

## XXVIII. Shared Responsibility for Employers (Play or Pay Penalty Tax)

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### A. Introduction to Shared Responsibility for Employers (Play or Pay Penalty Tax)

Beginning in 2015,<sup>1</sup> certain large employers may be subject to a penalty tax (also called an “assessable payment”) for (1) failing to offer minimum essential health care coverage for all full-time employees (and their dependents)—the subsection (a) penalty;<sup>2</sup> or (2) offering eligible employer-sponsored coverage that is not “affordable” (exceeds a specified percentage of the employee’s household income) or does not offer “minimum value” (the plan’s share of the total allowed cost of benefits is not at least 60%)—the subsection (b) penalty.<sup>3</sup> The penalty tax is due if any full-time employee is certified to the employer as having purchased health insurance through an Exchange (discussed in Section XXI) with respect to which a premium tax credit is allowed or paid to the employee.<sup>4</sup> These requirements are also referred to as the employer shared responsibility provisions. Although originally scheduled to take effect beginning in 2014, in July 2013, the IRS issued guidance<sup>5</sup> announcing a one-year delay in the application of the employer shared responsibility penalties (until 2015).<sup>6</sup>

<sup>1</sup> The employer shared responsibility provisions are codified in Code § 4980H, which was added to the Code by the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010) (ACA), as amended by the Health Care and Education Reconciliation Act, Pub. L. No. 111-152 (2010) (HCERA). Under Section 1513(d) of the ACA, Pub. L. No. 111-148, § 1513(d), these provisions apply to months beginning after December 31, 2013. However, on July 2, 2013, the Treasury Department announced a one-year delay in application of the penalties under Code § 4980H. U.S. Department of the Treasury, Continuing to Implement the ACA in a Careful, Thoughtful Manner (July 2, 2013), available at <http://www.treasury.gov/connect/blog/pages/continuing-to-implement-the-aca-in-a-careful-thoughtful-manner-.aspx> (as visited Dec. 9, 2019). The delay was formally announced on July 9, 2013, in Notice 2013-45, 2013-31 I.R.B. 116.

<sup>2</sup> Code § 4980H(a). Regulations have clarified the meaning of the parenthetical reference to “and their dependents”—see discussion in subsections D and E.

<sup>3</sup> Code § 4980H(b).

<sup>4</sup> Code §§ 4980H(a)(2) and (b)(1)(B). The determination of whether an employee is eligible for a premium tax credit is made under Code § 36B. To be eligible for a cost-sharing reduction, an individual must also be eligible for a premium tax credit. Therefore, although the statute appears to have two separate triggers for potential penalties, in reality at least one employee must qualify for a premium tax credit before the penalty can apply, and it does not matter if an employee also qualifies for a cost-sharing reduction.

<sup>5</sup> IRS Notice 2013-45, 2013-31 I.R.B. 116.

<sup>6</sup> The delay was prompted by IRS concerns about information reporting requirements under Code §§ 6055 (applicable to insurers, self-insuring employers, and other parties that provide health coverage) and 6056 (applicable to certain large employers), which were scheduled to begin in 2014. The Code § 6055 requirements are discussed in Section XXXVI. The Code § 6056 requirements are discussed in Section XXXVI. According to the IRS, because the information required by Code § 6056 is critical to administration of the employer shared responsibility penalties, it would have been “impractical” to determine liability for employer shared responsibility until the Code § 6056 reporting requirements begin. Consequently, the delay in the employer shared responsibility penalties was tied directly to the delay in the information reporting requirements.

In February 2014, the IRS issued final regulations on the employer shared responsibility provision,<sup>7</sup> finalizing provisions proposed in January 2013.<sup>8</sup>

The IRS has also issued questions and answers (Q&As) addressing various aspects of employer shared responsibility.<sup>9</sup> The Taxpayer Advocate Service (TAS)—an independent organization within the IRS—has developed an employer shared responsibility estimator, which is divided into three sections addressing applicable large employer determinations, maximum potential penalty amounts, and full-time employee status under both the monthly and look-back measurement methods.<sup>10</sup> Each section allows the user to enter relevant information<sup>11</sup> and includes definitions of keywords and other requirements under Code § 4980H.

**No IRS Letter Rulings or Determination Letters Regarding Code § 4980H.** The IRS has stated that it will not issue letter rulings or determination letters on whether an employer is required to make an assessable payment under Code § 4980H(a) or 4980H(b).\*

\* Rev. Proc. 2019-3, 2019-1 I.R.B. 130 (listing issues on which the IRS will not issue rulings or determination letters). This Revenue Procedure is part of an annual update and restatement of eight IRS revenue procedures governing letter rulings, determination letters, and other IRS guidance, which establish or clarify administrative issues regarding employee plans. See, e.g., Rev. Procs. 2019-1 through 2019-8.

States may apply for an “innovation waiver” from the employer shared responsibility penalty tax and certain other requirements for plan years beginning on or after January 1, 2017.<sup>12</sup>

**No Waivers Under Code § 4980H.** In 2017, the IRS’s Office of Chief Counsel responded to inquiries about the application of the employer shared responsibility requirements under Code § 4980H and emphasized that no waivers are available, including for financial or religious reasons.\* The IRS noted that the executive order directing agency heads with responsibility under health care reform to minimize the law’s “unwarranted economic and regulatory burdens” did not change the law,† and that the requirements remain in force until changed by Congress.

\* See IRS Information Letter 2017-0010 (Apr. 14, 2017) and IRS Information Letter 2017-0013 (Apr. 14, 2017).

† Executive Order Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal, 82 Fed. Reg. 8351 (Jan. 24, 2017).

### **1. Clarification of Periods During Which Code § 4980H Liability Does Not Apply—Limited Non-Assessment Periods**

In various circumstances, the final regulations provide that an employer will not be subject to a penalty under Code § 4980H for a certain period of time. The term “limited non-assessment period” for certain employees is used to describe these periods.<sup>13</sup>

<sup>7</sup> Shared Responsibility for Employers Regarding Health Coverage, 26 CFR Parts 1, 54, and 301, 79 Fed. Reg. 8543 (Feb. 12, 2014).

<sup>8</sup> Shared Responsibility for Employers Regarding Health Coverage, 26 CFR Parts 1, 54, and 301, 78 Fed. Reg. 217 (Jan. 2, 2013). The final regulations generally incorporate many of the provisions in the proposed regulations and in previously issued guidance in various IRS Notices, with some modifications and additional transition relief. See IRS Notice 2012-58, 2012-41 I.R.B. 436; IRS Notice 2012-17, 2012-9 I.R.B. 430; IRS Notice 2011-73, 2011-40 I.R.B. 47; IRS Notice 2011-36, 2011-21 I.R.B. 792.

<sup>9</sup> Questions and Answers on Employer Shared Responsibility Provisions Under the Affordable Care Act, available at <https://www.irs.gov/affordable-care-act/employers/questions-and-answers-on-employer-shared-responsibility-provisions-under-the-affordable-care-act> (as visited Dec. 9, 2019).

<sup>10</sup> Employer Shared Responsibility Provision Estimator, available at <http://taxpayeradvocate.irs.gov/estimator/esrp/> (as visited Dec. 9, 2019).

<sup>11</sup> For example, users can include monthly hours for regular employees and seasonal workers to determine applicable large employer status; they can enter the number of full-time employees to calculate potential penalties; they can choose the timing of measurement, administrative, and stability periods under the look-back measurement method; and they can select the optional weekly method under the monthly measurement method.

<sup>12</sup> ACA, Pub. L. No. 111-148, § 1332 (2010). For more details about innovations waivers, see Section XXI.

<sup>13</sup> Treas. Reg. § 54.4980H-1(a)(26).

Specifically, an employer will not be subject to a penalty under Code § 4980H(a), and in certain cases Code § 4980H(b), with respect to an employee in the following circumstances:

- the transition rule for an employer’s first year as an applicable large employer;<sup>14</sup>
- the application of Code § 4980H for the three full calendar month period beginning with the first full calendar month in which an employee is first otherwise eligible for an offer of coverage under the monthly measurement method;<sup>14.1</sup>
- the application of Code § 4980H during the initial three full calendar months of employment for an employee reasonably expected to be a full-time employee at the start date, under the look-back measurement method;<sup>15</sup>
- the application of Code § 4980H during the initial measurement period to a new variable-hour employee, seasonal employee, or part-time employee determined to be employed on average at least 30 hours of service per week, under the look-back measurement method;<sup>16</sup>
- the application of Code § 4980H following an employee’s change in employment status to a full-time employee during the initial measurement period, under the look-back measurement method;<sup>17</sup> and
- the application of Code § 4980H to the calendar month in which an employee’s start date occurs on a day other than the first day of the calendar month.<sup>18</sup>

Other than the transition rule for an employer’s first year as an applicable large employer, these limited non-assessment periods essentially align with permissible waiting periods that an applicable large employer might impose on a newly hired or newly eligible employee.

Note that the relief from the penalty under Code § 4980H provided by the rules above does not affect an employee’s eligibility for a premium tax credit.<sup>19</sup>

## 2. Roadmap for Compliance

In this Section, we address the following topics:

- How to determine whether an employer is an “applicable large employer” to whom the shared responsibility penalty tax may apply (subsection B);
- Who is considered a “full-time employee” for purposes of calculating the amount of the penalty tax (subsection C);
- How to calculate the penalty if the applicable large employer does not offer eligible employer-sponsored coverage to full-time employees and dependents—the subsection (a) penalty (subsection D);
- How to calculate the penalty even if the applicable large employer offers coverage to full-time employees and dependents, but the coverage either is unaffordable or does not provide minimum value—the subsection (b) penalty (subsection E);
- Transition rules (now expired) with respect to the application of the penalties (subsection F);
- Documentation and recordkeeping requirements relating to offers of coverage (subsection G);
- Rules relating to payment of premium tax credits/related notification from Exchanges and the employer’s payment of penalties (subsection H);
- Penalty tax issues in mergers and acquisitions (subsection I); and
- An analysis of the factors that may influence an applicable large employer’s decision whether to play (to avoid the penalty) or to pay the penalty (subsection J).

## B. Large Employers Are Potentially Subject to an Assessable Payment (Penalty Tax)

The penalty tax (or assessable payment) applies to “applicable large employers.” An applicable large employer (ALE) for a calendar year is an employer who employed (along with members of its controlled

<sup>14</sup> Treas. Reg. § 54.4980H-2(b)(5). See subsection B for more details.

<sup>14.1</sup> Treas. Reg. § 54.4980H-3(c)(2). See subsection C for more details.

<sup>15</sup> Treas. Reg. § 54.4980H-3(d)(2)(iii). See subsection C for more details.

<sup>16</sup> Treas. Reg. § 54.4980H-3(d)(3)(iii). See subsection C for more details.

<sup>17</sup> Treas. Reg. § 54.4980H-3(d)(3)(vii). See subsection C for more details.

<sup>18</sup> Treas. Reg. §§ 54.4980H-4(c) and 54.4980H-5(c). See subsections D and E for more details.

<sup>19</sup> Shared Responsibility for Employers Regarding Health Coverage, 26 CFR Parts 1, 54, and 301, 79 Fed. Reg. 8543, 8560 (Feb. 12, 2014).

group) an average of at least 50 “full-time employees” (including full-time-equivalent employees) on business days during the preceding calendar year.<sup>20</sup>

**“Applicable Large Employer” Status Also Significant for Reporting.** An employer’s status as an “applicable large employer” is not only relevant for purposes of Code § 4980H but also for purposes of the reporting requirement under Code § 6056. This reporting requirement became effective for the 2015 calendar year.\* For more on this reporting requirement, including the information that must be reported to the IRS and provided in written statements to full-time employees, see Section XXXVI.

\* See IRS Notice 2013-45, 2013-31 I.R.B. 116, Q/A-1.

For purposes of determining whether an employer is an ALE subject to employer shared responsibility provisions, an employer must convert part-time employees into full-time equivalents (even though such individuals would not trigger the tax by receiving a premium subsidy).

**Applicability of Rules for Employers With Employees in U.S. Territories.** A letter issued by HHS to the Governors of U.S. territories (e.g., Puerto Rico, Guam) describing the applicability of the Exchange requirements under health care reform to their governments and residents also addresses Exchange-related tax provisions (including Code § 4980H).\* While HHS acknowledges that territories have their own tax laws and must determine how those laws apply, it offers general “observations” based on its consultation with the Treasury. HHS states that the applicability of a tax provision depends on whether a territory’s tax laws mirror or do not mirror the federal tax Code. Although the employer shared responsibility penalty under Code § 4980H would not apply in either mirror or non-mirror territories, the stated reasoning is different. Mirror territories are generally not obligated to mirror excise tax provisions, and this penalty is considered an excise tax under the Code. Non-mirror territories have their own distinct tax codes and, thus, would not be subject to Code § 4980H (although such a territory could choose to enact a comparable provision under its own law). It is important to note that while the HHS letter is not official guidance, it does provide helpful insight into the application of the Exchange-related tax provisions to U.S. territories, including Code § 4980H.

\* See Information for the Territories Regarding the Affordable Care Act (Dec. 10, 2012), available at <http://www.cms.gov/CCIIO/Resources/Files/Downloads/gov-letter-territories-12-10-2012.pdf> (as visited Dec. 9, 2019).

## 1. Who Is the “Employer”?

Code § 4980H applies the controlled group test, meaning that all entities treated as a single employer under Code § 414(b), (c), (m), or (o) are treated as a single employer for purposes of § 4980H.<sup>21</sup> Thus, the employees of all employers within the controlled group are taken into account in determining whether any member of the controlled group is an ALE.<sup>22</sup> Employers participating in an association health plan are not treated as ALEs simply because of that participation. In other words, the controlled group rules present the only basis for aggregating employees of separate legal entities to determine ALE status.<sup>22.1</sup>

The regulations clarify that for a calendar year during which an employer is an ALE, the Code § 4980H standards generally are applied separately to each person that is a member of the controlled group comprising the employer (with each person referred to as an “applicable large employer member”) in

<sup>20</sup> Code § 4980H(c)(2)(A); Treas. Reg. § 54.4980H-1(a)(4).

<sup>21</sup> Code § 4980H(c)(2)(C)(i); Treas. Reg. § 54.4980H-1(a)(16). The controlled group rules are discussed in detail in Section XXVIII of *Cafeteria Plans* (Thomson Reuters/Tax & Accounting, 1991-present, updated quarterly).

<sup>22</sup> This rule prevents an employer from circumventing ALE status by setting up separate business entities and assigning fewer than 50 employees to each of them.

<sup>22.1</sup> Questions and Answers on Employer Shared Responsibility Provisions Under the Affordable Care Act, Q/A-18, available at <https://www.irs.gov/affordable-care-act/employers/questions-and-answers-on-employer-shared-responsibility-provisions-under-the-affordable-care-act> (as visited Dec. 9, 2019).

determining liability for, and the amount of, any assessable payment (see the discussion in subsections D and E regarding calculation of the penalties).<sup>23</sup>

For purposes of determining an ALE, the term “employer” also includes a predecessor employer and a successor employer.<sup>24</sup> The regulations reserve, and therefore do not address, the specific rules for identifying a predecessor employer (or the corresponding successor employer)—until further guidance is issued, reliance upon a reasonable, good faith interpretation of the statutory provision on predecessor (and successor) employer is permitted.<sup>25</sup> Note that although controlled group rules apply when determining if an employer is an ALE, Code § 4980H does not currently incorporate the separate line of business (SLOB) rules applicable under Code § 414(r). Thus, an employer could be affected by employer shared responsibility provisions even if the SLOB rules provide an exception for purposes of certain discrimination testing requirements.

**Example: Applicable Large Employer/Controlled Group.** For all of 2015 and 2016, Dean Corp. owned 100% of all classes of stock of Jimmy Corp. and Jean Corp. Dean Corp. did not have employees at any time in 2015. For every calendar month in 2015, Jimmy Corp. had 40 full-time employees and Jean Corp. had 60 full-time employees. Corporations Dean, Jimmy, and Jean were a controlled group of corporations under Code § 414(b).

Because Corporations Dean, Jimmy, and Jean had a combined total of 100 full-time employees during 2015, Corporations Dean, Jimmy, and Jean together were an ALE for 2016. Each of Corporations Dean, Jimmy, and Jean was an ALE member for 2016.\*

\* Treas. Reg. § 54.4980H-2(d), Example 1.

Government entities (such as federal, state, local, or Indian tribal government entities) as well as churches or conventions or associations of churches may be ALEs.<sup>26</sup> A federal trial court dismissed a lawsuit seeking to declare Indian tribes exempt from employer penalties under Code § 4980H.<sup>26.1</sup> Another federal trial court dismissed a lawsuit challenging the application of Code § 4980H (and the related reporting requirements under Code § 6056) to state school districts.<sup>26.2</sup>

The regulations under Code § 4980H reserve on the application of the employer aggregation rules to government entities and churches or conventions or associations of churches.<sup>27</sup> Until further guidance is issued, those entities may apply a reasonable, good faith interpretation in determining their status as an ALE.<sup>28</sup>

Regarding governmental entities, later guidance confirmed that they may apply a reasonable good faith interpretation of the employer aggregation rules for purposes of determining ALE status.<sup>28.1</sup> The IRS noted that potentially related governmental entities large enough to be ALEs independently would be subject to Code § 4980H regardless of aggregation rules, so the consequences of the aggregation rules would be limited to certain aspects of determining any assessable payment.

Legislation enacted in December 2015 clarifies how the controlled group aggregation and disaggregation rules apply to church plans.<sup>28.2</sup> Although these provisions were not adopted specifically to address ALE status under Code § 4980H, they are relevant for purposes of applying the aggregation rules to

<sup>23</sup> Shared Responsibility for Employers Regarding Health Coverage, 26 CFR Parts 1, 54, and 301, 79 Fed. Reg. 8543, 8548 (Feb. 12, 2014). “Applicable large employer member” is defined in Treas. Reg. § 54.4980H-1(a)(5).

<sup>24</sup> Treas. Reg. § 54.4980H-1(a)(16).

<sup>25</sup> Shared Responsibility for Employers Regarding Health Coverage, 26 CFR Parts 1, 54, and 301, 79 Fed. Reg. 8543, 8548 (Feb. 12, 2014).

<sup>26</sup> Treas. Reg. §§ 54.4980H-1(a)(9) (churches) and 54.4980H-1(a)(23) (governmental entities).

<sup>26.1</sup> See *N. Arapaho Tribe v. Burwell*, 2015 WL 4639324 (D. Wyo., July 2, 2015) (according to the court, the absence of a provision exempting tribes from Code § 4980H evidenced Congressional intent to include them, especially in light of the explicit exemption for tribal members from the individual mandate—discussed in Section XXIX).

<sup>26.2</sup> See *Indiana v. IRS*, 2018 WL 898720 (S.D. Ind. 2018). The school districts argued that if they were subject to Code § 4980H, they would be compelled to provide health insurance to employees to whom they otherwise would not offer it to avoid the federal penalties. The school districts contended, therefore, that the Code provisions violate the Constitution’s Tenth Amendment (which reserves to the states powers not constitutionally delegated to the federal government) by effectively forcing them to enact and enforce a federal regulatory program. The court was not persuaded and found that the provisions at issue constitute the type of non-discriminatory regulations applied to the states and private entities alike that are constitutionally permissible under the Commerce Clause.

<sup>27</sup> See Treas. Reg. § 54.4980H-2(b)(4).

<sup>28</sup> Shared Responsibility for Employers Regarding Health Coverage, 26 CFR Parts 1, 54, and 301, 79 Fed. Reg. 8543, 8548 (Feb. 12, 2014).

<sup>28.1</sup> IRS Notice 2015-87, 2015-52 I.R.B. 889, Q/A-18. The guidance also addresses the related reporting obligations that apply to an aggregated ALE group—see Section XXXVI for more details.

<sup>28.2</sup> Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, § 336 (2015).

churches and church-related entities. One clarification is that, for church-affiliated organizations, the aggregation rules require a high degree of common funding and direct involvement in operations; the disaggregation rules permit treating churches and related non-church entities separately.<sup>28.3</sup>

## 2. Who Is a Full-Time Employee?

The statute defines full-time employees as those who, with respect to any month, work at least 30 hours per week<sup>29</sup>—130 hours of service in a calendar month is treated as the monthly equivalent of at least 30 hours of service per week.<sup>30</sup> As discussed below in subsection C, IRS officials have informally commented that, for purposes of applying the look-back and monthly measurement methods, an employer must use 130 hours per month as the only basis to identify full-time employees.<sup>30.1</sup> But for purposes of determining whether an employer is an ALE, the employer must use 120 hours per month as the basis to identify full-time employees.<sup>30.2</sup>

An “employee” is an individual who is an employee under the common-law standard.<sup>31</sup> Full-time-equivalent employees are included for purposes of determining ALE status (see discussion below), but employees who work outside the U.S. are excluded.<sup>32</sup> A leased employee (as defined in Code § 414(n)(2)), a sole proprietor, a partner in a partnership, or a 2% S corporation shareholder is not considered an employee.<sup>33</sup> That means any such individual is not counted in determining whether an employer is an ALE, and the failure to offer coverage to any such individual would not expose an ALE to penalties under Code § 4980H.<sup>33.1</sup> Note that a sole proprietorship, partnership, or S corporation may be an ALE if it has enough non-owner employees, and it may be subject to penalties under Code § 4980H, if it fails to offer affordable, minimum value coverage to its full-time non-owner employees. In other words, the exclusion of sole proprietors, partners, and 2% S corporation shareholders from the definition of “employee” does not necessarily exempt a sole proprietorship, partnership, or S corporation from compliance with Code § 4980H. It just affects who is taken into account in determining whether and how Code § 4980H applies.

Note also that the exclusion of “leased employees” relates only to leased employees that meet the narrow definition in Code § 414(n)(2). This may not apply to many workers commonly considered to be “leased employees,” such as temporary employees or employees employed by a professional employer organization (PEO) or similar organization, as those workers may actually be common-law employees of the applicable large employer.

“Hours of service” are used in determining whether an employee is a full-time employee and in calculating an employer’s full-time equivalents. These rules are described in detail below in subsection C.

## 3. Full-Time Includes Full-Time Equivalents

For purposes of determining whether an employer is an ALE, “full-time” includes full-time-equivalent employees.<sup>34</sup> Therefore, the employer must take part-time employees into account to determine whether it is an ALE.

<sup>28.3</sup> Code § 414(c)(2).

<sup>29</sup> Code § 4980H(c)(4)(A).

<sup>30</sup> Treas. Reg. § 54.4980H-1(a)(21).

<sup>30.1</sup> ABA Joint Committee on Employee Benefits, meeting with IRS and Treasury officials, Q/A-24 (May 9, 2014), available at [http://www.americanbar.org/content/dam/aba/events/employee\\_benefits/2014\\_irs\\_qa.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/employee_benefits/2014_irs_qa.authcheckdam.pdf) (as visited Dec. 9, 2019).

<sup>30.2</sup> ABA Joint Committee on Employee Benefits, meeting with IRS and Treasury officials, Q/A-24 (May 9, 2014), available at [http://www.americanbar.org/content/dam/aba/events/employee\\_benefits/2014\\_irs\\_qa.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/employee_benefits/2014_irs_qa.authcheckdam.pdf) (as visited Dec. 9, 2019). When counting employees for purposes of the ALE determination, an employer counts how many employees worked at least 120 hours in a month. Each employee who works at least 120 hours counts as one full-time employee. It does not matter if the employee worked 121 hours or 250 hours that month—the employee counts as one employee. For employees who did not work 120 hours in that month, the employer counts the employee as a fraction, where the numerator is the employee’s actual hours for the month and the denominator is 120. This methodology is explained in greater detail below.

<sup>31</sup> See Treas. Reg. § 31.3401(c)-1(b).

<sup>32</sup> Treas. Reg. § 54.4980H-1(a)(24)(ii)(C).

<sup>33</sup> Treas. Reg. § 54.4980H-1(a)(15).

<sup>33.1</sup> As discussed in Section XXXVI, an ALE would not have a reporting obligation under Code § 6056 with respect to these individuals, but an employer would have a reporting obligation under Code § 6055 to the extent any of these individuals is provided with coverage under a self-insured health plan sponsored by the employer.

<sup>34</sup> Code § 4980H(c)(2)(E).

**No Penalty Tax for Part-Time Employees.** Because of the requirement to count full-time equivalent employees,\* an employer cannot avoid being treated as an ALE solely by making its workforce part-time. However, even if an employer is an ALE, it will not necessarily be liable for the penalty tax. The penalty is calculated based only on true full-time employees. Full-time equivalents are not used to calculate the amount of the penalty tax.

\* Treas. Reg. § 54.4980H-1(a)(22).

The number of full-time equivalents the employer employed during the preceding calendar year are taken into account. All employees (including seasonal workers) who were not employed on an average of at least 30 hours of service per week for a calendar month in the preceding calendar year are included in calculating the number of full-time equivalents for that calendar month.<sup>35</sup> The approach for converting part-time employees to full-time equivalents includes two steps:

- Step 1: Calculate the aggregate hours of service in a month for employees who are not full-time employees for that month. (Do not include more than 120 hours of service for any employee.)
- Step 2: Divide the total hours of service from Step 1 by 120.<sup>36</sup>

The result is the number of full-time-equivalent employees for the month.<sup>37</sup>

#### **4. Determining Applicable Large Employer Status**

Status as an ALE is based on the number of full-time employees on “business days” during the preceding calendar year.<sup>38</sup> The reference to “business days” is not explained. For example, must an employer have the requisite number of full-time employees on all of the business days of the prior year, or on at least half<sup>39</sup> of those days? Is passing the threshold on just one business day enough to make the employer an ALE?

##### **a. Methodology for Determining ALE Status**

The IRS has provided a multi-step method for calculating the number of full-time employees during the preceding calendar year that does not distinguish between business days and non-business days.<sup>40</sup> Rather than looking at days, the method focuses on the number of full-time employees during each calendar month and then obtains an average number of full-time employees by dividing by 12. Specifically, the method entails the following steps:

- Step 1: Calculate the number of full-time employees (including seasonal workers) for each calendar month in the preceding calendar year.
- Step 2: Calculate the number of full-time equivalents (including seasonal workers) for each calendar month in the preceding calendar year (using the method described above).
- Step 3: Add the number of full-time employees and full-time equivalents obtained in Steps 1 and 2 for each month of the preceding calendar year.
- Step 4: Add up the 12 monthly numbers from Step 3 and divide the sum by 12. This is the average number of full-time employees for the preceding calendar year.<sup>41</sup>
- Step 5: If the number obtained in Step 4 is less than 50, then the employer is not an ALE for the current calendar year. If the number obtained in Step 4 is 50 or greater and the employer included seasonal workers in Step 1 and/or Step 2, the employer may then apply a special rule for seasonal workers. This rule is described below.

<sup>35</sup> Treas. Reg. § 54.4980H-2(c)(1).

<sup>36</sup> Treas. Reg. § 54.4980H-2(c)(2).

<sup>37</sup> In determining the number of full-time equivalents for each calendar month, fractions would be taken into account. For example, if in a calendar month employees who are not full-time employees work 1,260 hours, there would be 10.5 full-time equivalents for that month ( $1,260 \div 120 = 10.5$ ). An employer may round the number of full-time-equivalent employees for each calendar month to the nearest one hundredth. For example, an employer with a calculation of 30.544 full-time-equivalent employees for a calendar month may round that number to 30.54 full-time-equivalent employees. See Treas. Reg. § 54.4980H-2(c)(2).

<sup>38</sup> Code § 4980H(c)(2); Treas. Reg. § 54.4980H-1(a)(4).

<sup>39</sup> As a comparison, for purposes of applying the small employer exception under COBRA, an employer is considered to have normally employed fewer than 20 employees during a particular calendar year if it had fewer than 20 employees on at least 50% of its typical business days during that year. Treas. Reg. § 54.4980B-2, Q/A-5(b).

<sup>40</sup> Treas. Reg. § 54.4980H-2(b)(1).

<sup>41</sup> Fractional amounts are disregarded, meaning that the employer can round down to the next-lowest whole number after dividing by 12 (i.e., 49.9 equals 49 full-time employees).

Note that the determination of ALE status is made retrospectively—employees would be counted in 2014 to determine applicable large employer status in 2015.<sup>42</sup> The determination of ALE status is made on a calendar-year basis, even if the ALE offers health coverage under a non-calendar year plan.

**Example: ALE With Full-Time-Equivalent Employees.** During each calendar month of 2015, Nano has 20 full-time employees, each of whom averages 35 hours of service per week; 40 employees, each of whom averages 90 hours of service per calendar month; and no seasonal workers.

Each of the 20 employees who average 35 hours of service per week count as one full-time employee for each calendar month. To determine the number of full-time-equivalent employees for each calendar month, the total hours of service of the employees who are not full-time employees (but not more than 120 hours of service per employee) are aggregated and divided by 120. The result is that the employer has 30 full-time-equivalent employees for each calendar month ( $40 \times 90 = 3,600$ , and  $3,600 \div 120 = 30$ ). Because Nano has 50 full-time employees (the sum of 20 full-time employees and 30 full-time-equivalent employees) during each calendar month in 2015, and because the seasonal worker exception is not applicable, Nano is an ALE for 2016.\*

\* Treas. Reg. § 54.4980H-2(d), Example 2.

According to informal remarks made by IRS and Treasury officials, for purposes of the applicable large employer determination, neither the 30 hours of service per week standard (the statutory full-time standard) nor 130 hours per calendar month standard (the regulatory full-time standard) is the correct measurement to determine whether an employee should be counted as full-time. Rather, as discussed above, each employee who works at least 120 hours in a month is included in the formula as a full-time employee.<sup>42.1</sup> This position seems correct as a practical matter, since 120 hours is equivalent to one full-time employee under the formula.

### b. Importance of Proper Worker Classification

Code § 4980H employer shared responsibility provisions apply only to ALEs. Generally speaking, an ALE is an employer that employed an average of 50 or more full-time employees (including full-time-equivalent employees) during the preceding calendar year.<sup>42.2</sup> What if an employer concludes that it is not an ALE (because it employed fewer than 50 full-time employees, including full-time equivalents), but the employer misclassified one or more of its workers as non-employees when they should have been classified as employees under the common-law standard? If a government agency or a court (or the employer itself) later reclassifies the workers as employees, then the reclassification could cause the employer to be an ALE subject to Code § 4980H.<sup>42.3</sup> The financial risks of misclassification are compounded by the fact that reclassification may be retroactive.<sup>42.4</sup> Thus, the stakes are now even higher in terms of adverse consequences resulting from worker misclassification.

<sup>42</sup> Code § 4980H(c)(2) defines applicable large employer as one who employed at least 50 full-time employees on business days “during the preceding calendar year.”

<sup>42.1</sup> ABA Joint Committee on Employee Benefits, meeting with IRS and Treasury officials, Q/A-24 (May 9, 2014), available at [http://www.americanbar.org/content/dam/aba/events/employee\\_benefits/2014\\_irs\\_qa.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/employee_benefits/2014_irs_qa.authcheckdam.pdf) (as visited Dec. 9, 2019).

<sup>42.2</sup> Treas. Reg. §§ 54.4980H-1(a)(4) and 54.4980H-2(b)(1). The IRS had provided transition relief to ALEs with fewer than 100 full-time employees (including full-time-equivalent employees) during 2014—these employers were not be subject to Code § 4980H penalties until 2016 if they satisfied certain conditions to qualify for the relief. See Shared Responsibility for Employers Regarding Health Coverage, 26 CFR Parts 1, 54, and 301, 79 Fed. Reg. 8543, 8569 (Feb. 12, 2014). For more information, see subsection F.

<sup>42.3</sup> In addition to potential Code § 4980H liability, other significant tax consequences would result if a worker is misclassified as an independent contractor and is subsequently reclassified as an employee—including liability for withholding taxes, interest and penalties, and potential disqualification of employee benefit plans. For more details, see Section XIV of *Self-Insured Health Plans* (Thomson Reuters/Tax & Accounting, 2012-present, updated quarterly).

<sup>42.4</sup> Prior to issuance of the employer shared responsibility final regulations, commenters had requested retroactive relief for Code § 4980H purposes that would be similar to the retroactive relief available under Section 530 of the Revenue Act of 1978 for tax-withholding and certain other purposes. Revenue Act of 1978, Pub. L. No. 95-600 (Nov. 6, 1978). Section 530 relief, which has been extended several times since its original enactment in 1978, does not apply to potential liabilities under Code § 4980H. See Joint Committee on Taxation, “Present Law and Background Relating to Worker Classification For Federal Tax Purposes” (May 7, 2007). The preamble to the final regulations specifically declined to provide Code § 4980H relief from retroactive reclassification, noting that it might encourage worker misclassification. Shared Responsibility for Employers Regarding Health Coverage, 26 CFR Parts 1, 54, and 301, 79 Fed. Reg. 8543, 8568 (Feb. 12, 2014).

## 5. *Disregarding Seasonal Workers in Certain Cases*

**Note: Seasonal Workers Must Be Counted.** Code § 4980H(c)(2) generally requires the inclusion of seasonal workers in the ALE determination.\* These workers may be excluded in certain cases, when determining ALE status, only if specified conditions are satisfied—see discussion below.

\* Treas. Reg. § 54.4980H-2(b)(2).

The regulations define a “seasonal worker” as a worker who performs labor or services on a seasonal basis as defined by the Secretary of Labor<sup>43</sup> and retail workers employed exclusively during holiday seasons. Employers may apply a reasonable, good faith interpretation of the term “seasonal worker” and a reasonable good faith interpretation of the DOL regulation (including as applied by analogy to workers and employment positions not otherwise covered under the regulation).<sup>44</sup>

**Compare: Seasonal Worker and Seasonal Employee.** The terms “seasonal worker” and “seasonal employee” are both used in the employer shared responsibility provisions but in two different contexts.\* The term “seasonal worker” is relevant for determining whether an employer is an ALE. The term “seasonal employee” is relevant for determining an employee’s status as a full-time employee under the look-back measurement method (see subsection C).

\* Questions and Answers on Employer Shared Responsibility Provisions Under the Affordable Care Act, Q/A-27, available at <https://www.irs.gov/affordable-care-act/employers/questions-and-answers-on-employer-shared-responsibility-provisions-under-the-affordable-care-act> (as visited Dec. 12, 2018).

An employer with 50 or more full-time employees can avoid ALE status if—

- the employer’s workforce exceeds 50 full-time employees for 120 days or fewer<sup>45</sup> during the calendar year; and
- the employees in excess of 50 employed during such 120-day period were seasonal workers.<sup>46</sup>

This rule makes it easier to avoid ALE status where the employer’s non-seasonal workforce (including full-time equivalents for part-time employees) is 50 or fewer employees.

<sup>43</sup> This includes (but is not limited to) workers covered by 29 CFR § 500.20(s)(1).

<sup>44</sup> Treas. Reg. § 54.4980H-1(a)(39).

<sup>45</sup> The IRS has indicated that four calendar months will be treated as equivalent to 120 days. The four calendar months and the 120 days are not required to be consecutive. See Treas. Reg. § 54.4980H-2(b)(2).

<sup>46</sup> Code § 4980H(c)(2)(B); Treas. Reg. § 54.4980H-2(b)(2).

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**Example: Seasonal Worker Exception.** During 2015, Farmco has 40 full-time employees for the entire calendar year, none of whom are workers. In addition, Farmco also has 80 full-time workers who work from September through December 2015. Farmco has no part-time employees who would be counted as full-time equivalent employees during 2015.

Before applying the worker exception, Farmco has 40 full-time employees during each of eight calendar months of 2015 and 120 full-time employees during each of four calendar months of 2015, resulting in an average of 66.67 employees  $[(40 \times 8) \text{ plus } (120 \times 4) \text{ divided by } 12 \text{ equals } 66.67]$ .

However, Farmco can apply the seasonal worker exception because its workforce exceeded 50 full-time employees for only four calendar months (treated as the equivalent of 120 days) during 2015, and the number of full-time employees would be less than 50 during those months if seasonal workers were disregarded. Thus, Farmco is not an ALE for 2016.\*

\* Treas. Reg. § 54.4980H-2(d), Example 3.

**Example: Seasonal Workers and Other Full-Time Equivalent Employees.** Same facts as above example, except that Farmco has 20 full-time equivalent employees in August, some of whom are seasonal workers.

The seasonal worker exception described above does not apply if the number of an employer's full-time employees (including seasonal workers) and full-time equivalent employees exceeds 50 for more than 120 days during the calendar year. Because Farmco has at least 50 full-time employees for a period greater than four calendar months (treated as the equivalent of 120 days) during 2015, the exception does not apply. Farmco averaged 68 full-time employees in 2015:  $[(40 \times 7) + (60 \times 1) + (120 \times 4)] \div 12 = 68.33$ . And accordingly, Farmco is an ALE for calendar year 2016.\*

\* Treas. Reg. § 54.4980H-2(d), Example 4.

In the case of an employer that was not in existence on any business day during the preceding calendar year (see discussion below), the seasonal worker exception applies so that the employer will not be treated as an ALE if it reasonably expects (a) its workforce to exceed 50 full-time employees (including full-time equivalent employees) for 120 days or fewer during the current calendar year, and (b) the employees in excess of 50 employed during such 120-day period to be seasonal workers.<sup>47</sup>

## 6. *Disregarding Certain Veterans*

Legislation enacted in July 2015 requires that certain individuals (primarily veterans) be disregarded solely for the purpose of determining whether an employer is an ALE.<sup>47.1</sup> Specifically, an employee is not taken into account for the ALE determination for any month that he or she has medical coverage provided by any of the uniformed services (including TRICARE) or under certain Veterans' Affairs (VA) health care programs.<sup>47.2</sup> The exemption applies for months beginning after December 31, 2013.

Larger employers that are ALEs regardless of whether their employees are counted under this legislation are unaffected by this provision. But some smaller employers near the ALE threshold might have a greater preference for hiring veterans because of the legislation.

<sup>47</sup> Treas. Reg. § 54.4980H-2(b)(2); Shared Responsibility for Employers Regarding Health Coverage, 26 CFR Parts 1, 54, and 301, 79 Fed. Reg. 8543, 8547–8548 (Feb. 12, 2014).

<sup>47.1</sup> Surface Transportation and Veterans Health Care Choice Improvement Act of 2015, Pub. L. No. 114-41, § 4007 (July 31, 2015).

<sup>47.2</sup> For a discussion of health plan issues related to military coverage (TRICARE), see *Group Health Plans: Federal Mandates Other Than COBRA & HIPAA* (Thomson Reuters/Tax & Accounting, 2002-present, updated quarterly).

## 7. *New Employers: Special Rule for Employers Not in Existence in Preceding Year*

If an employer was not in existence throughout the preceding calendar year, the determination of whether the employer is an ALE is based on the average number of full-time employees that the employer is reasonably expected to employ on business days in the current calendar year.<sup>48</sup>

**Example: New Employer.** Newbie Corp. is incorporated on January 1, 2016. On January 1, 2016, Newbie has three employees. However, prior to incorporation, Newbie's owners purchased a factory intended to open within two calendar months of incorporation and to employ approximately 100 full-time employees. By March 15, 2016, Newbie has more than 75 full-time employees.

Because Newbie can reasonably be expected to employ on average at least 50 full-time employees on business days during 2016, and actually employs an average of at least 50 full-time employees on business days during 2016, Newbie is an ALE (and an ALE member) for calendar year 2016.\*

\* Treas. Reg. § 54.4980H-2(d), Example 5.

The determination of whether a new employer is an ALE during its first calendar year is based on the employer's reasonable expectations at the time the business comes into existence—even if subsequent events cause the actual number of full-time employees (including full-time equivalent employees) to exceed that reasonable expectation.<sup>49</sup>

The regulations clarify that an employer is treated as not having been in existence throughout the prior calendar year only if the employer was not in existence on any business day in the prior calendar year.<sup>50</sup>

**Determining New Employer Status.** If an employer comes into existence on May 1 of Year 1, during Year 1 the employer's status as an ALE is determined based on the average number of employees that it is reasonably expected such employer will employ on business days in the current calendar year (Year 1). To determine the employer's status as an ALE for Year 2, the employer's status as an ALE is determined based on the number of employees that it employed on business days from May 1 through December 31 of Year 1 (rather than relying on the employer's reasonable expectations).\*

\* Shared Responsibility for Employers Regarding Health Coverage, 26 CFR Parts 1, 54, and 301, 79 Fed. Reg. 8543, 8547 (Feb. 12, 2014).

## 8. *Employer's First Year as an Applicable Large Employer*

Commenters noted that Code § 4980H should not apply to employers for a period of time after the end of the calendar year so that employers that are close to the 50 full-time employee (plus full-time equivalent employee) threshold, whose status may be affected by data from the final calendar months of the calendar year, have time to respond to becoming an ALE.<sup>51</sup> To address this concern, the final regulations provide, with respect to an employee who was not offered coverage at any point in the prior calendar year, that if the ALE offers coverage on or before April 1 of the first year in which the employer is an ALE, the employer will not be subject to a penalty (for January through March of the first year the employer is an ALE) under Code § 4980H(a) by reason of its failure to offer coverage to the employee for January through March of that year, and the employer will not be subject to a penalty (for January through March of the first year the employer is an applicable large employer) under Code § 4980H(b) if the coverage offered provides minimum value.<sup>52</sup>

However, if the employer does not offer coverage to the employee by April 1, the employer may be subject to the Code § 4980H(a) penalty for those initial calendar months in addition to any subsequent calendar months for which coverage is not offered, and if the employer offers coverage by April 1 but the coverage does

<sup>48</sup> Code § 4980H(c)(2)(C)(ii); Treas. Reg. § 54.4980H-2(b)(3).

<sup>49</sup> Shared Responsibility for Employers Regarding Health Coverage, 26 CFR Parts 1, 54, and 301, 79 Fed. Reg. 8543, 8547 (Feb. 12, 2014).

<sup>50</sup> Treas. Reg. § 54.4980H-2(b)(3); Shared Responsibility for Employers Regarding Health Coverage, 26 CFR Parts 1, 54, and 301, 79 Fed. Reg. 8543, 8547 (Feb. 12, 2014).

<sup>51</sup> Shared Responsibility for Employers Regarding Health Coverage, 26 CFR Parts 1, 54, and 301, 79 Fed. Reg. 8543, 8548 (Feb. 12, 2014).

<sup>52</sup> The penalties under Code § 4980H(a) and Code § 4980H(b) are discussed in subsections D and E, respectively.

not provide minimum value, the employer may be subject to the Code § 4980H(b) penalty for those initial calendar months (in addition to any subsequent calendar months for which coverage does not provide minimum value or is not affordable). This rule applies only during the first year for which an employer is an ALE—even if the employer falls below the 50 full-time employee (plus full-time equivalent employee) threshold for a subsequent year and then expands and becomes an ALE again.<sup>53</sup>

**Example: First Year as an Applicable Large Employer.** As of January 1, 2015, Growth Co. has been in existence for several years and did not average 50 or more full-time employees (including full-time equivalent employees) on business days during 2014. Growth Co. averages 50 or more full-time employees on business days during 2015, so that for 2016 Growth Co. is an ALE, for the first time. For all the calendar months of 2016, Growth Co. has the same 60 full-time employees. Growth Co. offered 20 of those full-time employees health care coverage during 2015, and offered those same employees coverage providing minimum value for 2016. With respect to the 40 full-time employees who were not offered coverage during 2015, Growth Co. offers coverage providing minimum value for calendar months April 2016 through December 2016.

For the 40 full-time employees not offered coverage during 2015 and offered coverage providing minimum value for the calendar months April 2016 through December 2016, the failure to offer coverage during the calendar months January 2016 through March 2016 will not result in penalties under Code § 4980H with respect to those employees for those three calendar months. For those same 40 full-time employees, the offer of coverage during the calendar months April 2016 through December 2016 may result in a penalty under Code § 4980H(b) with respect to any employee for any calendar month for which the offer is not affordable, and the employee receives a premium tax credit on the Exchange. For the other 20 full-time employees, the offer of coverage during 2016 may result in a penalty under Code § 4980H(b) for any calendar month if the offer is not affordable and the employee received a premium tax credit on the Exchange. For all calendar months of 2016, Growth Co. will not be subject to an assessable payment under Code § 4980H(a).\*

\* Treas. Reg. § 54.4980H-2(d), Example 6.

## 9. Employers Contributing to Multiemployer Plans

The preamble to the proposed regulations provided special rules for employers participating in multiemployer plans in view of such plans' unique operating structures.<sup>54</sup> The final regulations provided interim guidance (discussed below) intended to continue the special rules provided in the preamble to the proposed regulations, with some clarifications.<sup>55</sup>

The interim guidance under the final regulations applies to an ALE member that is required by a collective bargaining agreement (or an appropriate related participation agreement) to make contributions, with respect to some or all of its employees, to a multiemployer plan that offers, to individuals who satisfy the plan's eligibility conditions, coverage that is affordable and provides minimum value, and that offers coverage to those individuals' dependents. Under the interim guidance, the ALE member will not be treated, with respect to employees for whom the employer is required by the collective bargaining agreement (or appropriate related participation agreement) to make contributions to the multiemployer plan, as failing to offer the opportunity to enroll in minimum essential coverage to full-time employees (and their dependents)

<sup>53</sup> Treas. Reg. § 54.4980H-2(b)(5).

<sup>54</sup> See Shared Responsibility for Employers Regarding Health Coverage, 26 CFR Parts 1, 54, and 301, 78 Fed. Reg. 217, 238 (Jan. 2, 2013).

<sup>55</sup> Shared Responsibility for Employers Regarding Health Coverage, 26 CFR Parts 1, 54, and 301, 79 Fed. Reg. 8543, 8576 (Feb. 12, 2014). Any future guidance that limits the scope of the interim guidance will be applied prospectively and will apply no earlier than January 1 of the calendar year beginning at least six months after the date of issuance of the guidance.

for purposes of the penalty under Code § 4980H(a), and will not be subject to a penalty under Code § 4980H(b).<sup>56</sup>

For purposes of determining whether coverage under the multiemployer plan is affordable, employers participating in the plan may use any of the affordability safe harbors discussed in subsection E.<sup>57</sup>

If a penalty were due under Code § 4980H, it would be payable by a participating ALE member and that member would be responsible for identifying its full-time employees for this purpose (which would be based on hours of service for that employer). If the ALE member contributes to one or more multiemployer plans and also maintains a single employer plan, this interim guidance applies to each multiemployer plan but not to the single employer plan.

### C. Penalty Tax Hinges on Whether Employer Offers Coverage to Full-Time Employees

The penalty tax actually consists of two separate taxes. The first (discussed in subsection D) applies when the employer fails to offer enough full-time employees (and dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan.<sup>58</sup> The second (discussed in subsection E) applies when the employer offers minimum essential coverage under an eligible employer-sponsored plan, but the coverage is not affordable or does not provide minimum value.<sup>59</sup> Accordingly, both taxes hinge on whether an employer offers eligible employer-sponsored health coverage to “full-time employees,” but the nature of the penalty will depend on the cost to employees and the terms of coverage. Final regulations published in February 2014 contain rules for identifying full-time employees.<sup>60</sup>

**Proper Worker Classification Matters.** Properly classifying workers as employees or non-employees (e.g., independent contractors or employees of third parties) is important for many reasons, including minimizing exposure to Code § 4980H penalty tax liability. An applicable large employer’s failure to properly classify its common-law employees may (if the workers are not offered coverage because of the misclassification) expose the employer to penalties. It can often be difficult to distinguish between workers who are common-law employees and those who are not common-law employees—especially when the labels are confusing or even misleading. For example, a worker may be a common-law employee even if the documents establishing the arrangement refer to the worker as an independent contractor, consultant, or vendor. Similarly, a worker may be a common-law employee even if the worker is paid by another entity (such as a professional employer organization (PEO), staffing firm, leasing organization, or temporary employment agency). Although the labels used by the parties to an arrangement are relevant to the worker classification analysis, it is essential to focus on the substance of the relationship, rather than merely accepting the labels. The common-law employee standard requires consideration of all of the facts and circumstances of the relationship under a multi-factor analysis.\*

\* For a complete discussion of determining common-law employee status, see Section XIV of *Self-Insured Health Plans* (Thomson Reuters/Tax & Accounting, 2012-present, updated quarterly).

<sup>56</sup> Whether the employee is a full-time employee is determined under Code § 4980H(c)(4), whether coverage is affordable (for purposes of the penalty under Code § 4980H(b)) is determined under Code § 36B(c)(2)(C)(i), and whether coverage provides minimum value (also for purposes of the penalty under Code § 4980H(b)) is determined under Code § 36B(c)(2)(C)(ii). Determination of full-time employee status is discussed in detail in subsection C, and the standards for affordability and minimum value are discussed in subsection E.

<sup>57</sup> Coverage under a multiemployer plan will also be considered affordable with respect to a full-time employee if the employee’s required contribution, if any, toward self-only health coverage under the plan does not exceed 9.5% (as indexed) of the wages reported to the qualified multiemployer plan, which may be determined based on actual wages or an hourly wage rate under the applicable collective bargaining agreement or participation agreement.

<sup>58</sup> Code § 4980H(a). “Minimum essential coverage” and “eligible employer-sponsored plan” are defined by cross-reference to Code § 5000A(f). Minimum essential coverage is discussed in subsection D.

<sup>59</sup> Code § 4980H(b). Affordability and minimum value are determined under Code § 36B, which describes when individuals may qualify to purchase subsidized health insurance coverage through an Exchange. The regulations provide three safe harbors for determining whether coverage is affordable. Treas. Reg. § 54.4980H-5(e). These safe harbors are discussed in subsection E.

<sup>60</sup> Shared Responsibility for Employers Regarding Health Coverage, 26 CFR Parts 1, 54, and 301, 79 Fed. Reg. 8543, 8546–8547 (Feb. 12, 2014).