January 15, 2015 and the combined period cannot extend beyond February 28, 2015 the last day of the first month following the anniversary of the employee's start date.[106]

If the lookback period is shorter than 12 months, then the administrative period may be longer but it cannot exceed 90 days. For a new hire, the administrative period includes all periods between the start date of a new SEVPTE and the date the employee is first offered coverage.[107]

4. *The Initial Lookback Measurement/Stability Period*

If a new employee is not determined to be a FTE in the initial lookback measurement period, then the employer may generally treat the new employee as not being a FTE for the full initial stability period except that the initial stability period cannot be more than one month longer than the initial measurement period and it must not exceed the remainder of the first entire standard measurement period (including any administrative period).[108] However, if a new SEVPTE has a change in his employment status before the end of the initial measurement period in such a way that the SEVPTE's position been reasonably considered to be a full-time position, the employer will not be subject to an assessable penalty under either of the alternative penalty provisions for the period before the first day of the fourth calendar month following the change in employment status. So if an employee has a change in employment status to full-time during the measurement period that terminates looking at the full measurement period and moves the employee to full-time status for the penalty calculation, possible even before the stability period would have applied.[109]

If a SEVPTE averages more than 30 hours per week during the initial measurement period and the employee is offered coverage by the first day of the first month following the end of the initial measurement period, then the employer will not be subject to an assessable penalty for

[105] Treas. Reg. § 54.4980H-3(d)(i), (iii) and (v).
[106] Treas. Reg. § 54.4980H-3(d)(3)(vi).
[107] Treas. Reg. § 54.4980H-3(d)(d)(3)(v) and (vi).
[108] Treas. Reg. § 54.4980H-3(d)(3)(vi).
[109] Treas. Reg. § 54.4980H-3(d)(3)(vii).

such employee provided the employee is offered coverage which is affordable and provides minimum value during such time period.[110]

An employer may vary the initial measurement period and stability period within the parameters explained elsewhere in the regulations and this article. With respect to new SEVPTEs by an ALE Member and for the categories of employees specified below:

1. collectively bargained v. non-collectively bargained,
2. each separate collectively bargained group under a separate collective bargaining agreement,
3. salaried v. hourly employees; and
4. employees whose primary places of employment are in different states.[111]

Once an employee is determined to be a full-time employee in an initial measurement period, that status remains in effect for the full related stability period.[112]

5. *Transitioning from Initial Lookback/Stability Period to Ongoing*

When a SEVPTE has been employed for a full standard measurement period, the individual must be tested based on such standard measurement period in the same manner and under same conditions as the employer tests other ongoing employers.[113] Thereafter, the employee's status is determined in the same way as other ongoing employees.[114]

6. *Ongoing Employees*

There is also a measurement and stability period for ongoing employees for whom records must be kept and there are rules related to transitioning from the initial measurement/stability period to ongoing measurement/stability periods. If the measurement/stability period method is chosen, the employer must maintain records of hours worked for each employee's initial measurement period and for each ongoing measurement period for ongoing SEVPTEs and SEVPTEs that qualify as FTE for one measurement/stability period. The employer may use different measurement periods for different categories of employees as long as the records can be procured for each employee's respective initial and ongoing measurement period (and IT is willing).

7. *Ongoing Employer Measurement/Stability Period*

The individual's status and health plan coverage applies after the administrative period following the measurement period during the related stability period. There are limits on how long the administrative period may extend depending upon the duration of the lookback measurement period. The administrative period is the period during which an employer must determine that

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[110] *Id.*
[111] Treas. Reg. § 54.4980H-3(d)(1)(v) and -3(d)(3)(v).
[112] Treas. Reg. § 54.4980H-3(d)(4)(ii).
[113] Treas. Reg. § 54.4980H-3(d)(4).
[114] *Id.*

the employee is or is not a FTE, and prepare to offer the FTE coverage. While an employer is not required to use an administrative period, as a practical matter most employers will need time to make the determination and offer coverage to the FTE in a manner compliant with all applicable requirements and disclosures. The administrative period may not increase or decrease the length of the measurement or stability periods and any waiting period cannot exceed 90 days.[115] Special rules apply when longer lookback measurement periods are used to provide a combined limitation on the initial measurement period when combined with the administrative period as discussed above. Health plan coverage must be maintained for the duration of each stability period with respect to a measurement period during which the individual was determined to be a FTE.

The stability period for an ongoing employee must be at least 6 months and it cannot exceed 12 months. The stability period may not be shorter than the lookback measurement period. The lookback measurement period for ongoing employees must be at least 3 months and no longer than 12 months. There are also rules regarding the lookback measurement and stability period and how they must relate to each other. The 4 classifications of employees by which the measurement/stability period may vary are: (1) salaried v. hourly, (2) collective bargaining unit member, (3) member of different collective bargaining units, and (4) employees whose primary place of employment is in different states. However, there are additional limits and rules which apply in designating the lookback measurement and stability period and the employer needs to be sure that all of those are addressed. The lookback stability periods determinations must be made on a uniform and consistent basis across all employees in the same category.[116]

For the 2015 plan year, an employer may adopt a transition lookback measurement period as long as it is at least 6 months long and no longer than 12 months and it begins before July 1, 2014 and it must end no earlier than the first day of the 2015 plan year. So a transition period from April 15, 2014 to October 14, 2014 would be permissible for a January 1, 2015 plan year, with an administrative period from October 15, 2014 to December 31, 2014.[117] This applies to a stability period beginning in 2015 through the end of that stability period, including any portion of the stability period extending into 2016.

There are special rules for determining FTE status for employees who are rehired or who return after an absence. If an individual performs no hours for at least 13 weeks, the employer may calculate his full-time status as if he were a new hire, provided the employer is not an educational organization. Some of these special rules are explained below.

8. *Special Situations and FTE Determination*

Educational organizations have special rules due to the school year employment. Rules for churches are to be provided at a later date.

[115] 79 Fed. Reg. 10296 (Feb. 24, 2014). Treas. Reg. § 54.9815-2708.
[116] Treas. Reg. § 54.4980H-3(d)(1) and § 54.4980H-3(e).
[117] 79 Fed. Reg. 8544, 8572 XV.D.2. (Feb. 12, 2014).

9. *Expatriates*

If an employee transfers to a position outside of the U.S. that is expected to continue for at least 12 months and if substantially all of the compensation for such position will constitute compensation from sources outside of the U.S., that employee is not considered to be a FTE,[118] but an individual transferred into employment of the U.S. entity for at least 12 months and whose compensation will constitute U.S. source income is counted as an FTE for whom the pay or play penalty could be assessed.[119] This is slightly different than other tax rules related to inpats and expats, so employers need to be careful in counting these individuals. There are also special rules for certain inpats and expats when they move into the U.S. to permit treating them as new hires for purposes of the pay or play penalty.[120]

10. *Employee Terminations and Rehires and Other Absences*

Under the lookback measurement/stability period, for employers other than education organizations, an employee who is absent and does not work any hours for 13 or more weeks is treated as having terminated employment and rehired when the individual resumes working. Since the individual is treated as a rehire, the individual is a new employee and subject to the initial lookback measurement period and stability period.[121] If the employee were not treated as a rehire, they would be a continuing employee and subject to the lookback measurement/stability periods then in effect with the possibility of imputed hours during their absence. This rule applies solely to determine if the individual is treated as a new hire or a continuing employee when the individual returns to work and does not address whether the individual is a full-time employee.[122]

11. *Non-Educational Organization Employees*

If an employee is on a unpaid leave for FMLA, USERRA or jury duty and they are treated as a continuing employee rather than a new hire because their employment break without any hours of service is shorter than the 13 weeks above or the period for which their status is bridged under the rule of parity if the employer elected to use the rule of parity, then the individual is a continuing employee and for purposes of calculating their service during the measurement period in which the absence occurs the employer may elect to average their hours and impute such hours to their credit for their absence.[123] The average of new hours worked can be based on just the period during which they were not on leave, and, then the average is imputed to the full period of absence for such leaves in the lookback measurement period.

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[118] Treas. Reg. § 54.4980H-3(d)(6)(v).
[119] Treas. Reg. § 54.4498H-3(d)(6)(v).
[120] *Id.*
[121] Treas. Reg. § 54.4980H-3(d)(6).
[122] *Id.*
[123] Treas. Reg. § 54.4980H-3(d)(6)(i)(B).

12. *Educational Organization Employers and Special Unpaid Leaves for FMLA, USERRA or Jury Duty*

An employee of an education organization who does not have any hours of service credited for a period of at least 26 consecutive weeks immediately before they resumed working for the education organization will be treated as having terminated employment and as having been rehired with a new initial lookback measurement period and will not be treated as a continuing employee.[124] This is solely for purposes of determining if the individual is included as a new hire or a continuing employee not for determining if the individual is employed in a full-time status.

If the employee returning from the leave was absent with no hours of service for fewer than 26 consecutive weeks, from the education organization, then the individual is treated as a continuing employee and is not subject to a new initial measurement period, instead they reenter the measurement/stability periods then in effect for the individual.[125] The education organization may determine the employee's full-time status for a measurement period including such an unpaid leave by either averaging the hours in the measurement period, excluding the period of the unpaid leave or break and using that average for the full period, or the employer may choose to credit the employee for hours of service for the period of the special unpaid leave at a rate equal to the individual's average weekly rate during the weeks within the measurement period which are not part of the special unpaid leave period.[126] An educational organization is not required to credit more than 501 hours for a break in service. An employer computing the employee's average weekly rate may use any reasonable rate and if it is computed for a measure period of less than six months, the six-month period ending with the close of the measurement period is used to compute the average hours of service.[127]

13. *Continuing Employees – Offer of Coverage Requirements*

An employee who is treated as a continuing employee upon resuming work resumes the full-time or not status he had with respect to the stability period then in effect for him. A continuing employee who is full-time is treated as offered coverage if the employee is offered coverage as of the first day he works an hour of service when he returns, or as soon as administratively feasible, and will be as soon as administratively feasible if it is offered no later than the first day of the calendar month following the first day the employee works an hour of service.[128] The rules regarding continuing employee treatment apply to all continuing employees regardless of the type of employer.

14. *Rule of Parity*

Employers may also choose to use a version of the rule of parity for dealing with whether breaks in service constitute a termination and a rehire. The rule of parity was discussed above at

[124] Treas. Reg. § 54.4980H-3(d)(6)(ii).
[125] Treas. Reg. § 54.4980H-3(d)(6)(ii)(B).
[126] Treas. Reg. § 54.4980H-3(d)(G)(ii)(B).
[127] Treas. Reg. § 54.4980H-3(d).
[128] Treas. Reg. § 54.4980H-3(d)(6)(iii).

IV.B.2. A similar rule of parity provision exists in Treas. Reg. § 54.4980H-3(d)(6)(iv) under the monthly measurement method.

15. *Expatriates/Inpatriates*

Expatriates under the measurement stability period method are also not counted as full-time employees, provided they are out of the U.S. for at least 12 months and they have no income from U.S. sources.[129] Similarly inbound individuals are counted subject to the shared responsibility penalty if they are in the U.S. at least 12 months and have U.S. source income.[130]

16. *Changes in Employment Status When the Employer Uses Different Methods for Different Groups of Employees*

D. Change from Lookback Measurement/Stability Period to Monthly Measurement Period

If the individual was determined to be full-time using the lookback measurement stability method before they transferred to a monthly measurement method position and was in a stability period, they must be treated as full-time through the end of the stability period to which the full-time status determination related. If the employee had been determined to not be full-time in the last measurement period and is in the stability period, the employee may continue to use the last determination for the full stability period or the employer can apply the monthly measurement period through the end of the stability period. Once the stability period is over the monthly method applies.[131] The regulations do not address what happens if an employee transfers to a position measured using a different method during the administrative period before the stability period starts.

E. Change from Use of Monthly Method Position to Lookback/Measurement Stability Method

When an employee transfers from a position for which full-time status is measured under the monthly method to a position using the lookback stability method, different rules apply. If an employer used the monthly measurement method for that employee for determining the employee's full-time status for the duration of the applicable status period in effect when the employment position transfer occurred, unless the employee's hours prior to the transfer would have made the employee full-time during the stability period in which the change occurred and then the employee must continue to be a full-time employee for the duration of the related stability period.[132]

If such a change from monthly measurement to the lookback stability period method occurs, then for the stability period following the measurement period during which the employee changed to a position using the lookback measurement/stability period method, the employer must treat the

[129] Treas. Reg. § 54.4980H-3(d)(6)(iv).
[130] *Id.*
[131] Treas. Reg. § 54.4980H-3(f).
[132] Treas. Reg. § 54.4980H-3(f)(1)(ii)(A).

individual as a full-time employee for any calendar month during which either the employee would be treated as a full-time employee based on the measurement period in which the change in employment status occurred, or would be treated as a full-time employee under the monthly measurement period. Query: Does this mean that for an employee transferring from a position using the monthly measurement period to a position using the lookback/stability measurement method the employer must continue to apply the monthly measurement period for the initial lookback/stability period? [133] If so, for how long? For any calendar month subsequent to the above stability period, the lookback measurement period applies to determine the employee's full-time status.[134]

However, if an employee moved from a position measured by the lookback method to a position measured by the monthly method at the ALE, the employer can apply the monthly measurement method to such employee beginning with the last day of the fourth calendar month following the month of the change in status (instead of waiting to the end of the stability period) provided the employee would not have been expected to work 30 or more hours per week. If the ALE Member had offered such individual coverage with minimum value by the first day of the fourth calendar month after the individual changed employment status and only if the individual actually averaged less than 30 hours per week for each of the initial three full calendar months following the change to the position measured on a monthly basis.[135] The monthly method can be applied to such persons even if such method is not applied to other employees in that category.

F. Non Payment or Late Payment of Premiums

If an employee fails to pay the premium due to cover himself or his dependents and such individual's coverage is terminated during the period solely for failure to pay the premium, the employee is not treated as failing to offer a full-time employee coverage for such period when coverage was terminated. However, the employer is only treated as not failing to offer such individual and his dependents coverage through the end of the coverage period (typically the plan year) if the plan complies with COBRA's premium payment rules in Treas. Reg. § 54.4980B-8, Q&A 5 apply the: (a) 30-day grace period rule, (c) disclosure to healthcare providers and others pending premium payment regarding covered status, (d) the "not significantly less" rule and (e) payments are treated as made on the date sent to the plan.[136]

G. Effective Date

The Regulations in Treas. Reg. § 54.4980H-1, 2 and 3 relate to determination of full-time status, ALE status, and the applicable definitions are effective on and after January 1, 2014.

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[133] Treas. Reg. § 54.4980H-3(f)(1)(A)(ii)(B).
[134] Treas. Reg. § 54.4980H-3(f)(1)(A)(ii)(C).
[135] Treas. Reg. § 54.4980H-3(f)(2)
[136] Treas. Reg. § 54.4980H-3(g).

H. Shared Employees, Multiemployer Plans, Employees of Staffing Firms and the Code § 4980H(a) Penalty

For ALEs who may share employees and allocate their services among a number of the members of the ALE, (e.g., an ALE who allocates one member of its legal department staff to be the general counsel to two of its separate subsidiaries), the fact that one entity that is a member of the ALE's controlled group offers health coverage to the shared attorney satisfies the requirement that all of the ALE Members may have to offer coverage to such employee.[137] Similarly for an employer that participates in a multiemployer plan under a collective bargaining agreement with the sponsor of the multiemployer plan, the offer of coverage to the collective bargaining unit member by the collective bargaining unit sponsoring the multiemployer plan, Taft- Hartley plan or multiple employer welfare arrangement is treated as an offer of coverage made by the employer for that month.[138] If a full-time employee works for more than one ALE Member during a month, the Code § 4980H penalty is the obligation of the ALE Member for whom the employee has the greatest number of hours of service during the calendar month in question.[139]

If an employer contracts with a staffing firm to handle the employment of some or all of its employees and the employees are not common law employees of the staffing firm and the staffing firm offers the employees leased to the employer health coverage under a plan maintained by the staffing firm, such offer of coverage by the staffing firm is treated as made by the client employer who contracted with the staffing firm for purposes of the Code § 4980H penalties only if the fee the employer pays to the staffing firm for the employee enrolled in the staffing firm's health plan is higher than the fee the employer would pay to the staffing firm for a similar employee if that employee did not enroll in the staffing firm's health plan.[140]

V. When Has an Employer Offered Coverage?

In order for an employer to satisfy the requirement that it offered coverage to its full-time employees to avoid the Code § 4980H(a) penalty, it must provide its full-time employees with an effective opportunity to elect to enroll in coverage at least once with respect to each plan year.[141] This means that an opportunity to enroll during open enrollment annually suffices and it does not require a continuous open enrollment period during the plan year; however, it is important to remember that the special enrollment periods for addition of a dependent due to marriage, birth, adoption or placement for adoption or for loss of other coverage under HIPAA still apply[142] and that the cafeteria plan regulations governing when an election can be changed in the middle of a plan year also still apply to determine whether the change is a permitted pre-tax mid-year change in election of benefits.[143] One advantage of using the lookback measurement stability period is it can be set to somewhat closely approximate a plan year entity date so eligibility is determined close to annual enrollment for entry following annual enrollment. However, using a single plan

[137] Treas. Reg. § 54.4980H-4(b)(2).
[138] Treas. Reg. § 54.4980H-4(b)(2).
[139] Treas. Reg. § 54.4980H-4(d).
[140] *Id.*
[141] Treas. Reg. § 54.4980H-4(b).
[142] See Code § 9801(f) or ERISA §701(f).
[143] Treas. Reg. § 1.125-4.

year entry forces open enrollment later in the plan year. If lookback measurement/stability periods are used for eligibility, they could result in needing to offer coverage more than once per year which will present issues under cafeteria plan rules. To date the cafeteria plan regulations defining when a change in status has occurred have not been changed to accommodate a change in an employee's status as full-time or ceasing to be full-time under Code § 4980H.

In addition to the one-time per plan year offer requirement, the opportunity to enroll must be for enrollment in coverage that provides minimum value and that is affordable which requires that the employee contribution required to obtain the coverage be less than 9.5 percent of a monthly amount for a single individual which can be calculated as the federal poverty level for the 48 contiguous states and Washington, DC, for a single person for that year divided by 12.[144] Other safe harbor methods exist for calculating what is affordable as well.

If a plan provides for an evergreen election of coverage from one year to the next with last year's election of coverage automatically renewing for the next year unless the employee makes a different affirmative election, that evergreen election still constitutes an effective annual offer of coverage for purposes of having offered coverage for avoidance of the failure to offer coverage penalty.[145]

A. Amount of Coverage to Avoid Code § 4980H(a) Penalty

For an ALE Member to avoid the assessment of a Code § 4980H penalty, the ALE Member must not fail to offer coverage to a full-time employee for any day in the calendar month in question. An employer's failure to offer coverage for one day in a calendar month (regardless of the use of the payroll period or special weekly rules) results in the employer being required to treat that full-time employee as not being offered health coverage for that calendar month.[146] There is an exception to this rule applicable in the month in which a full-time employee terminates employment provided the terminated employee would have been offered coverage for the full month if the employee had been employed for the full calendar month, and in this situation, the ALE Member is not subject to an assessable penalty for the full-time employee whose employment terminated during the month. A similar rule applies for the calendar month in which the employee starts working as a full-time employee if the employee starts employment on any date other than the first day of the calendar month to permit the ALE to treat the newly hired employee as covered for the entire calendar month.[147] These special rules must be considered when determining how to report on each employee's coverage.

B. Determining if Your Coverage is Affordable

An employer can use one of three safe harbors to determine if its coverage is affordable and less than 9.5% of an amount deemed to be the employee's household income. The three safe harbors are to use the employee's Form W-2 wages at the end of the year, the rate of pay safe harbor which multiplies the employee's base pay rate by 130 hours, or the federal poverty level. Only

[144] Treas. Reg. § 54.4980H-4(b).
[145] Treas. Reg. § 54.4980H-4(b)(1).
[146] Treas. Reg. § 54.4980H-4(c).
[147] Treas. Reg. § 54.4980H-4(c).

the rate of pay and federal poverty level safe harbors permit the employer to determine prior to the end of the calendar year if the coverage provided to the employees meets the affordability requirement.[148]

1. *W-2 Compensation Safe Harbor*

The first safe harbor is Form W-2 Compensation. If an employer uses Form W-2 compensation as a proxy for household income, then the employer will not be subject to a shared responsibility penalty with respect to any of its full-time employees if that employee's required contribution toward health insurance premium for the year for the lowest cost self-only coverage offered by the employer that provides minimum value if the premium is less than 9.5% of the employee's Form W-2 wages from the employer for that calendar year. In order to be able to use this safe harbor, the employee's contribution toward their premium must remain a constant amount or percentage of wages all year so that the ALE Member or ALE is not permitted to make discretionary adjustments to the premium during the year. A consistent percentage of W-2 wages for the year which is subject to an absolute annual dollar cap on the total premium paid would be permissible.[149]

If coverage was not offered for the entire year, then the W-2 wages amount must be prorated for the period during which coverage was offered. For purposes of doing this pro-ration , employment during one day in the month is treated as employment for the full month to determine the applicable fraction for proration of wages based upon the fraction obtained by dividing the number of calendar months during which coverage was offered by the number of calendar months in which the individual was employed during the calendar year.[150] For calculating affordable coverage 1 day in a month counts as an entire month as opposed to other places for determining whether coverage was offered, where one day of coverage is not treated as any coverage for this month. Due to the complexity of these rules and the related programming issues related to these rules and the related reporting requirements, there appear to be reasons for employers to extend any coverage that might terminate by the month automatically to the last day of the month so the month is counted in the same manner for all purposes related to the penalty assessment and to delay offering coverage until the beginning of a month following the month of hire to avoid potential months of compensation being compared to the cost of a full month of coverage and to fully utilize administrative periods and other mechanisms which treat months after initial hire as not subject to the penalty.

2. *Rate of Pay Safe Harbor*

The first of the two affordability safe harbors that can be used prospectively to plan to minimize any penalty is the rate of pay safe harbor. The rate of pay safe harbor for an hourly employee is satisfied if the monthly premium the employee must pay for employee only coverage is less than 9.5% of the amount which is obtained by multiplying the individual's rate of pay per hour as of the first day of the coverage period times 130 hours per month, and the employer's coverage provides minimum value. An ALE Member satisfies the rate of pay safe harbor with respect to a

[148] Treas. Reg. § 54.4980H-5(e).
[149] Treas. Reg. § 54.4980H-5(e)(2)(ii).
[150] *Id.*

salaried employee if the employee's required monthly contribution toward self only coverage is less than 9.5% of the employee's monthly salary calculated as of the first day of the coverage period. Any reasonable method can be used to convert payroll periods to monthly salary.

If coverage is offered on one day during the month under this safe harbor, the entire calendar month is counted both for purposes of determining the assumed income for the calendar month and for determining the employee's share of the premium for the calendar month.[151] This is one of the two safe harbors that can be used to determine on a prospective basis if a coverage will be affordable for a particular employee which may be helpful to employers trying to plan to avoid the shared responsibility penalty. The income is imputed under this safe harbor regardless of the number of hours the individual actually works.

3. *Federal Poverty Line Safe Harbor*

The third safe harbor is the federal poverty line safe harbor. This applies to an employee if for a calendar month, the employee's required contribution is less than 9.5% of the monthly amount of the federal poverty line for a single individual for the applicable calendar year (i.e., federal poverty line for single individual divided by 12).[152] If coverage is offered on one day during the month under this safe harbor, the entire calendar month is counted both for purposes of determining the assumed income for the calendar month and for determining the employee's share of the premium for the calendar month. This is one of the two safe harbors that can be used to determine on a prospective basis if a coverage will be affordable for a particular employee which may be helpful to employers trying to plan to avoid the shared responsibility penalty.

C. Calculation of the Assessable Penalty under Code § 4980H(a) - Failure to Offer Coverage

If an ALE is not able to pass the test that it offered coverage to 95% or more of its full-time employees or that it did not offer coverage that provided minimum value and was affordable to fewer than 5 of its full-time employees (or meet the related transitional rule) in any calendar month, then the ALE Members will each be subject to the assessable penalty of $2,000 times 1/12 times the number of full-time employees employed for such month, less the ALE Member's allocable share of the 30 freebies.[153] Each ALE Member is allocated a share of the 30 full-time employee reduction under Code § 4980H(c)(2)(D)(i)(I) (the 30 freebies) to reduce its share of the Code § 4980H(a) penalty tax. An ALE Member's allocated share of the 30 freebies is calculated by calculating the ALE Member's pro rata share of the 30 freebies based upon the number of full-time employees that ALE Member employs as compared to the number of full-time employees employed by all of the other ALE Members of the ALE for that month.[154] This is one more reason why each ALE Member must have a monthly count of the number of full-time employees it employs for that month. This calculation of the number of full-time employees employed by an ALE Member considers the rules for allocating shared employees discussed herein. If the allocation of the 30 freebies results in an ALE Member being allocated a fractional

[151] Treas. Reg. § 54.4980H-5(e)(2)(iii).
[152] Treas. Reg. § 54.4980H-5(e)(2)(iv).
[153] Code § 4980H(a) and Treas. Reg. § 54.4980H-4(d) and (e); *see* Transition Rule below for 2015 modification.
[154] Treas. Reg. . § 54.4980H-4(e).

freebie, then the fractional freebie is rounded to the next highest whole number and this rounding is done even if it means that the total number of freebies allocated to the ALE exceeds thirty.[155] If the employee has an equal number of hours for more than one ALE Member, then the ALE Members may determine which ALE Member is the employer of that employee for the month and if the ALE Members are not able to agree and select which will be the employer, then the IRS will select which ALE Member will be treated as the employer of the employee for purposes of the Code § 4980H penalty assessment.[156] The regulation governing the penalty calculation under Code § 4980H(a) is effective for periods after December 31, 2014 because this tax is applicable in 2015.[157]

An employer is not subject to an assessable penalty under Code § 4980H(a) or (b) during the first three consecutive full calendar months after the employee is determined to be eligible for an offer of coverage if the employee is offered coverage that is effective no later than the first day of the first calendar month following the three consecutive full calendar months if the employee is still employed on such last day. The employer is only protected from the Code § 4980H(b) penalty if the coverage provided on such date provides minimum value.[158] A special rule addresses calculations using weekly instead of monthly periods.

D. Calculation of the Assessable Penalty under Code § 4980H(b) - Offered Coverage, but Employees Went to Marketplace and Your Coverage Was Not Affordable or Did Not Provide Minimum Value

If an ALE offers coverage to its full-time employees and their dependents in any calendar month and the employee or dependents instead obtain coverage on the marketplace and the employer received a § 1411 Certification with respect to one or more full-time employees of the ALE or one of its ALE Members and the ALE Members coverage either does not provide minimum value or is not affordable, then the ALE Member is subject to the assessable tax which is equal to the product of the number of full-time employees of the ALE Member for which it has received such a certification (that the employee received a tax credit or cost sharing reduction on the marketplace) less the number of such employees who were offered coverage providing minimum value that met one of the affordability safe harbors, and less the number of the employees in a limited non-assessment period, times $3,000 times 1/12th.[159] Once such amount is calculated, then it is compared to the penalty assessed under Code § 4980H(a) and the lesser of the two amounts is the assessable penalty for that calendar month.[160] This means the assessable penalty based on full-time employees must be calculated under both methods for each month, unless the safe harbor for offering coverage to 95% is satisfied, in which case the penalty under Code § 4980H(b) must be calculated after the safe harbor offer of coverage is documented. [161]

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[155] *Id.*
[156] Treas. Reg. § 54.4980H-4(d).
[157] Treas. Reg. § 54.4980H-4(g).
[158] Treas. Reg. § 54.4980H-3(c)(2).
[159] Treas. Reg. § 54.4980H-5(a).
[160] *Id.*
[161] *Id.*

An offer of coverage for this purpose has the same meaning as an offer of coverage under Code § 4980H(a) as discussed above.[162] In the same way that offering coverage for only a partial month in the 4980H(a) penalty calculation is treated as not offering coverage, failing to offer coverage for any day also is treated as not offering coverage for the month for the 4980H(b) penalty.[163] However, if an individual could have had a full month of coverage by paying the premium for continuing his coverage after his employment terminated, then his partial month of coverage is treated as a full month of coverage.[164] No penalty is assessed on a full-time employee for the month in which he starts employment other than on the first day of the month for purposes of the 4980H(b) penalty.[165] The Code § 4980H(b) penalty is assessed on the ALE Member that employed the individual for the month in question and if the employee was shared by two or more ALE Members, then the member with the most hours of service for that month is liable for the penalty for such full-time employee. If the full-time employee provided an equal number of hours of services to two or more ALE Members, then the ALE Members may either agree which one will be treated as the employer or if there is no agreement or if they take inconsistent positions (i.e., the fail to play well in the sandbox), then the IRS will determine which ALE Member should be liable.[166]

If the coverage was offered and provided minimum value to the full-time employees, the next defense against assessment is to show that the employee's share of the cost of coverage was "affordable" to the employee, that it cost less than 9.5% of one of the proxies for his household income.

Three safe harbors can be used as a proxy for the full-time employee's household income. Two of the safe harbors permit a prospective calculation which can permit an employer to plan to avoid the penalty. The third safe harbor looks at wages after the end of the year as reported on Form W-2. The safe harbors will apply even if they do not mean the coverage is affordable for any particular employee under the health care tax credit regulation provisions and that an applicable premium tax credit or cost sharing reduction is allowed with respect to such employee. An employer can use one or more of the affordability safe harbors only if it offers its full-time employees and their dependents he opportunity to enroll in health coverage that provides minimum value with respect to self-only coverage under an eligible employer sponsored plan. An employer may choose to apply the safe harbors to any group of employees or a reasonable category of employees that are applied in a uniform and consistent manner. Reasonable categories include: specified job categories, nature of compensation (hourly or salary), geographic location, and similar bona fide business criteria. Employees categorized by inclusion on a list of names is not a reasonable category.[167]

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[162] Treas. Reg. § 54.4980H-5(b)
[163] Treas. Reg. § 54.4980H-5(c)
[164] Id.
[165] Id.
[166] Treas. Reg. § 54.4980H-5(d)
[167] Treas. Reg. § 54.4980H-5(e)(2).

VI. Transition Rule For Pay or Play Penalty Tax Based on Number of FTEs and FTEEs

Transition relief provided in the preamble to the proposed regulations, as corrected, applies for 2014.[168] (See VI.C. for the transition relief on the penalty tax in the proposed regulations applicable for 2014) The final regulations provided broader transition relief than the proposed regulations. The guidance provides no assessable penalty will apply for 2014 continues to apply.[169] It is important to distinguish which transition relief provisions are being used and exactly what relief the ones used provide. The transition relief provisions under Code § 4980H do not relieve one from the reporting obligations under Code §§ 6055 and 6056 and vice-versa.

Employers who have 50 or more individuals who are treated as either FTEs or FTEEs and less than 100 full-time employees will not have to pay the assessable penalty for any individual in 2014 or 2015 and the pay or play penalty will not apply to those ALEs until 2016.[170] This also applies for non-calendar year plans for employees of this size for the non-calendar year plan that begins in 2015 and extends for such employees.[171] Penalty is assessed when this transaction rule is applied to calendar months which are part of a non-calendar plan year that began in 2015.[172] For employers with 100 or more employees who are either FTEs or FTEEs on more than 120 days in the prior calendar year will be required to comply in 2015 and pay the penalty in 2015 for anyone who does not meet the requirements.[173]

A. Calendar Year Plan Transition Relief

1. *Transition Relief for Determining Full-time Employee Status*

The determination of full-time employee status is based upon hours worked during the lookback measurement period prior to the stability period when the individual must be treated as being in that status for the duration of such stability period. For purposes of the stability period set to begin during 2015 an employer under this transition rule may adopt a lookback measurement period that is less than twelve consecutive months, but which is at least six months and that begins on or before July 1, 2014, and ends no sooner than 90 days before the first day of the plan year beginning on or after January 1, 2015 (90 days is the maximum permissible administrative period). For e.g., this means that an employer with a calendar year plan may use a measurement period from April 15, 2014 through October 14, 2014 which is the six months minimum duration, which is followed by an administrative period that ends on December 31, 2014 (less than the 90 day maximum administrative period) with coverage beginning January 1, 2015. This guidance applies only to stability periods that begin in 2015 and will not apply in plan years after 2015. It will also not apply for any stability period that occurs after the initial transition stability period. This only applies to employees who are employed as of the first day of the transition measurement period and in the example above, that means it only applies to the employees

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[168] 79 Fed. Reg. 8544, 8569 XV.A. (Feb. 12, 2014).
[169] Notice 2013-45.
[170] 79 Fed. Reg. 8544, 8574 XV.D.6. (Feb. 12, 2014).
[171] Code § 4980H(a) or (b).
[172] *Id.*
[173] 79 Fed. Reg. 8544, 8574 XV.D.6. (Feb. 12, 2014), Code, § 4980H.

employed on April 15, 2014 and not to any hired after April 15, 2014. Any employee hired after the initial transition measurement period is subject to the new general rules.[174]

2. *Transition Relief for Determining Applicable Large Employer Status for 2015*

An ALE with respect to a particular calendar year is an employer that employed on the average at least 50 full-time employees, including full-time equivalent employees, on business days during the preceding calendar year. For the 2015 calendar year, there is a transition rule that permits an employer to determine its status as an ALE by reference to a period that is at least six consecutive calendar months long and is chosen by the employer during the 2014 calendar year instead of using the full 2014 calendar year. This means that an employer in 2014 may designate six consecutive calendar months during which it will determine whether it is an ALE for 2015 by determining the average number of full-time employees and full-time equivalent employees on business days during those six consecutive months in 2014. The determination of whether any seasonal workers are included in the group that may potentially be excluded from the count of full-time employees and full-time equivalent employees in 2014 is based on the calendar year rather than on the calendar months chosen by the employer under the transition rule. This means that for the use of a seasonal worker exception an employer would need to be able to know the number of employees on each month during the calendar year 2014 even though it may be making a determination of ALE status based on a six month segment for 2014. There is no special rule for educational organizations in this transition rule. The transition rule regarding counting during 2014 to determine ALE status in 2015 may also be used for purposes of the rule regarding the 2015 transition relief for ALEs with fewer than 100 full-time employees including full-time equivalent employees.[175]

3. *Transition Rule Regarding Offering Coverage for January 2015*

Many employers offer coverage which commences on the first day of a pay period rather than on the first day of a calendar month. The regulations require that coverage be offered on every day of the month in order for the employer to be able avoid the shared responsibility penalty for that employee for that month. In order to accommodate the fact that many employers base coverage commencement on the first day of the pay period in the new year for January 2015 the transition rule treats such coverage as existing for the full month of January 2015 only if ALE Member offers coverage to a full-time employee no later than the first day of the first payroll period that begins in January 2015.[176]

4. *Transition Rule for Coverage of Dependents*

In order to avoid a potential assessable penalty under Code § 4980H(a) and (b), an ALE Member must offer coverage to its full-time employees and the full-time employees' dependents. The preamble to the proposed regulations provided a transition rule for 2014. The final regulations extend relief to plans that had not previously offered dependent coverage for plan years beginning in 2015 if certain circumstances are met. This applies to employers who for the 2015

[174] 79 Fed. Reg. 8544, 8572 XV.D.2. (Feb. 12, 2014).
[175] 79 Fed. Reg. 8544, 8572 XV.D.3. (Feb. 12, 2014).
[176] 79 Fed. Reg. 8544, 8573 XV.D.4. (Feb. 12, 2014).

plan year which have plans that do not offer dependent coverage, or that offer dependent coverage that does not constitute minimum essential coverage or dependent coverage is offered for some, but not all dependents, and it is available to the extent that the employer offered dependent coverage during either the plan year that begins in 2013 or the 2014, plan year and then subsequently dropped that offer of coverage. The coverage had been offered to some, but not all dependents during 2013 or 2014 and the relief that is extended applies only with respect to dependents who are not offered coverage at any time during the 2013 or 2014 plan year. This relief is only available if the employer takes steps during the 2014 or 2015 plan year or both to extend coverage under the plan to the dependents not offered coverage during the 2013 or 2014 plan year.[177]

5. *2015 Transition Relief for ALEs with fewer than 100 full-time employees or full-time equivalent employees*

A discussion of this transition relief for employers with fewer than 100 full-time employees and full-time equivalent employees is contained in the article at Section II.E. This transition rule is available to employers with fewer than 100 full-time employees and full-time equivalent employees and applies for all of 2015 for calendar year plans and for plan years beginning in 2015 for non-calendar year plans. This rule precludes such employer being subject to the assessable penalties under Code § 4980H(a) or (b). In order to be eligible for this transition relief, the number of full-time employees and full-time equivalent employees must be at least 50 but less than 100 on business days during 2014. The number of full-time employees is determined under the regulations. For the period beginning February 9, 2014 and ending December 31, 2014, the employer must not reduce the size of its workforce or the overall hours of service of its employees in order to fit within this special extension. Any workforce reduction or reduction in the overall service hours for bona fide business reasons will not be considered to have been made to satisfy the workforce size condition of this type of transition relief.

A coverage maintenance period is required to be complied with during which the employer must not eliminate or materially reduce the health coverage it offers to employees. The maintenance period begins on February 9, 2014. The employer is not considered as eliminating or materially reducing health coverage if it continues to offer each employee who is eligible for coverage during the coverage maintenance period an employer contribution towards the cost of employee only coverage that either is at least 95% of the dollar amount of the contribution towards such coverage that the employer was offering on February 9, 2014, or is the same, or a higher, percentage of the cost of coverage that the employer was offering to contribute to for the employee as of February 9, 2014. In the event there was a change in benefits under the employee only coverage offered and the coverage will still provide minimum value after the change and the employer does not alter the terms of the group health plan to narrow or reduce the classes of employees who are offered coverage as of February 9, 2014, it qualifies. The coverage maintenance period runs from February 9, 2014 and ends on December 31, 2015 for calendar year plans. Thus, the contribution toward the benefits must be maintained from the level of contribution on February 9, 2014 through December 31, 2015. Each employer must certify on the form prescribed by the Service of its compliance with the requirements with respect to the limited workforce size, its maintenance of previously offered healthcare coverage

[177] 79 Fed. Reg. 8544, 8573 XV.D.5. (Feb. 12, 2014).

and the contributions towards such coverage and the maintenance of its workforce and aggregate hours of service during the transition period.[178]

This particular transition rule can apply to new employers if that new employer is reasonably expected to employ on average at least 50 full-time employees, including any full-time equivalent employees on business days during the current calendar year and it actually employs an average of at least 50 full-time employees, including full-time equivalent employees, on business days during the calendar year and thus becomes an ALE. For a new employer in 2015 to be subject to this rule it must certify that it reasonably expects to employ at least 50 and fewer than 100 full-time employees and full-time equivalent employees on business days during 2015, that it will satisfy the maintenance standards with respect to maintaining the workforce and aggregate hours of service of its employees based at a level at least as of its initial date of operations and that it will maintain its health care coverage and contributions towards health care coverage at the same level that was in effect on the first day the coverage was offered.[179]

6. *Multiple Transition Rules*

If employer desires to use more than one transition rule, there are provisions contained in the preamble to the final Code § 4980H regulations which govern the use of multiple transition rules.[180]

7. *2015 Transition Relief with Respect to Offers of Coverage*

This transition rule applies only with respect to the Code § 4980H(a) penalty assessed for failing to offer coverage under Code § 4980H(a). The safe harbor for offering full-time employees coverage providing minimum value that is affordable to avoid the Code § 4980H(a) penalty is that the ALE must offer coverage to its full-time employees and their dependents so that it offers coverage to all but 5% of its employees, or if greater than 5%, all but 5 of its full-time employees.[181] The offer of coverage must happen at least once per plan year. Additional transition relief is provided in 2015 for calendar year plans and during the 2015 plan year months that fall in 2016 for non-calendar year plans. If the ALE that offers coverage, offers it to at least 70% of its full-time employees or it fails to offer coverage to no more than 30% of its full-time employees, then this transition rule, for 2015 only, treats the employer as having offered coverage and the penalty under Code § 4980H(a) does not apply for 2015, provided the other conditions described below apply. The employer may still be subject to an assessable penalty under Code § 4980H(b) with respect to any 2015 plan months that fall in 2016, then the penalty applies but it is calculated differently. In calculating the Code § 4980H(a) penalty, the ALE Member by the statute reduces its assessable penalty for its pro rata share of the 30 freebies; however, for 2015 the ALE Member reduces its assessable penalty by the ALE's pro rata share of 80 full-time employees. This relief applies to all calendar months in 2015 plus calendar months of fiscal plan years that fall in 2016 and which are within the employer's 2015 plan year for those employers maintaining non-calendar year plans. This transition relief applies in

[178] 79 Fed. Reg. 8544, 8574 XV.D.6. (Feb. 12, 2014).
[179] 79 Fed. Reg. 8544, 8574 XV.D.6.c. (Feb. 12, 2014).
[180] 79 Fed. Reg. 8544, 8575 XV.D.6. (Feb. 12, 2014).
[181] Treas. Reg. § 54.4980H-4(a).

addition to other transition relief with respect to non-calendar year plans and shorter measurement periods permitted in shorter stability periods or short period of 2014 for measuring ALE status and with respect to offering coverage.[182]

8. *Reliance*

This is effective for all Applicable Large Employers on and after January 1, 2016. Effective for Applicable Large Employers with more than 99 full-time employees on and after January 1, 2015.

B. Multiemployer and Non-Calendar Year Plans

There is additional guidance on transition rules with respect to multi-employer plans and non-calendar year plans which are not addressed in this article.

C. Transition Rules under Proposed Regulations in Effect in 2014

The transition rules from proposed regulations generally originally applied for 2014.[183] The final regulations extended the application of the transition rules from the proposed regulations to also be effective for certain ALEs with 50-99 full-time employees in the previous calendar year on and after January 1, 2016.[184]

1. *Fiscal Year Plans – Penalty Assessment Transition Rule*

Notice 2013-45 did not address how the fiscal year plan transition rules would be impacted by the delay in the effective date of Code § 4980H until January 1, 2015. The fiscal year plan transition rules are also addressed in the final regulations. The following options are under the proposed regulations.

a. Option 1

The penalty will not be assessable for certain months in the calendar year prior to the beginning of the first plan year beginning on or after January 1, 2014, provided a number of requirements are satisfied by the employer and its group health plan. The penalty can be assessed against an employer (the entity within the controlled group providing the coverage) for either not offering any coverage or for failing to offer coverage that provides minimum value and which is affordable. This transition rule only applies if (for all of the numbered items below, the employer is the employing entity within the controlled group that is the applicable large employer):

[182] 79 Fed. Reg. 8544, 8575 XV.D.7. (Feb. 12, 2014).
[183] 79 Fed. Reg. 8544, 8569 (Feb. 12, 2014).
[184] 78 Fed. Reg. 218, 239 X. (January 2, 2013); 79 Fed. Reg. 8544, 8576 XV.D.1.a and XV.D.7.d.(Feb. 12, 2014).

i. The employer must have had a group health plan with the same fiscal year on December 27, 2012 as it has in 2014.

ii. The eligibility terms of the group health plan on December 27, 2012 must be the same at the commencement of calendar year 2014.

iii. The group health plan for which the transition rule is sought must offer employees for the first plan year beginning in 2014 coverage that both provides minimum value and is affordable. The plan must be certain it has an option that using the minimum value calculator or via an actuarial certification can prove it provides coverage for 60% of the expected medical costs for an individual for the plan to meet the minimum value requirement. Such coverage also must be affordable, which means it must not cost more than 9.5% of the lowest paid employee's household income (or one of the safe harbors available for calculating household income).

iv. The coverage in item 3 must be affordable, provide minimum value and must be offered to employees of that employer on the first day of the first plan year beginning in 2014. In your example, it all of the above criteria are satisfied, the affordable minimum value coverage must be offered on July 1, 2014.

The employer must still report for which of its full-time employees it provides affordable minimum value coverage to the IRS and to the applicable exchange for every calendar month in 2014 regardless of the employer's plan year. The employer may determine which employees were full-time employees for the reporting requirement for all of calendar year 2014 at the end of 2014 based upon the actual hours worked and it does not need to use the look-back rule for the reporting for the full 2014 calendar year which will be due early in 2015. This is not a condition for the transition rule, but the employer must be prepared to do this reporting for 2014, or else, of course, there will be other penalties.

b. Option 2

A second transition rule may apply where an employer is a member of a controlled group of employers and all of the employers do not have the same plan year for their group health plan and the employer wants to expand its plan's eligibility to additional employees for 2014. This transition rule applies if either (1) the employer had at least 25% of its employees eligible for coverage under 1 or more fiscal year plans that have the same plan year on December 27, 2012, or (2) if the employer offered coverage to 1/3 or more of its employees during the most recent open enrollment period under the same fiscal year plan with an open enrollment period prior to December 27, 2012, and the employer wants to extend the offer of coverage under these plans to other employees. If the requirements of this transition rule for expanding coverage applies, no shared responsibility penalty will be assessed with respect to the employees (a) who are offered coverage that is affordable and provides minimum value no later than the first day of the first plan year beginning on or after January 1, 2014, and (b) who would not have been eligible for any group health plan maintained by the entities in their employer's controlled group as of December 27, 2012 that had a calendar year plan year. In order to calculate whether the 25% or

1/3 threshold are met for this transition rule to apply, the applicable large employer (controlled group) may determine the percentage of its employees covered under fiscal year plan(s) as of the end of the most recent enrollment period or any date between October 31, 2012 and December 27, 2012.

As with the first transition rule, the employer must still report for which of its full-time employees it provides affordable minimum value coverage to the IRS and to the applicable exchange for every calendar month in 2014 regardless of the employer's plan year. The employer may determine which employees were full-time employees for the reporting requirement for all of calendar year 2014 at the end of 2014 based upon the actual hours worked and it does not need to use the look-back rule for the reporting for the full 2014 calendar year which will be due early in 2015. This is not a condition for the transition rule, but the employer must be prepared to do this reporting for 2014, or else, of course, there will be other penalties.

When considering the above two transition rules options on the penalty, one must also consider how the employees will be able to enroll under the cafeteria plan to avoid the individual mandate penalty for the early months in 2014 before the new plan year commences because the transition rule for the employers on the penalty does not mean that the employees do not have to comply with the individual mandate to maintain coverage.[185]

2. *Fixed Year Cafeteria Plan Election Transition Rule*

There is also transition relief from the cafeteria plan rules for election changes for a cafeteria plan that is a fiscal year plan beginning in 2013 to permit the revocation, modification or commencement of salary reductions for accident and health coverage (i.e., medical plan coverage) offered through a cafeteria plan with a fiscal year to permit an employer to permit its employees to make certain elections. If the employer wants to permit such election changes, the employer must amend its cafeteria plan to permit such changes by December 31, 2014, retroactively effective to the first day of the 2013 plan year.

For employers that take advantage of the fiscal year plan transition rules, the employer needs to know how to calculate full-time employees and how the look-back/measurement period and stability period will need to be adjusted for the transition rule on the penalty and the calculation of which employees are full-time. The transition rule for implementing the determination of which employees are full-time for fiscal year plans is briefly described below. This is the transition rule for how you apply the determination of who is full-time working on the average 30 or more hours per week.[186]

3. *Measurement and Stability Period Transition Rule*

There are also transition rules for the initial measurement and stability periods for stability periods beginning in 2014. This transition rule permits a transition measurement period that is shorter than 12 months and is no less than 6 months and that begins no later than July 1, 2013 and ends no earlier than 90 days before the first day for the plan year beginning on or after

[185] 78 Fed. Reg. 218, 236 IX. (January 2, 2013).
[186] 78 Fed. Reg. 218, 236 IX.B. (January 2, 2013).

January 1, 2014. However, an employer with a fiscal year beginning on July 1 must use a measurement period that is longer than 6 months in order to comply with the requirement that the measurement period begin no later than July 1, 2013 and end no earlier than 90 days before the stability period (the next following July 1) when coverage must commence.[187]

VII. Related Reporting

A. Why Reporting?

In order for the IRS to be able to administer the healthcare tax credit under Code § 36B and the employer shared responsibility penalty under Code § 4580H, it needs to have certain information regarding the coverage offered, its cost and who had such coverage. The reporting required under Code § 6056 is designed to provide such information and uses many of the terms defined in Code § 4980H and the regulations thereunder, which makes sense since Code § 6056 requires reporting of the data needed for the IRS to assess the Code § 4980H penalty when was an employee offered coverage with minimum value that was affordable. The Code § 6056 regulations which focus on the reporting the IRS needs to assess the Code § 4980 penalties borrow the Code § 4980H definitions for:

Applicable Large Employer
Applicable Large Employer Member
Dependent
Eligible Employer Sponsored Plan
Full-Time Employee
Governmental Unit and Agency or Instrumentality of a Governmental Unit
Minimum Essential Coverage
Minimum Value
Person[188]

The filing requirement applies to an ALE Member in the same way that the shared responsibility tax is calculated based upon each ALE Member's records.[189] ALE Members who do not have any employees are not required to file under Code § 6056.[190]

If the ALE Member is a disregarded entity (*i.e.*, a qualified subchapter S subsidiary under Code § 1361(b)(3)(B) or an entity described in Treas. Reg. § 301.7701-2(c)(2)(i)), the disregarded entity is treated as a separate entity from its owner and the disregarded entity must report under Code § 6056, not its owner. For example, when a qualified S corporation is owned by an ESOP, the qualified S corporation must report not the ESOP, or when LLC taxed as a partnership that is a fund investing in a venture capital operating company which is organized as a partnership for tax proposes, the fund does not report but the LLC that is an Applicable Large Employer Member.[191]

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[187] 78 Fed. Reg. 218, 236 IX.C. (January 2, 2013).
[188] 79 Fed. Reg. 13231, 13234 (March 10, 2014).
[189] *Id.*
[190] 79 Fed. Reg. 13231, 13235 (March 10, 2014).
[191] 79 Fed. Reg. 13231, 13235 (March 10, 2014).

Failure to comply with the Code § 6056 reporting requirements is subject to the penalties under Code § 6721 (failure to file correct returns). Failure to provide the correct information returns is subject to the penalty under Code § 6722.[192] However, the penalties can be waived or abated if the failure to file or provide the information returns is due to reasonable causes.[193] For the Forms 1095-C required to be filed or furnished in 2016 for 2015 coverage, the IRS will not impose a penalty if the ALE Member made a good faith effort to comply with the Code § 6056 information reporting requirements. However, no relief is available for an ALE Member who fails to file, only for incomplete filings.[194] Both the information under Code § 6056 and 6055 are reported on the same Form 1095-C.

The Code § 6055 regulation which focus on the information that the IRS needs to administer the healthcare tax credit under Code § 36B for the individual and to administer the individual mandate the penalty under Code § 5000A instead focus on minimum essential coverage (the coverage an individual must have to avoid being assessed the individual mandate tax penalty) and the exchange based coverage. The Code § 6055 requirements apply to self-insured health plans and health insurance plan sponsors of issuers. If an employer has a health plan that includes self-insured benefit options and fully aligned options, nothing excepting the overall employer plan which is in part self-insured from the reporting requirements under the Code § 6055 with respect to the employees who elect one of the fully insured options which will also be required to separately report on such individuals under Code § 6055. The Code § 6055 regulations and preamble were revised on April 30, 2014.[195] The text of this article has been updated to reflect such changes.

B. Self-Insured Plan Reporting of Minimum Essential Coverage Provided Requirement

The reporting requirements under Code § 6055 are intended to facilitate the IRS's administration of Code § 5000A, the individual mandate by reporting which individuals had minimum essential coverage ("MEC") in each calendar month during a year and to help individuals file their federal income tax return regarding whether the individual maintained minimum essential coverage. Under Code § 5000A, coverage of only one day in a calendar month counts as a full month of coverage. So when insurers and self-insured plans provide coverage, they must complete Form 1095-C or 1095-B to report when they provide MEC to the responsible individual (employee) and for the coverage for each covered dependent. The requirements include reporting the responsible individual's name (for an employer this is the employee), tax identification number, address and if federal tax identification number is not provided at the initial request, the employer must make a second request for the tax identification number, and for each covered dependent, their name, tax identification number or date of birth. For the dependent's tax identification number, the employer must make two requests each year.[196] No penalty will be assessed as long as the TIN is requested at initial enrollment and a follow up request is made by December 31 of the year in which the relationship commenced. Each annual enrollment is

[192] 79 Fed. Reg. 13231, 13246 XIII. (March 10, 2014).
[193] *Id.*; Code § 6724.
[194] 79 Fed. Reg. 13231, 13246 XIII. (March 10, 2014).
[195] 79 Fed. Reg. 24331 (April 30, 2014).
[196] 79 Fed. Reg. 13220, 13223 (March 10, 2014).

treated as an initial solicitation, thus it appears there may need to be an annual pair of solicitations for a dependent's tax identification number. [197] Reporting a birth date for a dependent does not excuse an employer from making the initial and follow up request for the dependent's tax identification number.[198]

The reporting requirement applies to all common law employees but it does not apply to statutory employees.[199] Reporting is only required for responsible employees who enroll in coverage offered by the employer on Form 1095-C.

TINs reported can be truncated on the statements sent to individuals, but not on the Forms 1095-C sent to the government. Forms 1095-C can be mailed with Form W-2 to employees.[200] The Form 1095-C must report the coverage months for each responsible person/employee and each covered dependent using one day of coverage in a calendar month qualifying as coverage for that full month in minimum essential coverage.[201] While employers may report for coverage in 2014, it is not required for 2014 coverage. Beginning in calendar year 2015 each month of coverage in 2015 will be required to be reported in 2016.[202] If this was the only rule for reporting a month of coverage the reporting would present challenges for pulling together the information due to obtaining dependents tax identification numbers and a month the conversion of 1 day of coverage into a month of coverage, but it is more challenging because the next reporting requirement only treats an employee as covered for a month if they are covered every day in the calendar month to be treated as covered. This one day of coverage equals a month of coverage reported under Code § 6055 contrasts with the reporting for Code § 6056 on the same form which treats one day of coverages missed during a calendar month and no coverage for such month except in special circumstances for termination of employment or coverage terminations in certain circumstances.[203] As employers plan for open enrollment for the 2015 plan year, they need to implement the steps to gather the tax identification numbers of each employee and dependent as part of open enrollment also to follow up with a second request to anyone who does provide the information during open or initial enrollment.

C. Reporting Related to Enforcement of the Employer Mandate and Offers of Coverage Providing Minimum Value on ALE Members

For each choice there are many restrictions that also apply and must be considered. There are also a number of conditions related to which rules apply. The documentation of who is an FTE will also determine for which employees the employer will be required to report based on the proposed regulations on reporting. The reporting regulations on health care coverage under the ACA are critical because they require pulling information that is often housed in different systems such as information on to whom coverage is offered and the premiums at which coverage providing minimum value is offered for particular months may be contained in the

[197] 79 Fed. Reg. 13220, 13223 (March 10, 2014).
[198] 79 Fed. Reg. 13220, 13222 (March 10, 2014).
[199] 79 Fed. Reg. 13220, 13221 (March 10, 2014); Treas. Reg. § 1.6055-1(b)(11).
[200] 79 Fed. Reg. 13220, 13225 (March 10, 2014).
[201] 79 Fed. Reg. 13220, 13224 (March 10, 2014).
[202] 79 Fed. Reg. 13220, 13226 (March 10, 2014).
[203] Treas. Reg. § 1.6055(1)(e)(1)(iv) v. Treas. Reg. § 301.6056-1(d)(1)(iv)(v) and (vi) and Treas. Reg. § 54.4980H-4(c)

HRIS system while the hours worked may be contained in a payroll system for determining full-time status and also soliciting for the information most employers do not hold, the Social Security Numbers of dependents and spouses. Thus, reporting may require employers to solicit information, pull information from separate computer systems and combine the new data with the data pulled from different systems into one report for the IRS and inclusive of such information in statements sent to the FTEs or statements sent to the responsible individuals.

The Code § 4980H regulations also require employers to offer coverage to those full-time employees qualifying as full-time by the first day of the fourth month after the end of the measurement period to avoid the 4980H penalty for the first three months after the measurement period ends.[204] If an employer fails to offer coverage to a FTE on any day during the month, that employee is treated as not offered coverage for the entire month and thus the employer is subject to the failure to offer coverage penalty for that employee for that month under the Code § 6056 reporting which adopts the Code § 4980H definitions. The Code § 4980H definition of full-time employee is used as the definition of such term in Code § 6056.[205]

This contrasts with the individual mandate penalty where an employee can avoid the individual mandate penalty if they have coverage for just one day in a calendar month. The employer must also report one day of coverage as a month of coverage under the Code § 6055 regulations, even though the employer cannot treat such same day of coverage as a month of coverage to defend itself against the assessment of the pay or play penalty with respect to offering coverage to offering coverage to the same individual, this may require some very good system programming.[206]

However for January 2015 only, if the employer offers the employee coverage by the first day of the first payroll period in January 2015, the employer will be treated as offering coverage for the entire month. The use of the one day of non-coverage exposing the employer to the penalty for the entire month[207] may cause employers to rethink the plan provisions regarding when coverage terminates for an employee or dependent and when coverage is added for the employee or dependent for a change in status or special enrollment period; however, employers need to be careful to consider how the cafeteria plan rules regarding the effective date of changes due to changes in status and special enrollment rights and the date coverage is effective for such changes mesh with the ACA rule regarding a day of missed coverage means no coverage for the month the cafeteria plan rules regarding the effective date of coverage claim elections and consider the cost of extending coverage as compared to the penalty cost for not providing coverage for a month. Before extending coverage from all coverage terminations occurring mid-month to the end of the month to be able to support that the employer offered coverage for the full month, the employer should consider that for coverage lost due to termination of employment mid-month, where the coverage would have extended to the end of the month and the employee would have been offered coverage to the end of the month if employment had continued is treated as coverage for the full month,[208] thus, the employer may only need to

[204] Treas. Reg. § 54.4980H-3.
[205] Treas. Reg. § 301.6056-1(b)(6).
[206] Treas. Reg. § 1.6055-1(e) through (g).
[207] Treas. Reg. § 54.4980H-4(c).
[208] Treas. Reg. § 54.4980H-5(c).

consider extending coverage from a mid-month loss of coverage for a reason other than the employee's termination of employment. Extending coverage for employee's and dependents' mid-month coverage losses other than the employee's loss due to termination of employment, would lead to all employees and dependents mid-month coverage ending events not causing the employer to pay a shared responsibility penalty for such individual for such month.

D. Reporting Relief and Alternatives under Code § 6056

In an effort to make the reporting under Code sections 6055 and 6056 easier for applicable large employer self-insured health plans, the IRS is permitting the information under both sections to be both reported on Form 1095-C by completing different portions of such Form. The Form 1095-C must not only be filed with the IRS, but it also must be furnished to the full-time employees. No transitional reporting methods or alternatives were included in the final regulations under Code § 6055, only that Code § 6055 reporting was not required for calendar year 2014 and no penalties would be imposed for such year.[209]

1. *Code § 6056 Reporting Alternatives*

The reporting required under Code § 6056 can be done under either the general or alternative method. The employer may use the general method for all employers and for any or all of its full-time employees and may use the alternative method for those employees who qualify.[210] The information must be reported on and to each full-time employee of one of the ALE Members. If the alternative method is not available for some group or groups of employees, the employer must use the general method for such groups of employees.

a. General Method

The information that must be reported under Code § 6056 and the final regulations are: (1) name, address and EIN of the reporting ALE Member and the calendar year for which the information is reported; (2) name, address and telephone number of the contact for the ALE Member who can be an employee, agent or other party acting on behalf of the ALE Member; (3) a certification as to whether the ALE Member offered its full-time employees and their dependents the opportunity to enroll in coverage constituting minimum essential coverage by each calendar month; (4) the number of full-time employees for each calendar month during the year; (5) for each full-time employee, the months during the calendar year for which minimum essential coverage under the plan was available; (6) for each full-time employee, that employee's share of the lowest cost monthly premium for self-only coverage providing minimum value that was offered to such full-time employee under the plan; and (7) the name, address and taxpayer identification number of each full-time employee during the calendar year and the months, if any, during which the employee was covered under an eligible employer sponsored plan[211] Note the final regulation dropped the requirement that the taxpayer identification number of the spouse and each dependent also be included for Code § 6056 reporting, but retained the

[209] Treas. Reg. § 1.6055-1(j).
[210] *Id.*
[211] Treas. Reg. § 301.6056-1(d).

requirement for Code § 6055 reporting.[212] In addition to the above seven types of information reported additional information will be reported via the use of codes on the forms. The additional information that is reported via codes includes:

1) whether the coverage offered to full-time employees and their dependents provides minimum value and whether the employee's spouse was offered coverage:

2) the total number of employees for each calendar month;

3) whether the employee's effective date of coverage was affected by a permissible waiting period by calendar month;

4) whether the ALE Member had no employees or credited hours of service to any employee during the calendar month;

5) whether the ALE Member is a member of a controlled group under Code § 414(b), (c), (m) or (o) and if such a member, then the name and Employer Identification Number of each employer member of such ALE who was a member on any day of the calendar year being reported;

6) if the ALE Member is a contributing member to a multiemployer plan, whether with respect to a full-time employee, the employer is not subject to an assessable penalty under Code § 4980H due to the employer's contributions to a multiemployer plan;

7) if an ALE appropriately designated person is reporting on behalf of an ALE Member that is a governmental unit or any agency or instrumentality thereof, the name, address and identification number of such appropriately designated person;[213] and

8) if a third party reports for an ALE Member with respect to its full-time employees, the name, address and identification number of the third party (in addition to the same information on the ALE Member).[214]

Further each calendar month of coverage reported for a full-time employee will carry with it codes for each month indicating whether coverage with minimum value was offered and to whom it was offered, or if coverage was not offered, why it was not offered, or if coverage was offered to a person who did not qualify as a full-time employee, whether the employee was covered and if the coverage was affordable.[215]

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[212] 79 Fed. Reg. 13231, 13236 (March 10, 2014); Treas. Reg. § 301.6056-1(d) vs. Treas. Reg. § 6.605-1(g).
[213] Treas. Reg. § 301.6056-1(k).
[214] 79 Fed. Reg. 13231, 13237 (March 10, 2014); Treas. Reg. § 301.6056-1(d) and (e).
[215] 79 Fed. Reg. 13231, 13238 (March 10, 2014).

For the 2015 year, the Form 1095-C must be filed with the IRS by March 1, 2016 (March 31, 2016 if electronically filed) and must be furnished to full-time employees by January 31, 2016.[216]

b. Alternative Methods

i. Reporting Based on Certification of Qualifying Offers

Simplified reporting is permissible for certain ALE Members if the qualifying ALE Member certifies that it offered certain coverage to one or more of its full-time employees. With this simplified reporting also comes simplified statements to be provided to the full-time employees who received an offer of coverage for each of the twelve calendar months. The ALE Member must certify that if offered coverage providing minimum value to all of its full-time employees (as defined in Code Treas. Reg. § 4980H) and their spouses and dependents with the cost for employee only coverage not in excess of 9.5% of the federal single poverty level for the 48 contiguous states and DC. However, this alternative method to comply with the Code § 6056 reporting requirement does not apply if the transition relief related to offering dependents coverage in 2015 is used. See VI.A.4 above; however, the cross-reference does not appear to relate to the correct provision in the final Code § 4980H regulations.[217] Using this Alternative Method for Code § 6056 reporting requires the ALE Member to issue a statement to the employee that he and his dependents do not qualify for the premium tax credit, and it does not relieve the employer from complying with the Code § 6055 reporting requirements.

ii. Reporting Based on Qualifying Offers in 2015

For 2015, an ALE Member may use an alternative method similar to VII.C.2.a. above if it files with the IRS the Form 1095-C providing the employee's name, social security number and address and indicates using the indicator codes that the qualifying offer was made for all twelve months or the specified months for which it was made and provides a statement with such details to the employee. To use this alternative reporting method for Code § 6056 reporting, the ALE Member must certify that it made the qualifying offer in X.A. of the preamble or in VII.C.2.a. above to full-time employees, spouses and their dependents and that in lieu of providing Form 1095-C to its employees, it satisfies the Code § 6056 requirements with respect to full-time employees by furnishing a statement to each full-time employee by January 31 of the year for which the statement is provided.[218] Use of this alternative method of reporting for Code § 6056 does not relieve the ALE Member from its reporting obligation under Code § 6055.

c. An Employer Can Report Without Separately Identifying Its Full-Time Employees if Certain Conditions Related to Offers of Coverage are Met (the 98% offers rule)

If an ALE Member satisfies this alternative reporting method's requirements, the ALE Member is not required to report the following requirements under the Code § 6056 reporting, (1) the number of full-time employees it has or (2) whether any particular employee was a full-time employees for any calendar month during the year. The employer still must report on the

[216] *Id.*; Treas. Reg. § 301.6056-1(g).
[217] 79 Fed. Reg. 13231, 13241 (March 10, 2014); Treas. Reg. § 301.6056-1(j)(1).
[218] 79 Fed. Reg. 13231, 13241 X.A.2. (March 10, 2014); Treas. Reg. § 301.6056-1(j)(1).

employees, it just does not have to specify which were in full-time status. This works for an employer who offers minimum value coverage to all of its full-time employees but may have missed a few employees. As long as the ALE Member offered coverage providing minimum value that was affordable (employee only under any applicable 4980H affordability safe harbor) and it can certify it offered such coverage to at least 98% of its employees (regardless of whether they are full-time employees) for whom it reports under Code § 6056 for Treas. Reg. § 301.6056(j)(2). Penalties for failure to report under Code § 6721, (failure to file a correct return) and 6722 (failure to provide correct information returns) still apply.[219] There is no guidance on how employment fluctuations due to mergers or acquisitions will impact the availability of this alternative.

d. Reporting for ALE's with Fewer than 100 Full-Time Employees Eligible for Transition Relief under Code § 4980H

For ALE's with at least 50 and fewer than 100 FTEs and who qualify for transition relief under the final regulations under Code § 4980H, there is a special rule for 2015 providing relief from the Code § 6056 reporting requirement. Such employers must certify on its Code § 6056 transmittal form for 2015 (that it will file in 2016) that it meets the eligibility requirements in XV.D.6.(a)(1) through (3) of the preamble to the final Code § 4980H regulations.[220] It appears that this certification is all that is required but the preamble did not specify the relief that was provided, presumably it is relief from the requirement that they furnish the forms 1095-C to the employees.

2. *Combinations of Alternative Reporting Methods*

An ALE Member may use alternative reporting methods for particular groups of employees that in many cases would not be identical at the employers election as permitted in the instructions and forms.[221] Two examples of combined alternative reporting methods/safe harbors are explained below.

a. 95% Safe Harbor/Transition Rules for the Penalty Tax and Related Alternate Rule for Reporting on Coverage Offered

The penalty tax regulations included a safe harbor permitting an employer to avoid the penalty for failure to offer coverage if the employer met the safe harbor by offering affordable coverage to all but 5% of its employees, or if greater to all but 5 employees. This safe harbor is expanded for 2015 to permit employers to avoid the penalty tax under Code section 4980H(a) for failure to offer affordable coverage if the employer offers affordable coverage to all but 30% of its FTEs, or it offers affordable coverage to at least 70% of its employees as of the first day of the 2015 plan year, then no 4980H(a) penalty (the penalty for failing to offer coverage) applies for the months in the plan year during calendar year 2015. This expansion of the safe harbor applies for 2015 if certain other requirements are satisfied.[222]

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[219] 79 Fed. Reg. 13231, 13232 (March 10, 2014); Treas. Reg. § 301.6056-1(j)(2).
[220] 79 Fed. Reg. 13231, 13242-3, 13242-13243 X.C. (March 10, 2014).
[221] 79 Fed. Reg. 13231, 13243 X.D. (March 10, 2014).
[222] 79 Fed. Reg. 8544, 8575 XV.D.7. (Feb. 12, 2014).

If an employer uses this safe harbor with respect to avoiding the penalty tax, there is an alternative method to comply with the reporting requirements related to offers of coverage by certifying that at least 95% of its full-time employees, spouses and dependents were offered coverage, and if this certification is made, the employer may instead of providing Form 1095-C to all of its full-time employees, provide to each of its full-time employees a statement to be defined in the instructions to the form regarding whether the employee received a qualifying offer of health coverage for all, some or none of the months, and if less than all for which months, along with other information. Note this statement is still required to be provided to only full-time employees. This reporting alternative is available for 2015 as an optional method.[223] It is not clear if this safe harbor is lost if a corporate transaction causes the ALE to no longer meet this rule for a period of time while a new group transitions in.

b. 95% Safe Harbor Rule for the Penalty Tax Combined with the 98% Alternate Reporting Rule

However, if the 95% Safe Harbor from the shared responsibility penalty tax is combined with the 98% Safe Harbor Reporting Relief (explained below), the ALE Member can avoid determining whether any particular employee is a shared responsibility penalty tax "full-time employee" until an employee goes to the exchange and gets a premium tax credit and the IRS assesses a penalty tax on such individual. At the time of such assessment, the employer must then be able to either determine if the individual was not a full-time employee or it must pay the assessed penalty tax.

It is important to remember that even if the employer uses this safe harbor to avoid imposition of the 4980H(a) penalty for failure to offer coverage, it still may be subject to the penalty under 4980H(b) when an employee seeks coverage from the marketplace and obtains a premium tax credit if the employer's coverage is either not affordable or does not provide minimum value and then must be able to pull the data to defend itself against the penalty tax.[224] The reporting regulations related to the offer of coverage included a new temporary safe harbor to avoid certain portions of the reporting requirements, but no relief was provided for the penalty tax, if the employer offered coverage to 98% of all employees;[225] however this provides relief from a portion of the reporting requirement on Form 1095-C and does not negate all of the reporting requirements, nor does it fully eliminate the need to determine which employees are full-time. If the individual uses only the 98% safe harbor for reporting relief, it will not exempt the ALE Member from any penalties if it failed to report on a full-time employee. However, in some speeches Service personnel have also stated that this is 98% of the employer's expected full-time personnel, yet the preamble also only references 98% of the employees, leaving some question as to the true measurement and the open question of when is this test measured- beginning of the year, beginning of the month, last day of the year?

Thus, this alternative method may provide some temporary relief and it delays determining full-time status until contacted by the IRS, but at that contact, the ALE Member must be able to either prove the individual was not a "full-time employee" based upon its records of hours

[223] 79 Fed. Reg. 13231, 13241 X.A.2. (March 10, 2014).
[224] 79 Fed. Reg. 8544, 8575 XV.D.7. (Feb. 12, 2014).
[225] 79 Fed. Reg. 13231, 13242 (March 10, 2014).

worked, or it must pay the applicable shared responsibility penalty and the penalties for failure to report on the full-time employees.[226] The 98% rule does not indicate if it is calculated on an annual basis or on a monthly basis, while the penalties are calculated on a monthly basis and the reporting reflects monthly offers of coverage, the reporting is an annual requirement. It is unclear how the use of the 98% rule will be impacted for fluctuations in employee statistics due to seasonal work fluctuations or the impact of mergers or acquisitions.

It is not clear what happens to an employer who is relying on the 95% rule for offers of coverage and the 98% rule for reducing the reporting burden, if its offers of coverage dip below the 95% or 98% rule levels due to a corporate transaction adding a group of employees that did not previously have coverage available.

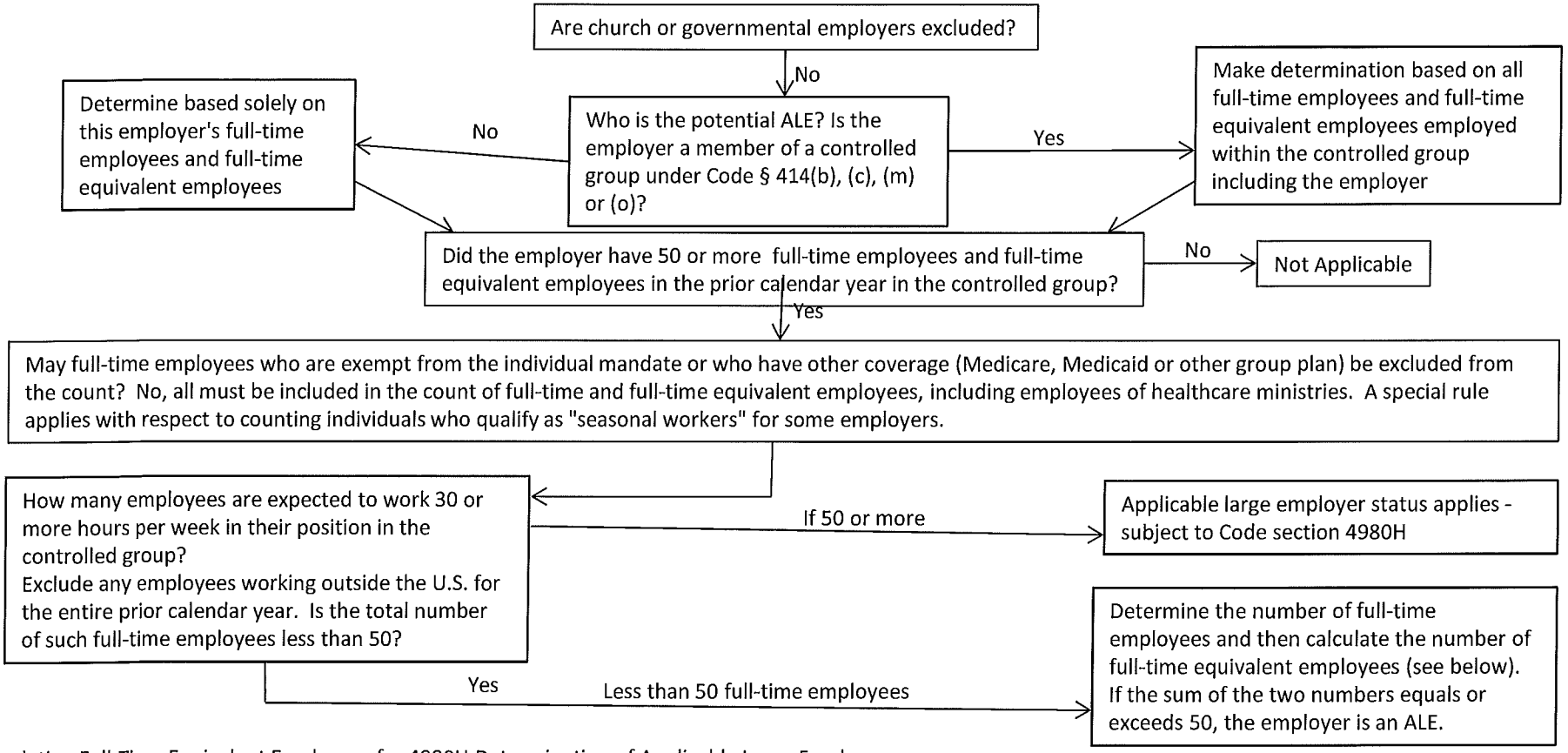
VIII. Employer Shared Responsibility Tax Planning and ERISA

An employers plan for the employer shared responsibility tax in deciding how to staff their operations, they must also consider and avoid taking actions which may fall under ERISA § 510's prohibition on interfering with a right protected under ERISA by "interfering with the attainment of any right to which such participant may become entitled under the plan, this Title . . . It shall be unlawful for any person to discharge, file, suspend, expel or discriminate against a participant or beneficiary for exercising any right to which he is entitled under a benefit plan or this Title." The first case testing a claim based on refusal to promote to full-time status to prevent access to health benefits as an action of discrimination to prevent the individual from exercising a right under a benefit plan, survived a motion to dismiss.[227] However, this first case is too early in the proceedings to draw any conclusions based upon the viability of ERISA section 510 claims based on employer's staffing decisions which may appear in part directed to limit the number of full-time employees as such is determined under the shared responsibility penalty rules.

[226] 79 Fed. Reg. 13231, 13241 X.A.2. (March 10, 2014).
[227] *Sanders v. Amerimed*, Case No. 1:13-cv-813 (S.D. Ohio, April 25, 2014).

Are you an Applicable Large Employer Subject to Code 4980H
This flowchart does not address transition rules)

Applicable large employers are employers who employ 50 or more full-time or full-time equivalent employees on 20 or more days in the month



Calculating Full-Time Equivalent Employees for 4980H Determination of Applicable Large Employers

1. Identify all employees who are not employed on the average at least 30 hours per week for a calendar month in the preceding calendar year.
2. Calculate the aggregate number of hours each non-full-time employee had in each month and then sum up all of the non-full-time employees monthly hours by month for a total number of hours worked by non-full-time employees for each month, but limit the hours worked by each employee in each month to 120 hours.
3. Divide the total number of hours worked by non-full-time employees for each month by 120 and that resulting number is the number of full time equivalent employees for that month. The resulting number for each month can be rounded to the nearest one-hundredth.
4. Review the resulting number of full-time employees plus the month's full-time equivalent employees (rounded to the next lowest whole number). If the employer had seasonal workers (not seasonal employees), the seasonal workers' hours are included in the calculation of full-time equivalent employees. (Treas. Reg. § 54.4980H-2(e)(i)). However, if the sum of an employer's full time employees and full time equivalent employees exceeds 50 for 120 days or less in the prior calendar year and if the employees employed during the period (when the number was in excess of 50) and those employees who were in excess of 50 were seasonal workers, the employer is not considered to be an applicable large employer and the seasonal worker exception applies. Treas. Reg. § 54.4980H-2(b)(2). (Seasonal workers perform labor or services on a seasonal basis as defined by the Secretary of Labor, including workers covered by 29 C.F.R. 500.20(s)(1) and certain retail workers employed exclusively during the holiday season.) While seasonal employees are persons hired into a position in which the customary annual employment is 6 months or less.

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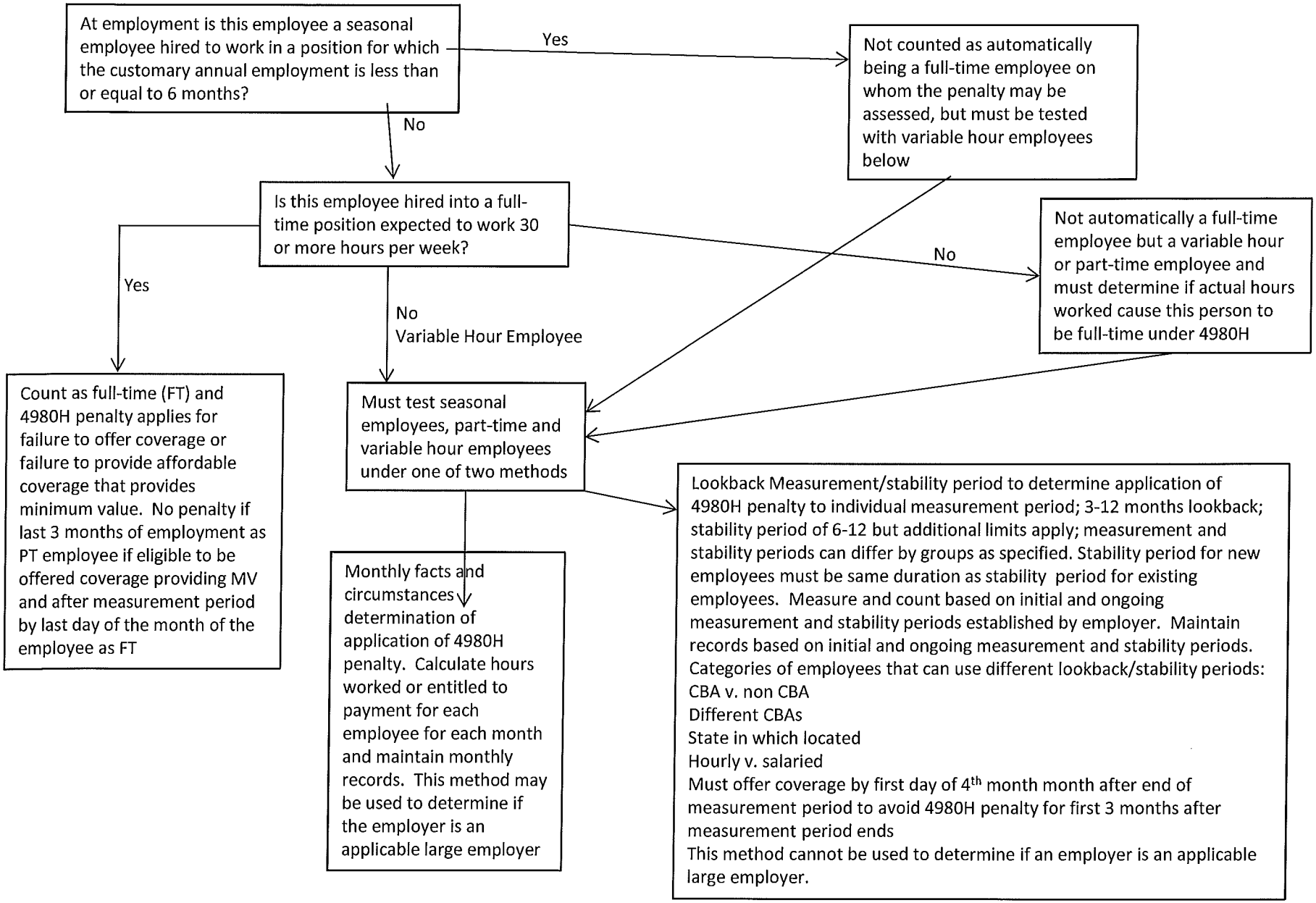
4980H – Full-Time Employee Status Determination under the Final Regulations for determining on which employees the penalty may be assessed



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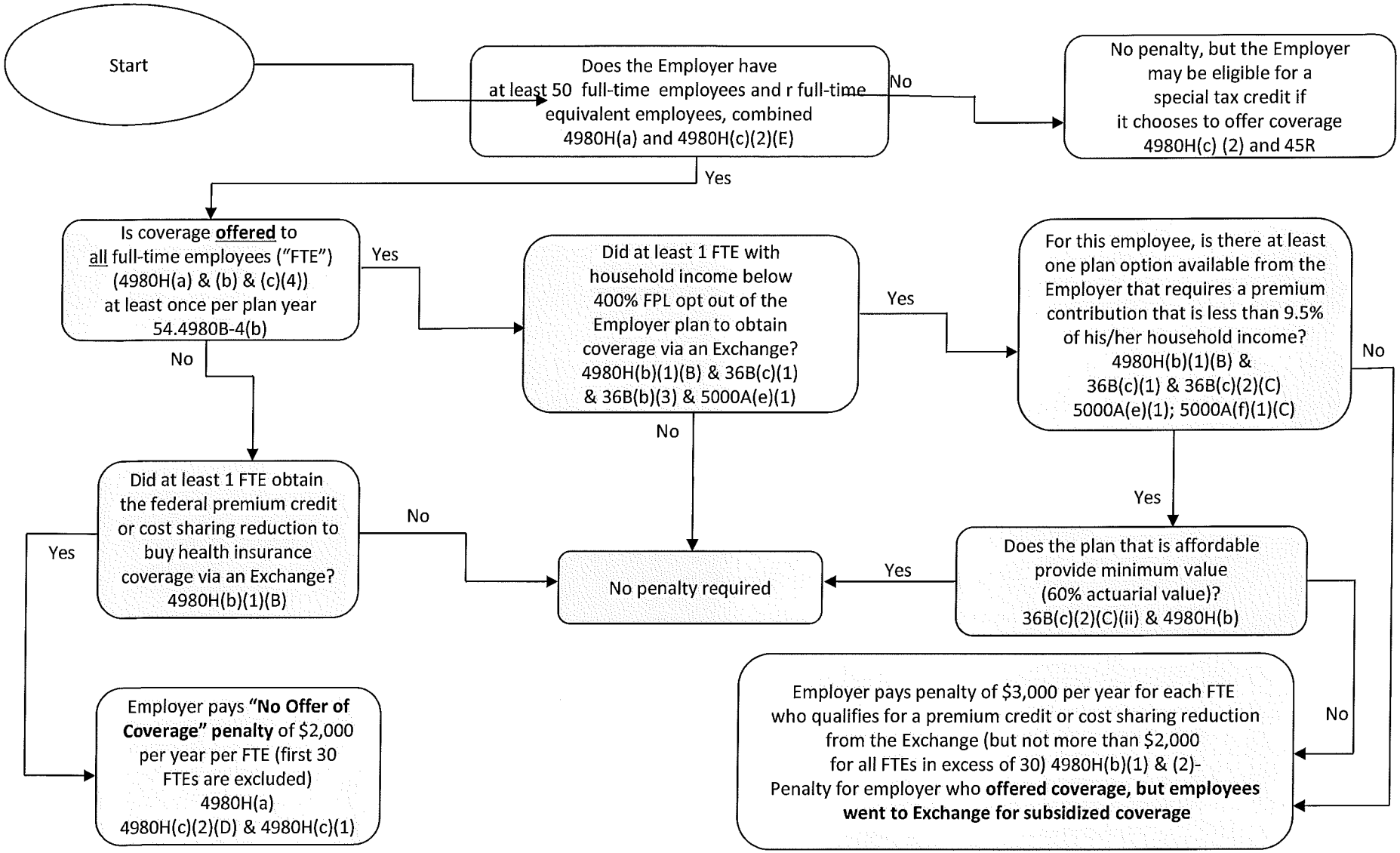
High Level Overview of Employer Shared Responsibility Penalty Analysis (Effective 1-1-2014)



An ALE member cannot be liable for both the penalty under 4980H(a) and under 4980H(b) in the same month. Treas. Reg. 54.4980H-5(d). This only addresses the shared responsibility penalty and does not address PCORIs, reinsurance fees, additional Medicare taxes or other costs that result from the decision.

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