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Shared Responsibility for Employers Regarding Health Coverage—The Pay or Play Rules

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Introduction

- On December 28, 2012, the Department of Treasury/IRS issued proposed regulations titled "Shared Responsibility for Employers Regarding Health Coverage"
  - These rules are often referred to as the "Pay or Play" rules or the "Employer Mandate"
- Final regulations were issued on February 9, 2014
- We will discuss the highlights of these regulations

Transition Relief!

- For 2014, no employer is subject to the employer shared responsibility payments
- For 2015, the rules apply to applicable large employers with 100 or more full-time employees (including FTEs) in 2014
- For 2016, the rules apply to applicable large employers with 50 or more full-time employees (including FTEs) in 2015
  - For the second and the third bullet, there are several other requirements in order for this transition relief to apply, which are discussed later in this presentation

Transition Relief!

- To avoid the payment for failing to offer coverage (4980H(a)), an employer needs to offer coverage to at least 70% of its full-time employees (and their dependents) in 2015
  - For 2015: applies to applicable large employers with 100 or more full-time employees (including FTEs)
    - Generally, ALE status determined in 2014
  - For 2016 and beyond: 95% threshold for applicable large employers (50 or more full-time employees (including FTEs))
    - Generally, ALE status determined in previous year

Limited Relief for Reporting Requirements

- Employers are not subject to information reporting requirements under IRC sections 6055 and 6056 until 2015
  - These sections require an employer to annually report to the IRS information regarding the health insurance that the employer offers to its full time employees
- This webinar does not discuss these reporting rules

Section 4980H—In General

- An applicable large employer is subject to an assessable payment if either:
  - (a) the employer fails to offer to substantially all (at least 70% in 2015 and 95% in 2016 and beyond) of its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan and any full-time employee is certified to the employer as having received an applicable premium credit or cost sharing reduction for coverage purchased on the public exchange **(section 4980H(a) liability)**

OR

Section 4980H—In General

- (b) the employer offers substantially all (at least 70% in 2015 and 95% in 2016 and beyond) of its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan and one or more full-time employee is certified to the employer as having received an applicable premium tax credit or cost sharing reduction for coverage purchased on the public exchange **(section 4980H(b) liability)**

  - (NOTE: The employee can only receive the tax credit or cost sharing reduction if he is not offered coverage or declines the employer's offer of coverage because it either does not provided minimum value or it is not affordable.)

Dependent

- For 4980H(a) and (b), a dependent is a child
  - Child means a biological child, adopted child, or child placed for adoption
  - Does not include step children, foster children (new change under final regulations)
  - Does not include a spouse
- A child is a dependent for the entire calendar month during which she attains age 26

4980H (a) and (b)

- The 4980H(a) penalty will likely be triggered because the employer does not offer enough of its full-time employees the ability to enroll in employer-sponsored health coverage
  - 2015: 70%
  - 2016 and beyond: 95%

- The 4980H(b) penalty will likely be triggered because the employer's coverage is unaffordable or does not provide minimum value

4980H (a) and (b)

- The assessable payment under 4980H(a) is based on ALL (excluding the first 30) full-time employees
  - Annualized penalty: The number of full-time employees of the applicable large employer member (reduced by the allocable share of the 30-employee reduction) multiplied by $2,000
  - 80-employee reduction for 2015 only
- The assessable payment under 4980H(b) is based on the number of full-time employees who are certified to the employer as having received an applicable premium tax credit or cost-sharing reduction for coverage purchased on the public exchange
  - 2015 annualized penalty: The number of full-time employees of the applicable large employer member who receive an applicable premium tax credit or cost-sharing reduction multiplied by $3,000

Determination of Applicable Large Employer Status

- An applicable large employer is one that, with respect to a calendar year, employed an average of at least 50 full-time employees (taking into account full-time employee equivalents/FTEs) on business days during the preceding calendar year
  - Remember special transition rules for 2015
- All entities within the same controlled group are treated as a single employer for determining the applicable large employer status

Determination of Applicable Large Employer Status

- An employer also includes a predecessor employer and a successor employer
- For a new employer, it is based on whether the entity is reasonably expected to employ an average of at least 50 full-time employees (including FTEs) on business days during the current calendar year
  - Remember special transition rules for 2015

Employee—Applicable Large Employer

- An employee is an individual who is an employee under the common law standard
  - Does not include a sole proprietor, a partner in a partnership, or a 2% S corporation shareholder
    - Also excluded are leased employees who are not common law employees of the employer that receives the services
- A full-time employee is an employee who was employed on average at least 30 hours of service per week

Hours of Service

- Used for identifying Full-Time Employees and Calculating Hours for FTEs
- Hours of Service include:
  - (1) each hour for which an employee is paid, or entitled to payment, for the performance of duties for the employer, and
  - (2) each hour an employee is paid, or entitled to payment, on account of a period of time during which no duties are performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence

Hours of Service

- For employees paid on an hourly basis, calculate actual hours of service from records of hours worked and hours for which payment is made or due for vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence

Hour of Service

- For employees NOT paid on an hourly basis, calculate hours of service under any of the following:
  - (1) counting actual hours from records of hours worked and hours for which payment is made or due for vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence, OR

Hours of Service

- (2) using a days-worked equivalency method whereby the employee is credited with eight hours of service for each day for which the employee would be required to be credited with at least one hour of service under these service crediting rules, OR
- (3) using a weeks-worked equivalency of 40 hours of service per week for each week for which the employee would be required to be credited with at least one hour of service under these service crediting rules

Hours of Service

- Must use one of these methods for counting hours of service for all non-hourly employees—but do not need to use the same method for all non-hourly employees
- May apply different methods for different classifications
- Cannot use a method if it would substantially understate an employee's hours of service or would understate the number of hours of service for a substantial number of employees (even if no given employee's hours of service are understated substantially)

Exclusions From the Definition of Hour of Service—Bona Fide Volunteer

- Hours of service by a bona fide volunteer are not counted
- Bona fide volunteers include any volunteer who is an employee of a government agency or tax-exempt organization whose only compensation from that entity is in the form of (i) reimbursement for (or reasonable allowance for) reasonable expenses incurred in the performance of services by volunteers or (ii) reasonable benefits (including length of service awards) and nominal fees, customarily paid by similar entities in connection with the performance of services by volunteers

Exclusions From the Definition of Hour of Service—Student Employees

- Hours of service performed by students in positions subsidized through the federal work study program or a substantially similar program of a State or political subdivision thereof will not be counted
- However, all hours of service for which a student employee of an educational organization (or an outside employer) is paid or entitled to payment in a capacity other than through the federal work study program (or a State or local government's equivalent) are required to be counted as hours of service

Special Hours of Service Rules

- Different rules apply for:
  - Members of religious orders
  - Adjunct faculty
  - Employees with layover hours
  - Employees with on-call hours
  - Travelling salesmen

- These special hours of rules are not discussed in this presentation

Full-Time Equivalent Employees (FTEs)—Applicable Large Employer

- Must calculate the number of full-time equivalent employees (FTEs) employed during the preceding calendar year—and not just full-time employees
  - Remember, this is for the applicable large employer determination
  - FTEs not relevant for outside of ALE status determination

Full-Time Equivalent Employees (FTEs)—Applicable Large Employer

- All employees (including seasonal workers) who were not full-time employees for any month in the preceding year are included in the FTEs for that month by:
  - (1) calculating the aggregate number of hours of service (but not more than 120 hours for any employee) for all employees who were not employed on average of at least 30 hours of service per week for that month, and
  - (2) dividing the total hours of service in #1 above, by 120

  That is the number of FTEs for that calendar month

Employee—Seasonal Workers—Applicable Large Employer

- If an employer's workforce exceeded 50 full-time employees (including FTEs) for 120 days or fewer during the preceding calendar year, and the employees in excess of 50 who were employed during that period of no more than 120 days were seasonal workers, the employer is not an applicable large employer for the current calendar year
  - Seasonal worker includes (but is not limited to):
    - The employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year
    - Retail workers employed exclusively during holiday seasons

Applicable Large Employer with FTEs—Example #1

- Example: During each month of 2015, Employer has 20 full-time employees, and 40 other employees who averaged 90 hours of service per month
  - Each of the 20 employees count as one full-time employee. To determine the number of FTEs, the total hours of service of the employees who are not full-time are aggregated and divided by 120. (40 x 90 =3,600 and 3,600 ÷ 120 = 30 FTEs).
  - Employer has 50 full-time employees (20 true full-time employees and 30 FTEs)
  - Means Employer is applicable large employer for 2016

Applicable Large Employer—Seasonal Workers—Example #2

- Example: During 2015, Employer has 40 full-time employees for the entire calendar year. Employer also has 80 seasonal full-time workers who work for Employer from September through December 2015.
- Before applying the seasonal worker exception, Employer has 40 full-time employees during 8 calendar months and 120 full-time employees during 4 calendar months—resulting in an average of 66.5 full-time employees for the year.
  - 40 x 8 = 320; 120 x 4 = 480; 320 + 480 = 800
  - 800 / 12 = 66.66

Example #2—Continued

- However, Employer's workforce equaled or exceeded 50 full-time employees for no more than 4 calendar months—and the number would be fewer than 50 during those months if seasonal workers were disregarded
  - Without the seasonal workers, the employer would have had only 40 full-time employees from September through December
- Applying the seasonal worker exception, Employer is not an applicable large employer for 2016

Special Rules for First Year Of ALE

- With respect to an employee who was not offered coverage at any point in the prior calendar year, 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 an assessable payment (for January through March of the first year the employer is an ALE) under 4980H(a) and (b), if the coverage offered by April 1 provides minimum value

Transition Relief

- For 2015, the rules apply to applicable large employers with 100 or more full-time employees (including FTEs) in 2014.
- For 2016 and beyond, the rules apply to applicable large employers with 50 or more full-time employees (including FTEs) in 2015.
- However, for this 2015 transition relief for employers with 50-less than 100 full-time employees (including FTEs) to apply, the employer must meet all of the requirements on the next slide.

Transition Relief

- From the coverage maintenance period (generally 2/9/14 to 12/31/14), the employer does not reduce the size of its workforce or the overall hours of service of its workforce in order to come within these transition rules
  - CMP slightly different for fiscal year plans
- During the CMP, generally the employer does not eliminate or materially reduce the health coverage it offered as of 2/9/14 (if any) or narrow or reduce the class of employees to whom coverage was offered on 2/9/14
  - There are additional specific rules for this element, which are not addressed in this presentation
- The applicable large employer certifies on a prescribed form that it meets the eligibility requirements for this rule. (This is part of the 6056 form that is filed with the IRS.)

Determination of Full-Time Employees For Penalties

- No longer discussing applicable large employer status—but discussing the penalty provisions—who needs to be offered coverage to avoid penalties under 4980H
  - Must be offered to true full-time employees (and their dependents)
- The assessable payment under 4980H(a) and (b) is a monthly penalty that is determined based on the number of full-time employees employed at the end of each month
- There are 2 different methods for determining the number of full-time employees:
  - (1) The monthly measurement method, or
  - (2) The look-back measurement method

Use of the 2 Different Methods

- Under the proposed regulations, it appeared that an employer had to use one method or the other for its entire workforce
- The final regulations provide that with respect to each of the categories listed below, the employer may apply either the look-back measurement method or the monthly measurement method:
  - Salaried and hourly employees
  - Employees whose primary places of employment are in different states
  - Collectively bargained employees and non-collectively bargained employees
  - Each group of collectively bargained employees covered by a separate collective bargaining agreement

Use of the 2 Different Methods

- As you can see, an employer is not permitted to use the look-back measurement method for variable and seasonal employees, and the monthly measurement method for regular full-time employees
- The regulations provide additional rules addressing the transition of employees who experience a change in employment status from a position for which the monthly measurement method is used to a position where the look-back method is used (or vice versa)
  - This presentation does not discuss those rules

Monthly Measurement Method

- These full-time employees would be identified based on the hours of service for each calendar month
- Under this method, an employer will not be subject to an assessable payment under 4980H(a) with respect to a new employee because of a failure to offer coverage to that employee before the end of the period of 3 full calendar months beginning with the first full calendar month in which the employee is otherwise eligible for an offer of coverage (i.e., has not yet satisfied waiting period) if the employee is offered coverage no later than the day after the end of that 3-month period
- This means that if the plan provides that a new full-time employee is eligible, but must satisfy the waiting period before coverage takes effect, the employer will not be subject to the 4980H(a) penalty as long coverage is effective on or before the first day of the new employee's fourth full calendar month of employment

Monthly Measurement Method

- If that coverage is minimum value (MV), the employer will also not be subject to an assessable payment under 4980H(b) during that initial 3-month period
- For rehired employees, the employee must be treated as a continuing employee—and not a new employee—unless the employee had a period of at least 13 weeks during which no hours of service were credited (26 weeks for an employee of an educational organization)
  - Could also use the rule of parity rule (which is described later)

Monthly Measurement Method

- The special unpaid leave and employment break periods do not apply to the monthly measurement period (discussed later in presentation)
- Can use hours of service over successive one-week periods for determining hours of service in a month (the weekly rule)
  - Full-time status for certain calendar months is based on hours of service over four-week period for some months and five-week period for other months

Monthly Measurement Method

- Under the weekly rule, the period measured for the month must contain either the week that includes the first day of the month or the week that includes the last day of the month, but not both
- For calendar month calculated using 4 week periods, an employee with at least 120 hours of service is a full-time employee
- For calendar months calculated using five week periods, an employee with at least 150 hours of service is a full-time employee
- Standard monthly measurement method is based on 130 hours of service as the 30-hour/week equivalency

Look-Back Measurement Method

- This is a method under which employers may determine the status of an employee as a full-time employee during a future period (referred to as the stability period) based on the hours of service of the employee in a prior period (referred to as the measurement period)
- However, be aware of the rule for a new employee who is reasonably expected to be a full-time employee at his start date
  - While the measurement period and stability period still apply, they are applied differently for this group

Look-Back Measurement Method—New Employee

- If a new employee who is reasonably expected to be a full-time employee at his start date is offered coverage by the first day of the month immediately following the conclusion of the employee's initial 3 full calendar months of employment, the employer is not subject to a 4980H(a) assessment for those 3 months
  - To avoid liability under 4980H(b) for the 3 month period, the coverage offered after the initial 3 month period must provide minimum value (MV)

Look-Back Measurement Method—Variable Employees and Seasonal Employees

- New Variable Employees: Where the employer cannot determine whether the new employee is reasonably expected to be employed on average at least 30 hours of service per week during the initial measurement period
  - Because the employee's hours are variable or otherwise uncertain
- New Seasonal Employees: Where the employee is hired into in a position for which the customary annual employment is six months or less
  - That period should begin each calendar year in approximately the same part of the year, such as summer or winter

Look-Back Measurement Method for On-Going Employees

- An on-going employee is an employee who has been employed by the employer for at least one standard measurement period
  - An employer can determine each ongoing employee's full-time status by looking back at a measurement period (a time period of not less than 3 months but not more than 12 consecutive months, as chosen by the employer)

Look-Back Measurement Method for On-Going Employees

- If the employee was employed on average at least 30 hours of service per week during the standard measurement period, then the employer must treat the employee as a full-time employee during the immediately following stability period
  - Regardless of the number of hours of service during the subsequent stability period, so long as the person remains an employee

Look-Back Measurement Method for On-Going Employees

- For employees determined to be full-time employees (because they averaged at least 30/hours per week during the measurement period):
  - The duration of the stability period is at least the greater of:
    - (1) Six months, or
    - (2) The length of the standard measurement period

Look-Back Measurement Method for On-Going Employees

- If not a full-time employee during the standard measurement period (because did not average at least 30 hours/week):
  - Can treat the employee as not a full-time employee during the immediately following stability period
  - That stability period cannot be longer than the associated measurement period

Look-Back Measurement Method

- The look-back measurement method is designed to limit movement by employees in-and-out of the Exchanges and employer coverage
- Consequently, the **minimum** stability period for someone determined to be full-time employee would be 6 months
- On the other hand, if someone is determined **not** to be full-time, the employer cannot treat that employee as not full-time (and therefore not offer coverage) for longer than the measurement period

Look-Back Measurement Method

- An odd timing issue arises for an employer that uses a measurement period of less than 6 months
- If an employer has a 3-month measurement period and the employee tests as full-time, the employer must treat the person as full-time for 6 months
  - Remember that the stability period cannot be less than 6 months
- However, if the person tests as not full-time, the employer can only treat the person as not full-time for 3 months and then the employer needs to test again to see if the person is full-time
  - Remember that the employee cannot be excluded for longer than the measurement period

Look-Back Measurement Method for On-Going Employees

- Generally the standard measurement period and the stability period must be uniform for all employees, but can have different periods for the following categories of employees:
  - (a) each group of collectively bargained employees
  - (b) collectively bargained and non-collectively bargained employees
  - (c) salaried employees and hourly employees
  - (d) employees whose primary places of employment are in different states

Look-Back Measurement Method for On-Going Employees

- The employer can add an administrative period between the measurement period and the stability period
- The administrative period can last up to 90 days
  - It cannot reduce or lengthen the measurement period or the stability period
  - It must overlap with the prior stability period

New Employees-- Look-Back Measurement Method

- For an employer who uses the look-back measurement method for on-going employees, that employer must also use this optional method for new variable hour employees and for seasonal employees

New Employees—Look-Back Measurement Method —Variable Hour & Seasonal

- For these new employees, the initial measurement period can be between 3-12 months and an administrative period can be up to 90 days
  - The initial measurement period and the administrative period combined cannot extend beyond the last day of the first calendar month beginning on or after the one-year anniversary of the employee's start date (totaling, at most, 13 months and a fraction of a month)
  - The stability period for that new variable hour or seasonal employee must be the same length as the stability period for ongoing employees

New Employees—Look-Back Measurement Method—Variable Hour & Seasonal

- Example #3—Limitation on Administrative Period:
  - New variable hour employee is hired July 15, 2015
  - Employer's 6-month initial measurement period begins on the first day of the first month following employee's start date (August 1)
  - The 17-day period between July 15 and August 1 (the date the initial measurement period begins) counts toward the 90-day administrative period limit
  - The 6-month initial measurement period concludes January 31, 2016 – employee averaged more than 30 hours/week
  - The period between February 1, 2016 and the date the employer offers coverage cannot be more than 73 days (90 – 17)
  - Employee must be offered coverage by April 14, 2016 to avoid potential penalty liability

New Employees—Look-Back Measurement Method

- If determined to be a full-time employee during the initial measurement period, the initial stability period must be at least 6 months and no shorter than the initial measurement period (it must also be the same length as the standard stability period)

New Employees—Look-Back Measurement Method

- If determined NOT to be a full-time employee during the initial measurement period, can treat the employee as not a full-time employee during the initial stability period
  - The initial stability period cannot be more than one month longer than the initial measurement period and must not exceed the remainder of the standard measurement period

New Employees—Look-Back Measurement Method

- Example #4 – New Variable Hour Employee
  - New variable hour employee is hired July 15, 2015
  - Employer's 6-month initial measurement period begins on the first day of the first month following employee's start date (runs from August 1, 2015 to January 31, 2016)
  - During the two-month administrative period from February 1, 2016 through March 31, 2016, the employee is determined to not have been a full-time employee during the initial measurement period
  - Employee can be excluded from coverage for the initial stability period from April 1, 2016 through September 30, 2016
  - BUT NOT REALLY!!! SEE NEXT SLIDE

New Employees—Look-Back Measurement Method

- Example #4 Cont'd:
  - Other part of the rule: The initial stability period must not exceed the remainder of the standard measurement period (plus any admin period)
  - Assume the employer's standard measurement periods are the six-month periods from January 1 through June 30, and July 1 though December 31
  - New employee to ongoing employee transition rules require the employer to test the employee's status during the standard measurement period that overlaps the initial stability period
  - This means that the employee will be tested from January 1, 2016 to June 30, 2016 under the standard measurement period

Example #4 Continued

- Example #4 Cont'd:
  - Assume this employee tested as not being full-time during the initial measurement period (August 1, 2015 through January 31, 2016)—meaning no coverage from April 1, 2016 through September 30, 2016
  - But the employee now tests as being full-time during the standard measurement period that overlaps the initial stability period (January 1, 2016 through June 30, 2016)
  - The employee is now going to be treated as full-time during the standard stability period associated with the standard measurement period ending June 30, 2016 (even though the standard stability period begins before the end of the initial stability period that would have ended September 30, 2016)

New Employees—Change in Employment Status—Look-Back Measurement Method

- These rules apply to new variable hour or seasonal employees or new part-time employees who have a change in employment status during the initial measurement period
- A change in employment status means a material change in the position of employment that, had the employee begun employment in that new position, would have resulted in him being reasonably expected to be employed on average at least 30 hours of service per week

New Employees—Change in Employment Status—Look-Back Measurement Method

- A new variable hour or seasonal employee or part-time employee who has a change in employment status during the initial measurement period will be treated as a full-time employee as of the first day of the fourth full calendar month following the change
  - Or, if earlier and the employee averages more than 30 hours of service per week during the initial measurement period, the first day of the first month following the end of the initial measurement period

Change in Employment Status

- A change in employment status for an on-going employee does not change the on-going employee's status during the stability period
- There is one exception for an employee who experiences a change in status from full-time employee status to part-time employee status in the initial measurement period
  - The exception is optional and explained on the next slide

Change in Employment Status

- An employer is allowed to apply the monthly measurement method to such an employee within 3 months of the change if the employee actually averages less than 30 hours per week for each of the 3 months following the change in employment status and if the employer has offered the employee continuous coverage that provides minimum value (MV) from at least the 4th month of the employee's employment

Example #5—New Employee is a Variable Hour Employee

- The employer has a 12-month standard measurement period for ongoing employees starting on 10/15
- Stability period starts on 1/1
- Administrative period is from 10/15 through 12/31
- For NEW variable employees, Employer uses a 12-month initial measurement period that begins on the start date and applies an administrative period from the end of the initial measurement period through the end of the 1st calendar month beginning on or after the end of the initial measurement period.

Example #5--Continued

- Employer hires Employee Y on 5/10/15. Employee Y's initial measurement period runs from 5/10/15 through 5/9/16
- Employee Y is determined to be a full-time employee during this initial measurement period
- Employee Y is offered coverage for the stability period that runs from 7/1/16 through 6/30/17

Example #5--Continued

- Employer used an initial measurement period that does not exceed 12 months (5/10/15 through 5/9/16)
- Employer used an administrative period totaling not more than 90 days (5/10/16 to 6/30/16)
- Employer used a combined initial measurement period and administrative period that did not last beyond the final day of the first calendar month beginning on or after the one-year anniversary date of Y's start date (no later than 6/30/16)
- Y is offered coverage for the stability period that runs from 7/1/16 through 6/30/17

Example #5--Continued

- Employer must test Y again based on the period from 10/15/15 through 10/14/16 (the Employer's first standard measurement period that begins after Y's start date)

Rehired or Return From Unpaid Leave

- If the period for which no hours of service is credited is at least 13 consecutive weeks (or 26 weeks for an educational organization), that employee can be treated as a new employee when he returns to work
- Can use the rule of parity for periods less than 13 weeks (or 26 weeks for an educational organization)
  - Treated as terminated and rehired as a new employee if the period with no credited hours of service is at least 4 weeks long and is longer than the employee's period of employment immediately preceding that period

Rehired or Return From Unpaid Leave

- Example of Rule of Parity:
  - The employee works for 4 weeks, terminates employment, and is rehired ten weeks after terminating employment
  - Can be treated as a new employee because the 10-week period with no credited hours of service is longer than the immediately preceding 4-week period of employment

Rehired or Return From Unpaid Leave—Look-Back Measurement Method Example

- For an employee who is treated as a continuing employee (as opposed to an employee who is treated as terminated and rehired), the measurement period and the stability period that would have applied had the employee not experienced the period with no hours of service—would continue to apply on his return to service.
  - For the example below, assume that the employer offers all full-time employee coverage
  - If the employee returns during the stability period in which he would have been treated as a full-time employee, he is treated as a full-time employee through the end of that stability period
  - Must offer coverage as soon as administratively practicable, and no later than the first day of the calendar month following return
  - If continuing employee declined coverage during stability period previously, not required to offer coverage again upon return for duration of stability period

Unpaid Leaves

- There are rules for averaging hours when applying the look-back measurement method to measurement periods that include special unpaid leave

- Special unpaid leave refers to a period of unpaid leave under FMLA, USERRA and unpaid leave on account of jury duty

Unpaid Leaves—Look-Back Measurement Method

- Determine the average hours of service per week for the employee during the measurement period excluding special unpaid leave, and use that average for the entire measurement period
- Alternatively, treat employee as credited with hours of service for special unpaid leave at a rate equal to the average weekly rate at which he was credited with hours of service during the weeks in the measurement period that are not special unpaid leaves

Unpaid Leaves

- There are special rules for educational organizations
  - We have not included those rules in this presentation
- These averaging rules do not apply when using the monthly measurement period

Temporary Staffing Agencies

- There are special factors for determining variable-hour status of temporary staffing agency employees
  - This presentation does not discuss those rules
- REMEMBER to look for which entity is the true common law employer
- Where the staffing firm is NOT the common law employer, and the staffing firm offers coverage to the employee on behalf of the employer, the offer is considered made by the employer as long as the employer pays an additional fee to the staffing firm if the employee enrolls in the health coverage

Compliance with Section 4980H—In General

- The determination of applicable large employer status is made on a controlled group basis
- Once the 4980H(a) penalty is triggered, the applicable large employer is permitted one reduction of 30 full-time employees (80 full-time employees in 2015) in calculating the liability. That reduction must be allocated ratably among the members of the applicable employer based on each member's number of full-time employees

Compliance with Section 4980H—In General

- The determination of whether an employer is subject to an assessable payment, and the amount of any such payment, is determined on a member-by-member basis
  - The liability for, and the amount of, the assessable payment is computed and assessed separately for each member

Compliance with Section 4980H(a)

- The employee must also have the opportunity to decline an offer for coverage that is not minimum value coverage or that is not affordable
  - Essentially, the employer may not render an employee ineligible for a premium tax credit on the exchange by providing an employee with mandatory coverage that does not meet minimum value
  - The offer of coverage by an employer during the collective bargaining process between the union and the employer that is not accepted by the union is NOT an offer of coverage to the employee

4980H(b)—In General

- The penalty can occur because:
  - (a) The coverage is unaffordable for an employee who receives a premium tax credit or cost-sharing reduction on the exchange, or
  - (b) The coverage under the plan does not provide minimum value coverage for an employee who receives a premium tax credit or cost-sharing reduction on the exchange, or
  - (c) The employer offers coverage to at least 95% (70% in 2015) but less than 100% of its full-time employees (and their dependents) and one or more of those employees who are not offered coverage receive a premium tax credit or cost-sharing reduction on the exchange

4980H(b)—Affordable Coverage

- For purposes of eligibility for the premium tax credit, coverage for an employee under an employer-sponsored plan is affordable if the employee's required contribution for the lowest cost self-only coverage does not exceed 9.5% of the employee's household income for the taxable year

4980H(b)—Affordability Safe Harbors

- An employer may use one or more of the safe harbors for all of its employees or for any reasonable category of employees, provided it does so on a uniform and consistent basis for all employees in a category
- Reasonable categories include specified job categories, nature of compensation (such as salaried or hourly), geographic location, and similar bona fide business criteria

4980H(b)—Affordability Safe Harbors

- Form W-2 Safe Harbor—Based on amount to be reported in Box 1 of W-2. For safe harbor to apply:
  - (1) An employer must offer its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan, and
  - (2) The required employee contribution toward the self-only premium for the employer's lowest cost coverage that provides minimum value must not exceed 9.5% of the employee's W-2 wages for that calendar year

Affordability Safe Harbor—Form W-2

- For example, the employer determines whether it met the Form W-2 safe harbor for 2015 for an employee by looking at that employee's 2015 W-2 wages
- This safe harbor also requires that the employee contribution remain a consistent amount or percentage (subject to a dollar limit) of Form W-2 wages during the plan year
  - Means that the employer cannot make discretionary adjustments to the employee contribution amount for a pay period to use up remaining amount within 9.5%

Affordability Safe Harbor—Form W-2

- For an employee who was not a full-time employee for the entire calendar year, the Form W-2 safe harbor is applied by adjusting the employee's Form W-2 wages to reflect the period when the employee was offered coverage
- Example: Employee worked 8 months of 2015 calendar year. He was offered coverage during 5 of those months. The 2015 W-2 shows wages of $24,000.
  - The adjusted wages is $24,000 multiplied by 5/8ths (or $15,000).

Affordability Safe Harbor—Rate of Pay

- For an hourly employee: Coverage treated as affordable for a calendar month if the employee's required contribution for the calendar month for the lowest cost self-only coverage that provides minimum value does not exceed 9.5% of an amount equal to 130 hours multiplied by the lower of:
  - (1) The employee's hourly rate of pay as of the first day of the coverage period (generally, the first day of the plan year), or
  - (2) The employee's lowest hourly rate of pay during the calendar month

Affordability Safe Harbor—Rate of Pay

- The affordability of the rate of pay safe harbor is not altered by a leave of absence or reduction in hours worked
- For example, if an hourly employee treated as a full-time employee earns $10 per hour in a calendar month (and earned at least $10 per hour as of the first day of the coverage period), but has one or more calendar months in which the employee has a significant amount of unpaid leave or otherwise reduced hours, the employer may still require an employee contribution of up to 9.5% of the $10 multiplied by 130 hours ($123.50)

Affordability Safe Harbor—Rate of Pay

- For a non-hourly (i.e., salaried) employee: The employee's required contribution for the calendar month for the lowest cost self-only coverage that provides minimum value cannot exceed 9.5% of the employee's monthly salary, as of the first day of the coverage period
  - Cannot use this safe harbor for a non-hourly employee if the employee's monthly salary is reduced (including because of a reduction in work hours)

Affordability Safe Harbor—Federal Poverty Line

- Employer-provided coverage offered to an employee is affordable if the employee's cost for the lowest cost self-only coverage that provides minimum value under the plan does not exceed 9.5% of the federal poverty line for a single individual
- Employers are permitted to use the federal poverty guidelines in effect six months prior to the beginning of the plan year
  - 2014: $11,670
  - $11,670 x 0.095 = $1,108.65 / 12 = $92.38/month

Additional Transition Rules

- For 2015, there are additional transition rules for non-calendar plans, but those are not discussed in this presentation
- For 2014, employers may adopt a transition measurement period that is at least 6 months, begins no later than July 1, 2014, and ends no earlier than 90 days (maximum administrative period length) before the first plan year beginning on or after January 1, 2015
  - For example, calendar year plan with 12-month stability period beginning January 1, 2015 may use a measurement period from April 15, 2014 through October 14, 2014 (six months), followed by an administrative period ending on December 31, 2014

Additional Transition Rules

- Offer of Coverage for 2015—If an ALE member offers coverage to a full-time employee no later than the first day of the first payroll period that begins in January of 2015, the employee will be treated as having been offered coverage for all of 2015
- There is special interim guidance with respect to multiemployer plans, but that is not discussed in this presentation

Additional Transition Rules

- For the 2015 calendar year, an employer may determine its status as an ALE by reference to a period of at least six consecutive calendar months, as chosen by the employer, during the 2014 calendar year (rather than the entire 2014 calendar year).
- For purposes of determining whether the employer meets the requirements of the seasonal worker exception to ALE status for 2015, the employer must use the entire calendar year (i.e., all of 2014).

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