



December 31, 2012

Treasury, IRS Release Notice of Proposed Rulemaking on Health Care Law's Employer Requirements

The Department of the Treasury and the IRS on Friday, December 28, 2012, released a notice of proposed rulemaking on the Affordable Care Act's employer requirements under Internal Revenue Code §4980H, which takes effect on January 1, 2014. The proposed regulations are intended to provide a comprehensive set of rules upon which employers can rely as they work to comply with the law and mitigate tax liabilities. The proposed regulations may be relied upon and will remain in effect until final regulations are issued. The Administration stressed that any changes to the regulations would be applied prospectively after sufficient time for employers to come into compliance. The proposed regulations build upon information provided in four previous notices (Notices 2011-36, 2011-73, 2012-17 and 2012-58) and public comments received in response to those notices.

The ACA's employer requirements are centered on the key definitions and concepts listed below.

- **Large employer.** Employers with 50 or more full-time equivalent employees are considered "applicable large employers" under IRC §4980H (referred to herein as "large employers") and are subject to the ACA's employer requirements. Only large employers may be liable for an assessable payment under IRC §4980H.
- **Full-time employee.** The ACA defines full-time employee status as working on average 30 hours of service per week per month. This standard is lower than the standard many employers currently use to determine full-time status.
- **Tax penalties under IRC §4980H.** Large employers may be subject to a nondeductible excise tax if at least one full-time employee receives a premium tax credit to purchase health insurance through an Exchange. Under IRC §4980H(a), large employers who fail to offer coverage to full-time employees and their dependents will face an annual

penalty of \$2,000 times the total number of full-time employees. Under IRC §4980H(b), large employers who offer coverage to full-time employees that does not meet the law's affordability or minimum value standards will face an annual penalty of \$3,000 times the number of full-time employees who receive tax credits for Exchange coverage. (The amount of the IRC §4980H excise tax penalties is determined on a monthly basis, but likely will be assessed annually.)

The proposed regulations are organized as follows:

- Definitions
- Rules for determining status as a large employer and large employer member
- Rules for determining full-time employees
- Rules for determining the assessment of a nondeductible excise tax under IRC §4980H(a) for not offering coverage to full-time employees and their dependents
- Rules for determining the assessment of a nondeductible excise tax under IRC §4980H(b) for offering coverage to full-time employees that does not meet the ACA's standards for affordability and minimum value
- Rules relating to the administration and assessment of nondeductible excise taxes under IRC §4980H

Key highlights from the proposed regulations

Importantly, the proposed regulations provide rules for transition relief in certain circumstances, notably for large employers who maintain a non-calendar year plan. Generally, a large employer who currently offers a non-calendar year plan will not be liable for tax penalties under IRC §4980H for months prior to the first day of their plan year beginning in 2014. This transition relief means that a large employer would not have to make mid-year changes to a non-calendar year plan in order to meet the law's coverage requirements. The proposed regulations also provide relief for large employers with calendar year plans that opt to apply a look-back measurement period to determine who is a full-time employee.

For smaller employers, the proposed regulations provide some transition relief for how they determine their large employer status in 2013 ahead of the January 1, 2014, compliance deadline.

The proposed regulations provide that although the determination of large employer status is calculated based on the Internal Revenue Code's controlled group rules, the IRC §4980H standards generally are applied separately to each entity that is a member of the controlled group comprising the employer (referred to in the rule as a "large employer member") in determining the liability for and assessment of any tax penalties under IRC §4980H. (In this document, reference to "large employer member" means a member of a controlled group and also an employer that is a single entity and not part of a controlled group of corporations.)

In addition, the proposed regulations confirm that to avoid the IRC §4980H(a) tax penalty, an offer of coverage must be made to full-time employees and their dependents. Dependents, for purposes of IRC §4980H, is defined as children under age 26. Large employers will not face tax penalties for not offering coverage to spouses, who will be able to seek a federal premium

tax credit to purchase health insurance in an Exchange if other minimum essential coverage is not available.

The excise tax under IRC §4980H(a) should not apply in the case of a large employer member who intends to offer coverage to all its full-time employees, but fails to offer coverage to a few full-time employees. The proposed regulations state that a large employer will be treated as offering coverage to full-time employees if they offer coverage to 95% of their full-time employees.

The proposed regulations provide additional safe harbors for large employers to use to determine whether employer-sponsored coverage meets the law's affordability standard (i.e., that an employee's premium share for self-only coverage does not exceed 9.5% of household income). In addition to a previously proposed safe harbor based on W-2 wages, the proposed regulations add safe harbors based on the rate of pay and the federal poverty line.

Outstanding issues

The proposed regulations highlight a number of issues that Treasury and the IRS plan to address in subsequent guidance, including:

- Definition of minimum essential coverage under IRC §5000A(f) and eligible employer-sponsored plans
- The law's minimum value standard (IRC §36B(2)(c)(ii) and ACA §1302(d)(2)), i.e. determination of whether a plan's share of the total allowed costs of benefits provided under the plan is at least 60% of those costs
- Information reporting requirements by large employers to the IRS under IRC §6056

The proposed regulations also state that the Department of Health and Human Services (HHS) is expected to issue regulations that will establish a process for informing large employers that an employee was certified (consistent with methods adopted by the IRS) to be eligible for a premium tax credit to purchase health insurance in an Exchange. HHS will also provide for an additional process to notify large employers that an employee is seeking coverage on an Exchange with the benefit of a premium tax credit.

The Departments of Labor, HHS and Treasury are also expected to issue regulations under section 2708 of the Public Health Service Act addressing the 90-day coverage waiting period limitation. Large employers will need to design their plans to offer coverage that satisfies both the IRC §4980H rules and the 90-day waiting period rules.

Comment period, public hearing

The notice of proposed rulemaking is scheduled for publication in the January 2, 2013, Federal Register, and comments are due by March 18, 2013. In addition, the IRS announced a public hearing on the notice of proposed rulemaking for April 23, 2013.

A summary of key provisions of the proposed regulations is provided below.

Determination of large employer status

The proposed regulations restate from the statute and previous guidance that to determine large employer status for each calendar month of the preceding calendar year, employers must:

1. Count the number of full-time employees (including seasonal employees) who work on average 30 hours per week per month.
2. Calculate the number of full-time equivalent employees by aggregating the number of hours worked by non-full-time employees (including seasonal employees) and dividing by 120.
3. Add the number of full-time employees and full-time equivalents calculated in steps (1) and (2) for each of the 12 months in the preceding calendar year.
4. Add the monthly totals and divide by 12. If the average exceeds 50 full-time equivalents, determine whether the seasonal employee exception applies.

The law creates special rules for employers whose workforce exceeds 50 full-time employees for no more than 120 days or four calendar months during a calendar year if the employees in excess of 50 who were employed during that period were seasonal employees (the seasonal employee exception). The proposed regulations add the four calendar months criterion and clarify that the 120 days or four calendar months are not required to be consecutive. If the seasonal employee exception does not apply, the employer is a large employer for the current calendar year and is subject to the employer mandate.

After consultation with the Department of Labor, Treasury and the IRS have determined that the term seasonal worker, as incorporated in IRC §4980H, is not limited to agricultural or retail workers. For purposes of determining large employer status until further guidance is issued, employers may apply a reasonable, good faith interpretation of the statutory definition of seasonal worker, including a reasonable good faith interpretation of the standard set forth under the DOL regulations at 29 CFR 500.20(s)(1).

IRC §4980H applies to all common law employers, including governmental entities, churches, tax exempt organizations, and foreign companies with at least 50 full-time equivalent employees performing work in the US with US source compensation.

Application of aggregation rules

The determination of large employer status is made based on the Internal Revenue Code's controlled group rules under IRC §§414(b), (c), (m), or (o).

Significantly, the proposed regulations make an important clarification that in determining the liability for and assessment of any tax penalties under IRC §4980H, the standards generally are applied separately to each large employer member of the controlled group comprising the large employer.

The proposed regulations provide the example of a large employer comprised of a parent corporation and 10 wholly owned subsidiary corporations that, on a controlled group basis, have 50 or more full-time equivalent employees and, therefore each corporation, regardless of the number of its employees, is treated as a large employer subject to IRC §4980H.

However, for purposes of assessing liability, the IRC §4980H tax penalties are applied separately for each corporation. Each large employer member is liable for its own tax penalties under IRC §4980H and is not liable for the IRC §4980H tax penalties of any other large employer member in the controlled group comprising the large employer. (See discussion of compliance with IRC §4980H(a) and §4980H(b) below.)

Identifying full-time employees for purposes of IRC §4980H

IRC §4980H provides that a full-time employee is an employee who was employed on average at least 30 hours of service per week per month.

The proposed regulations generally incorporate the guidance provided in previous Treasury and IRS Notices for determining which employees are considered full time. In particular, for variable hour employees of unknown status, the proposed regulations permit large employers to utilize an optional look-back measurement period with a corresponding stability period to determine full-time status.

The proposed regulations made some modifications to the prior Notice guidance in response to comments and also addressed some additional issues. Some of these modifications and additions are described below.

Hours of service

The proposed regulations confirm that an employee's "hours of service" include (1) each hour for which an employee is paid for performance of services, or entitled to payment even when no work is performed; and (2) each hour for which an employee is paid, or entitled to payment by the employer on account of a period of time during which no duties are performed due to vacation, holiday, illness, incapacity, layoff, jury duty or leave of absence. There is no limit on the number of hours counted for a paid leave of absence.

Of particular importance for US and foreign employers with employees working outside of the US, the proposed regulations provide that hours of service do not include hours to the extent the compensation for those hours is foreign source income. Therefore, employees working outside of the US, generally will not qualify as full-time employees either for purposes of determining whether an employer is a large employer or for purposes of determining and calculating potential IRC §4980H liability.

Look-back measurement period

The proposed regulations generally incorporate the prior guidance in Notice 2012-58 but made some modifications providing some additional flexibility for employers using the optional look-back period.

In response to comments, the proposed regulations permit large employers to adjust the starting and ending dates of their three- to 12-month look-back measurement period in order to avoid splitting employees' regular payroll period. Large employers may make certain adjustments at the beginning and end of the measurement period; for example, excluding the entire payroll period at the beginning of the year and including the entire payroll period at the end of the year.

The look-back measurement period rules continue to apply for newly hired employees who are reasonably expected to work on average 30 hours of service per week and for newly hired variable hour and season employees. Similarly, the proposed regulations reserve the definition of “seasonal employee” and confirm that through 2014 large employers are permitted to use a reasonable, good faith interpretation of the term for purposes of determining full-time status.

Change in employment status

The proposed regulations address the treatment of new variable hour or seasonal employees who have a change in employment status during the initial measurement period. A change in employment status is defined as a “material change in the position of employment or other employment status that, had the employee begun employment in the new position or status, would have resulted in the employee being reasonably expected to be employed on average at least 30 hours of service per week.” A new variable hour or seasonal employee who has a change in status during an initial measurement period is treated as a full-time employee as of the first day of the fourth month following the change in status, or an earlier date if certain conditions are satisfied.

Rehired and resuming service employees

The preamble to the proposed regulations recognizes that an employee may work for the same employer on and off during a period. In addition, an employee without having terminated employment may have an unpaid leave of absence or a continuous period during which the employee is not credited with any hours of service and is not paid for some other reason. These circumstances raise two important questions for determining the rehired employee’s or resuming service employee’s full-time status:

1. When is the employee treated as a new employee and prior service is disregarded?
2. If the employee is treated as a continuing employee, how does the employer count the period during which no hours of service were performed?

The proposed regulations establish a break-in-service rule to determine when a rehired or resuming service employee may be treated as a new employee. Under the proposed regulations, if the period of service for which no hours of service are credited is at least 26 weeks, an employer may treat the rehired or resuming service employee as a new employee. (An employer may also choose to apply a rule of parity for breaks-in-service of less than 26 weeks.)

For a continuing employee who has not had a break-in-service, the proposed regulations propose a method for averaging hours during a look-back measurement period in which a special unpaid leave of absence occurs. Special unpaid leaves of absence include periods of leave under the Family and Medical Leave Act of 1993 (FMLA), unpaid leave subject to the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), and unpaid leave on account of jury duty. Under the proposed averaging method for these special unpaid leaves of absence, the employer determines the average hours of service per week for the employee during the measurement period excluding the special unpaid leave period and uses that average as the average for the entire measurement period. Treasury and IRS are considering whether final regulations should extend this averaging rule beyond the special unpaid leaves of absence.

Special rules

The proposed regulations provide special rules for educational and multiemployer organizations. No special rules or presumptions are provided for temporary staffing agencies. However, comments are requested on whether special rules should be provided for in the final regulations.

Compliance with IRC §4980H(a) - employer does not offer coverage to full-time employees and their dependents

The proposed regulations state that in general, large employers or large employer members will not be subject to the penalty under IRC §4980H(a) so long as the employer offers minimum essential coverage under an eligible employer-sponsored plan to its full-time employees and their dependents. Such minimum essential coverage (to be defined in a future regulation) does not have to meet the law's affordability and minimum value standards to avoid penalties under IRC §4980H(a). The proposed regulations also state that a large employer or large employer member cannot be liable for tax penalties under both IRC §§4980H(a) and (b) for the same month.

Definition of dependent

The proposed regulations define "dependents" for purposes of IRC §4980H as an employee's child (as defined in IRC §152(f)(1)) under age 26. Employers will not face tax penalties for not offering coverage to spouses, who will be able to seek a federal premium tax credit to purchase health insurance in an Exchange if other minimum essential coverage is not available. This definition of dependents does not apply for purposes of any other section of the Code.

Offer of coverage

The proposed regulations do not propose any new specific rules for demonstrating that an offer of coverage was made. The normal rules for substantiation and recordkeeping requirements would apply. However, the proposed regulations require that employees be given an effective opportunity to accept coverage, as well as an opportunity to decline an offer of coverage that does not meet the law's standards of affordability or minimum value.

Offer of coverage in the case of nonpayment or late payment of premiums

The proposed regulations provide that a large employer will not be treated as failing to offer a full-time employee (and his or her dependents) the opportunity to enroll in coverage if the coverage is terminated solely due to the employee's failure to pay the employee's share of premium on a timely basis. Employers would not have to provide coverage for the period for which the premium is not timely paid. The proposed regulations adopt the COBRA rule providing a 30-day grace period for payment of premiums. (This nonpayment of premiums is of particular concern in instances in which the employee's share of premium is not collected through withholding from the employee's salary or wages. Examples of cases when this would apply include tipped employees and employees who were full time during a measurement period but work few hours during the corresponding stability period.)

Relief for failure to offer coverage to a limited number of full-time employees

In the proposed regulations, the Administration states that the penalties under IRC §4980H(a) should not apply in the case of a large employer member that intends to offer coverage to all its full-time employees but fails to offer coverage to a few full-time employees.

The preamble to the proposed regulations provides that Treasury and the IRS “should exercise their administrative authority to allow recognition of a margin of error consistent with an intent to recognize the possibility of inadvertent errors.”

The proposed regulations state that a large employer member will be treated as offering coverage to full-time employees if they offer coverage to 95% of their full-time employees. For cases of a relatively small large employer, the proposed regulations provide that a large employer member will be treated as offering coverage if it offers coverage to all but 5% or (if greater) five of its full-time employees (provided that an employee is treated as having been offered coverage only if the employer also offered coverage to that employee’s dependents).

Application of the 30-employee reduction

IRC §4980H(c)(2)(D)(i) states that an employer may reduce its total number of full-time employees during any month by 30 for purposes of calculating tax penalties under IRC §4980H(a) for not offering coverage and for purposes of calculating the overall limit on tax penalties under IRC §4980H(b) for offering coverage that does not meet the law’s affordability and minimum value standards. Recognizing that large employer status is determined on a controlled group basis, the proposed regulation states that only one 30-employee reduction is allowed per controlled group and that the reduction is allocated among the large employer members that make up the controlled group on the basis of the number of employees employed by each.

Application of the IRC §4980H(a) excise tax

The following example is a basic illustration of the application of the IRC §4980H(a) excise tax that tracks an example provided in the proposed regulations.

Facts: Corporation A owns 100% of Corporation B. Corporation A employs 40 full-time employees in each calendar month of 2015. Corporation B employs 35 full-time employees in each calendar month of 2015. For 2015, the IRC §4980H(a) excise tax for a calendar month is \$2,000 divided by 12. Corporation A does not sponsor an employer-sponsored plan for any calendar month of 2015, and receives a certification that at least one of its full-time employees has acquired health care coverage on an Exchange with the benefit of a premium tax credit. Corporation B sponsors an eligible employer-sponsored plan under which all full-time employees are eligible for minimum essential coverage that is affordable and meets the minimum value standard.

Conclusion: Corporation A and Corporation B are members of a controlled group that employs 50 or more full-time employees and, therefore, are large employers subject to IRC §4980H; however, the excise tax liability is applied separately. Under these facts, Corporation A is subject to an assessable excise tax under IRC §4980H for 2015 equal to \$48,000, which is equal to $24 \times \$2,000$ (40 full-time employees reduced by 16 (its allocable share of the 30-employee offset ($(40/75 \times 30 = 16)$) and then multiplied by \$2,000. Corporation B is not subject to any assessable excise tax under IRC §4980H for 2015.

Compliance with IRC §4980H(b) - employer offers coverage to full-time employees that does not meet the law's affordability and minimum value standards

Affordability safe harbors

The proposed regulations provide additional safe harbors for large employer members to use to determine whether employer-sponsored coverage meets the law's affordability standard. Under the law, an employer plan is considered affordable if the employee's required contribution for self-only coverage does not exceed 9.5% of the employee's household income for the taxable year.

Recognizing the difficulty in determining an employee's household income, the Administration had previously proposed a safe harbor based on W-2 wages. The proposed regulations expand on this safe harbor and add safe harbors based on the rate of pay and the federal poverty line. Employers can demonstrate that they offer coverage that meets the affordability standard by showing that the employee premium share for self-only coverage under the large employer member's lowest-cost plan that meets the minimum value standard under the following safe harbors:

- **Form W-2 safe harbor.** Employee premium share does not exceed 9.5% of the amount required to be reported in Box 1 of Form W-2. The proposed regulations provide guidance for using the W-2 safe harbor for an employee who was not a full-time employee for the entire calendar year. Application of this safe harbor is determined after the end of the calendar year and on an employee-by-employee basis, taking into account the employee's Form W-2 wages from the employer and the employee contribution.
- **Rate of pay safe harbor.** Employee premium share does not exceed 9.5% of the product of multiplying the hourly rate of pay (either the large employer member's lowest rate of pay or each employee's individual rate of pay) by 130 hours per month (the benchmark for full-time status for a month under IRC §4980H).
- **Federal poverty line safe harbor.** Employee premium share does not exceed 9.5% of the Federal poverty line for one person. The calculation could be done using the most recently published federal poverty guidelines as of the first day of the plan year for the large employer member's plan.

Application of the IRC §4980H(b) excise tax

The following examples are basic illustrations of the application of the IRC §4980H excise tax and the Form W-2 and rate of pay affordability safe harbors. These examples track examples provided in the proposed regulations.

Example 1 (Form W-2 wages safe harbor)

Facts: Employer C is a member of a large employer controlled group ABC. Employee A is employed by Employer C consistently from January 1, 2015, through December 31, 2015. Employer C offers Employee A and her dependents minimum essential coverage during that period that meets the minimum value requirements. The employee contribution for self-only coverage is \$100 per calendar month, or \$1,200 for the calendar year. For 2015, Employee A's Form W-2 wages with respect to employment with Employer C are \$24,000.

Conclusion: Employee A's contribution for self-only coverage to Employer C's plan is less than 9.5% of Employee A's Form W-2 wages for 2015 (\$1,200 is 5% of \$24,000). Consequently, the coverage is treated as affordable with respect to Employee A for 2015. Employer C would not be subject to an excise tax under IRC §4980H(b) with respect to Employee A because Employer C's plan meets the minimum value requirements and is affordable to Employee A.

Example 2 (Rate of pay safe harbor)

Facts: Employer X is a member of a large employer controlled group XYZ. Employee B is employed by Employer X consistently from January 1, 2015, through December 31, 2015. Employer X offers Employee B and his dependents minimum essential coverage during that period that meets the minimum value requirements. The employee contribution for self-only coverage is \$85 per calendar month. Employee B is paid at a rate of \$7.25 per hour (the minimum wage in Employer X's jurisdiction) for the entire year 2015. For purpose of the affordability safe harbor, Employer X assumes that Employee B earned \$942.50 per calendar month (130 hours of service multiplied by \$7.25 per hour). Accordingly, affordability is determined by comparing the assumed income per month (\$942.50) to the employee contribution per month (\$85).

Conclusion: Employee B's contribution for self-only coverage to Employer X's plan is less than 9.5% of Employee B's assumed income Form W-2 wages for 2015 (\$85 is 9.01% of \$942.40). Consequently, the coverage is treated as affordable with respect to Employee B for 2015. Employer X would not be subject to an excise tax under IRC §4980H(b) with respect to Employee B because Employer X's plan meets the minimum value requirements and is affordable to Employee B.

Assessment and payment of IRC §4980H liability

The proposed regulations state that each large employer member is liable for its tax penalties under IRC §4980H and is not liable for the IRC §4980H tax penalties of any other large employer member in the controlled group comprising the large employer.

The proposed regulations also state that any assessable payment under IRC §4980H is assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68 of the Internal Revenue Code. The proposed regulations restate that the tax penalty is nondeductible.

In addition, the proposed regulations state that pursuant to regulations to be issued by HHS, the IRS will follow procedures that ensure employers receive certification if one or more employees have received premium tax credits and are provided an opportunity to respond before the issuance of any notice and demand for payment of a tax penalty.

Transition rules

Employers with non-calendar year plans

The proposed regulations provide transition relief for large employer members that maintain a non-calendar year plan as of December 27, 2012. The proposed regulations state that such employers will not be liable for tax penalties under IRC §4980H for employees who would be eligible for coverage under the plan (whenever hired) as of the first day of the plan year that begins in 2014 under the eligibility terms of the plan as in effect on December 27, 2012. If the employee is offered coverage that meets the law's affordability and minimum value standards no later than the first day of the 2014 plan year, then no IRC §4980H penalty will be assessed with respect to that employee for the period prior to the first day of the 2014 plan year. In effect, this transition relief means that an employer would not have to make mid-year changes to a non-calendar year plan in order to meet the law's coverage requirements. For example, if an employer maintained a plan with a July 1 through June 30 plan year as of December 27, 2012, that employer would need to ensure that the eligible employees are offered coverage that meets the law's affordability and minimum value standards by June 30, 2014 (the beginning of the 2014 plan year).

Further relief is provided for employees not eligible for coverage under a non-calendar year plan if a significant percentage of the large employer member's employees are enrolled in or eligible for a non-calendar year plan. Specifically, relief is provided for these with respect to employees who would not have been eligible to participate in the non-calendar year plan if 1) as of December 27, 2012, at least one quarter of the employees are covered under fiscal year plans that have the same plan year; or 2) one-third of the employees are offered coverage under those plans during the most recent open-enrollment before December 27, 2012. Such employers would not face penalties under IRC §4980H prior to the first day of the first year of that plan that begins in 2014, provided these employees are offered coverage that meets the law's affordability and minimum value standards as of the first day of the employer's plan year in 2014.

Employers who use this transition relief still will be subject to the reporting requirements under IRC §6056 for the entire 2014 calendar year.

Cafeteria plans

The proposed regulations give large employers the option of amending one or more of its written cafeteria plans to permit either or both of the following changes:

1. An employee who has elected salary reductions through the cafeteria plan for accident and health plan coverage with a fiscal plan year beginning in 2013 would be permitted to prospectively revoke or change elections with respect to the accident and health plan once during that plan year without regard for whether the employee experienced a change in status
2. An employee who did not make a salary reduction election through a large employer's cafeteria plan for accident and health plan coverage with a fiscal plan year beginning in 2013 before the deadline for making such elections would be permitted to make a prospective salary reduction election for accident and health plan coverage on or after the first day of the 2013 plan year without regard for whether the employee experienced a change in status

The proposed regulations state that large employers could retroactively implement the necessary cafeteria plan amendments to implement these transition rules. The retroactive amendment must be made by December 31, 2014, and be effective retroactively to the first day of the 2013 plan year of the cafeteria plan.

Measurement periods for stability periods starting in 2014

Large employers that intend to utilize the look-back measurement method for determining full-time status for 2014 will need to begin their measurement periods in 2013 to have corresponding stability periods for 2014. Solely for purposes of stability periods beginning in 2014, the proposed regulation states that large employers may adopt a transition measurement period that is:

- Shorter than 12 months but that is no less than six months long; and
- Begins no later than July 1, 2013, and ends no earlier than 90 days before the first day of the plan year beginning on or after January 1, 2014.

The transition relief is particularly beneficial to plans with a calendar year plan year. It is intended to address the time constraints faced by large employers that maintain calendar year plans and intended to adopt a 12-month measurement period and corresponding 12-month stability period.

Multi-employer plans

A large employer member will not be subject to IRC § 4980H tax penalties if (i) the employer is required to make a contribution to a multiemployer plan with respect to a full-time employee pursuant to a collective bargaining agreement or appropriate related participation agreement, (ii) coverage under the multiemployer plan is offered to the full-time employee (and the employee's dependents), and (iii) the coverage offered to the full-time employee is affordable and provides minimum value.

Notwithstanding this transition relief, any waiting period for coverage under the plan must separately comply with the 90-day limitation on waiting periods in section 2708 of the Public Health Service Act.

Determination of large employer status for smaller employers

The proposed regulations provide some transition relief for the determination of large employer status in 2014 that is aimed primarily at employers near the 50 full-time equivalent employee threshold. The transition relief allows employers to determine whether they are large employers based on a period of six consecutive calendar months as chosen by the employer in the 2013 calendar year, rather than based on the entire 2013 calendar year. However, the transition relief does not delay the January 1, 2014, compliance deadline for smaller employers if it is determined that they are large employers based on the six-month calculation.

Coverage for dependents

Recognizing the challenges that many employers who offer coverage only to their employees (and not to their dependents) will face, the proposed regulations state that employers will not face tax penalties under IRC §4980H relating to the offering of coverage to dependents

provided that employers take steps during plan years that begin in 2014 toward satisfying the law's requirements for offering dependent coverage.

Definition of variable hour employee

Citing the interpretation by some plan sponsors of guidance provided in Notice 2012-58, the proposed regulations clarify that beginning on January 1, 2015, although an employee's hours of service might be expected to vary, employers will be required to assume that an employee (except for seasonal employees) will continue to be employed by the employer for the entire initial measurement period. The proposed regulations state that "accordingly, the employer will not be permitted to take into account the likelihood that the employee's employment will terminate before the end of the initial measurement period."

Effective dates and reliance

IRC §4980H is effective for months after December 31, 2013.

Employers may rely on these proposed regulations for guidance pending the issuance of final regulations or other guidance. Final regulations will be effective as of a date not earlier than the date the final regulations are published in the Federal Register. To the extent future guidance is more restrictive than the guidance in these proposed regulations, the future guidance will be applied without retroactive effect and employers will be provided with sufficient time to come into compliance with the final regulations.

More information

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