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26 CFR Parts 1, 54 and 301

Shared Responsibility for Employers Regarding Health Coverage;  
Proposed Rule

**DEPARTMENT OF THE TREASURY****Internal Revenue Service****26 CFR Parts 1, 54 and 301**

[REG-138006-12]

RIN 1545-BL33

**Shared Responsibility for Employers Regarding Health Coverage****AGENCY:** Internal Revenue Service (IRS), Treasury.**ACTION:** Notice of proposed rulemaking and notice of public hearing.

**SUMMARY:** This document contains proposed regulations providing guidance under section 4980H of the Internal Revenue Code (Code) with respect to the shared responsibility for employers regarding employee health coverage. These proposed regulations would affect only employers that meet the definition of “applicable large employer” as described in these proposed regulations. As discussed in section X of this preamble, employers may rely on these proposed regulations for guidance pending the issuance of final regulations or other applicable guidance. This document also provides notice of a public hearing on these proposed regulations.

**DATES:** Written or electronic comments must be received by March 18, 2013. Outlines of topics to be discussed at the public hearing scheduled for April 23, 2013, at 10:00 a.m., must be received by April 3, 2013.

**ADDRESSES:** Send submissions to: CC:PA:LPD:PR (REG-138006-12), Internal Revenue Service, room 5203, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-138006-12), Courier’s Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC. Alternatively, taxpayers may submit comments electronically via the Federal eRulemaking Portal at <http://www.regulations.gov> (IRS REG-138006-12). The public hearing will be held in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Concerning the proposed regulations, call Kathryn Bjornstad at (202) 927-9639; concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, call Oluwafunmilayo Taylor at (202) 622-7180 (not toll-free numbers).

**SUPPLEMENTARY INFORMATION:****Background**

This document contains proposed Pension Excise Tax Regulations (26 CFR part 54) under section 4980H of the Code. Section 4980H was added to the Code by section 1513 of the Patient Protection and Affordable Care Act, enacted March 23, 2010, Public Law 111-148, and amended by section 1003 of the Health Care and Education Reconciliation Act of 2010, enacted March 30, 2010, Public Law 111-152, and further amended by the Department of Defense and Full-Year Continuing Appropriations Act, 2011, Public Law 112-10 (125 Stat. 38, (2011)), (collectively, the Affordable Care Act). Section 4980H is effective for months beginning after December 31, 2013.

*I. Section 4980H***In General**

Section 4980H generally provides that an applicable large employer is subject to an assessable payment if either (1) the employer fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage<sup>1</sup> (MEC) under an eligible employer-sponsored plan and any full-time employee is certified to the employer as having received an applicable premium tax credit or cost-sharing reduction (section 4980H(a) liability), or (2) the employer offers its full-time employees (and their dependents) the opportunity to enroll in MEC under an eligible employer-sponsored plan and one or more full-time employees is certified to the employer as having received an applicable premium tax credit or cost-sharing reduction (section 4980H(b) liability). Generally, section 4980H(b) liability may arise because, with respect to a full-time employee who has been certified to the employer as having received an applicable premium tax credit or cost-sharing reduction, the employer’s coverage is unaffordable within the meaning of section 36B(c)(2)(C)(i) or does not provide minimum value within the meaning of section 36B(c)(2)(C)(ii).<sup>1</sup> As noted, an employer may be liable for an assessable payment under section 4980H(a) or (b) only if one or more full-time employees are certified to the employer as having received an applicable premium tax credit or cost-sharing reduction.

The assessable payment under section 4980H(a) is based on all (excluding the first 30) full-time employees, while the

assessable payment under section 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 with respect to that employee’s purchase of health insurance for himself or herself on an Exchange. In contrast, an employee’s receipt of a premium tax credit or cost sharing reduction with respect to coverage for a dependent will not result in liability for the employer under section 4980H. Under section 4980H(b), liability is contingent on whether the employer offers minimum essential coverage under an eligible employer-sponsored plan, and whether that coverage is affordable and provides minimum value, as determined by reference to the cost and characteristics of employee-only coverage offered to the employee. Section 4980H(c)(4) provides that a full-time employee with respect to any month is an employee who is employed on average at least 30 hours of service per week. An applicable large employer with respect to a calendar year is defined in section 4980H(c)(2) as an employer that employed an average of at least 50 full-time employees on business days during the preceding calendar year. For purposes of determining whether an employer is an applicable large employer, full-time equivalent employees (FTEs), which are statutorily determined based on the hours of service of employees who are not full-time employees, are taken into account.

*II. Previous Guidance*

The Treasury Department and the IRS have published four notices addressing issues under section 4980H. Each notice, briefly summarized in this section of the preamble, outlined potential approaches to future guidance, and each requested public comments. See Notice 2011-36 (2011-21 IRB 792), Notice 2011-73 (2011-40 IRB 474), Notice 2012-17 (2012-9 IRB 430), and Notice 2012-58 (2012-41 IRB 436). Notice 2012-58 also provided guidance that taxpayers may rely upon for periods specified in the notice. Extensive public comments were submitted in response to each of the four notices. See § 601.601(d)(2).

*A. Notice 2011-36*

Notice 2011-36 addressed the definitions of employer, employee, and hours of service. The notice also specifically described and requested comments on a possible approach that would permit employers to use an optional “look-back/stability period safe harbor” to determine whether ongoing employees (that is, employees other

<sup>1</sup> See section III of the Background section of the preamble for a discussion of MEC, minimum value and affordability.

than new employees) are full-time employees for purposes of determining and calculating assessable payments under section 4980H. (In the proposed regulations and the remainder of this preamble, this optional safe harbor method generally is referred to, for convenience, as the “look-back measurement method.”) This method may not be used for purposes of determining status as an applicable large employer, which is prescribed by the statute.

Under this method, an employer would determine each ongoing employee’s status as a full-time employee by looking back at a defined period of not less than three but not more than 12 consecutive calendar months, as chosen by the employer (the measurement period), to determine whether during that measurement period the employee was employed on average at least 30 hours of service per week. If the employee were determined to be employed on average at least 30 hours of service per week during the measurement period, then the employee would be treated as a full-time employee during a subsequent period (the stability period), regardless of the employee’s hours of service during the stability period, so long as he or she remained an employee. For an employee who has been determined to be employed on average at least 30 hours of service per week during the measurement period, the stability period would be a period that followed the measurement period, and the duration of which was at least the greater of six consecutive calendar months or the length of the measurement period. If the employee were employed on average less than 30 hours per week during the measurement period, the employer would be permitted to treat the employee as not a full-time employee during a stability period that followed the measurement period, but the length of the stability period could not exceed the length of the measurement period.

Notice 2011–36 also outlined potential approaches under section 4980H for determining whether an employer is an applicable large employer, including calculating the number of the employer’s full-time employees and full-time equivalents, defining employer and employee, and calculating the number of hours of service completed by an employee.

#### B. Notice 2011–73

Notice 2011–73 addressed the requirement that, in order to avoid a potential assessable payment under section 4980H(b), the coverage offered

be affordable, generally meaning that the employee portion of the self-only premium for the employer’s lowest cost coverage that provides minimum value not exceed 9.5 percent of the employee’s household income. Recognizing the inability of employers to ascertain their employees’ total household incomes, Notice 2011–73 described a potential safe harbor under which coverage offered by an employer to an employee would be treated as affordable for section 4980H liability purposes if the employee’s required contribution for that coverage was no more than 9.5 percent of the employee’s wages from the employer reported in Box 1 of the Form W–2 (Form W–2 wages) instead of household income. This potential affordability safe harbor would apply in determining whether an employer is subject to the assessable payment under section 4980H(b), but would not affect an employee’s eligibility for a premium tax credit under section 36B.

#### C. Notice 2012–17

Notice 2012–17 stated that the Treasury Department and the IRS intended to incorporate the look-back measurement method described in Notice 2011–36 and the affordability safe harbor described in Notice 2011–73 into upcoming proposed regulations or other guidance.

Notice 2012–17 also described and requested comments on a potential approach for determining the full-time status of a new employee. Under that approach, if, based on the facts and circumstances at the date the employee began providing services to the employer (the start date), a new employee was reasonably expected to be employed an average of 30 hours of service per week on an annual basis and was employed full-time during the first three months of employment, the employer’s group health plan would be required to offer the employee coverage as of the end of that period in order to avoid a potential section 4980H assessable payment for periods after the end of that three-month period. In contrast, if, based on the facts and circumstances at the start date, it could not reasonably be determined whether the new employee was expected to be employed on average at least 30 hours of service per week because the employee’s hours were variable or otherwise uncertain, employers would be given three months or, in certain cases, six months, without incurring an assessable payment under section 4980H, to determine whether the employee was a full-time employee.

In response to Notice 2012–17, many commenters requested that employers

be allowed to use a measurement period of up to 12 months to determine the status of new employees, similar to the potential approach outlined in Notice 2011–36 to determine the status of ongoing employees (although some commenters were not in favor of allowing a measurement period of up to 12 months for new employees).

#### D. Notice 2012–58

Notice 2012–58 provided employers reliance, through at least the end of 2014, on the guidance contained in that notice and on the following approaches described in the prior notices discussed in this section of the preamble: (1) For ongoing employees, an employer will be permitted to use measurement and stability periods of up to 12 months; (2) for new employees who are reasonably expected to be full-time employees, an employer that maintains a group health plan that meets certain requirements will not be subject to an assessable payment under section 4980H for failing to offer coverage to the employee for the initial three months of employment; and (3) for all employees, an employer will not be subject to an assessable payment under section 4980H(b) for failure to offer affordable coverage to an employee if the coverage offered to that employee was affordable based on the employee’s Form W–2 wages and otherwise provided minimum value.

Notice 2012–58 also announced and provided similar reliance on a revised optional look-back measurement method for new employees with variable hours and new seasonal employees that more closely resembled the optional method for ongoing employees described in Notice 2011–36. The expanded method provides employers the option to use a measurement period of up to 12 months to determine whether new variable-hour employees or seasonal employees are full-time employees, without being subject to an assessable payment under section 4980H for this period with respect to those employees. Under this approach, a new employee is a variable hour employee if, based on the facts and circumstances at the employee’s start date, it cannot be determined that the employee is reasonably expected to be employed on average at least 30 hours of service per week.

In addition, Notice 2012–58 proposed and provided similar reliance on an option for employers to use specified administrative periods (in conjunction with specified measurement periods) for ongoing employees and certain new employees, and facilitated a transition for new employees from the determination method the employer

chose to use for new employees to the determination method the employer chose to use for ongoing employees. Notice 2012–58 provided employers reliance for these options, through at least the end of 2014.

### III. Minimum Essential Coverage, Minimum Value and Affordability

Under section 4980H, an applicable large employer member<sup>2</sup> may be subject to an assessable payment under section 4980H(a) if the employer fails to offer its full-time employees (and their dependents) the opportunity to enroll in MEC under an eligible employer-sponsored plan. Also, under section 4980H(b), an applicable large employer member may be subject to an assessable payment if its offer of MEC under an eligible employer-sponsored plan is unaffordable (within the meaning of section 36B(c)(2)(C)(i)) or does not provide minimum value (within the meaning of section 36B(c)(2)(C)(ii)). The determinations of MEC, minimum value and affordability are all determined by reference to other statutory provisions, but also all relate to the determination of liability under section 4980H, as described in this section of the preamble.

#### A. Minimum Essential Coverage—In General

MEC is defined in section 5000A(f). Section 5000A(f)(1)(B) provides that MEC includes coverage under an eligible employer-sponsored plan. Under section 5000A(f)(2), an eligible employer-sponsored plan is a group health plan or group health insurance coverage offered by an employer to an employee that is a governmental plan (within the meaning of section 2791(d)(8) of the Public Health Service Act (42 U.S.C. 300gg–91(d)(8))), any other plan or coverage offered in the small or large group market, or a grandfathered plan offered in the group market. Section 5000A(f)(3) provides that MEC does not include health insurance coverage which consists of coverage of excepted benefits described in section 2791(c)(1) of the Public Health Service Act, or sections 2971(c)(2), (3) or (4) of the Public Health Service Act if the benefits are provided under a separate policy, certificate, or contract of insurance. Future regulations under section 5000A are expected to provide further guidance on the

<sup>2</sup> For explanation of applicable large employer and applicable large employer member, see section I.A.2. and section III.A. of the preamble. If the applicable large employer consists of only one entity, rather than a controlled group of entities, then the applicable large employer member is the applicable large employer.

definition of MEC and eligible employer-sponsored plans. These regulations under section 5000A are expected to provide that an employer-sponsored plan will not fail to be MEC solely because it is a plan to reimburse employees for medical care for which reimbursement is not provided under a policy of accident and health insurance (a self-insured plan).

#### B. Minimum Value—In General

If the coverage offered by an applicable large employer fails to provide minimum value, an employee may be eligible to receive a premium tax credit. Under section 36B(c)(2)(C)(ii), a plan fails to provide minimum value if the plan's share of the total allowed costs of benefits provided under the plan is less than 60 percent of those costs. Section 1302(d)(2)(C) of the Affordable Care Act sets forth the rules for calculating the percentage of total allowed costs of benefits provided under a group health plan or health insurance plan. Notice 2012–31 (2012–20 IRB 906) requested comments on potential approaches for determining minimum value.

On November 26, 2012, the Department of Health and Human Services (HHS) issued proposed regulations providing guidance on methodologies for determining minimum value (77 FR 70644). Those HHS proposed regulations provide that the percentage of the total allowed cost of benefits will be determined using one of the main methodologies described in those proposed regulations and Notice 2012–31. These methodologies include a minimum value calculator which will be made available by HHS and the IRS. The proposed regulations also provide that minimum value for employer-sponsored self-insured group health plans and insured large group health plans will be determined using a standard population that is based upon large self-insured group health plans. Also, as there is no requirement that employer-sponsored self-insured and insured large group health plans offer all categories of essential health benefits or conform to any of the essential health benefit benchmarks, the proposed regulations describe how to take account of a benefit that an employer offers that is outside the parameters of the minimum value calculator. The Treasury Department and the IRS intend to propose additional guidance under section 36B with respect to minimum value. All comments received in response to Notice 2012–31 are being considered in connection with the development of that guidance.

#### C. Affordability—In General

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 (within the meaning of section 5000A(e)(1)(B)) for self-only coverage<sup>3</sup> does not exceed 9.5 percent of the employee's household income for the taxable year. See section 36B(c)(2)(C)(i) and § 1.36B–1(e). Household income for purposes of section 36B is defined as the modified adjusted gross income of the employee and any members of the employee's family (including a spouse and dependents) who are required to file an income tax return. Section 36B(d)(2)(A). Modified adjusted gross income means adjusted gross income (within the meaning of section 62) increased by (1) amounts excluded from gross income under section 911, (2) the amount of any tax-exempt interest a taxpayer receives or accrues during the taxable year, and (3) an amount equal to the portion of the taxpayer's social security benefits (as defined in section 86(d)) which is not included in gross income under section 86 for the taxable year. See section 36B(d)(2)(B) and § 1.36B–1(e)(2).

#### Explanation of Provisions

The proposed regulations generally incorporate the provisions of Notice 2012–58, as well as many of the provisions of Notices 2011–36, 2011–73, and 2012–17, with some modifications in response to comments. The regulations also propose guidance on additional issues. Employers will be permitted to rely on these proposed regulations to the extent described in the section X of this preamble.

The proposed regulations are organized as follows: definitions (proposed § 54.4980H–1), rules for determining status as an applicable large employer and applicable large employer member (proposed § 54.4980H–2), rules for determining full-time employees (proposed § 54.4980H–3), rules for determining assessable payments under section 4980H(a) (proposed § 54.4980H–4), rules for determining whether an employer is subject to assessable payments under section 4980H(b) (proposed § 54.4980H–5), and rules relating to the administration and assessment of assessable payments under section 4980H (proposed § 54.4980H–6).

<sup>3</sup> TD 9590 (77 FR 30377) reserved the rules under section 36B on determining affordability of coverage under an eligible employer-sponsored plan for individuals eligible for coverage because of a relationship to an employee.

## *I. Determination of Applicable Large Employer Status*

### A. Identification of Employer and Employees

#### 1. In General

Only applicable large employers may be liable for an assessable payment under section 4980H. Section 4980H(c)(2) defines an applicable large employer with respect to a calendar year as an employer that employed an average of at least 50 full-time employees (taking into account FTEs) on business days during the preceding calendar year. The proposed regulations adopt the position outlined in Notice 2011–36 under which an employee is an individual who is an employee under the common law standard, and an employer is the person that is the employer of an employee under the common law standard. Under the common law standard, an employment relationship exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. Under the common law standard, an employment relationship exists if an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so. See §§ 31.3121(d)–1(c), 31.3231(b)–1(a)(2), 31.3306(i)–1(b), and 31.3401(c)–1(b).

Several commenters responding to Notice 2011–36 asked that the definition of employer in the Fair Labor Standards Act be used instead of the common law employer. However, the term employer, as generally used in the Code, refers to the common law employer. Further, use of the common law standard is consistent with the definition of employer generally applied in Title I of the Affordable Care Act (which includes section 4980H). Specifically, section 1551 of the Affordable Care Act provides that “unless specifically provided otherwise, the definitions contained in section 2791 of the Public Health Service Act (42 U.S.C. 300gg–91) shall apply with respect to this title.” Section 2791 of the Public Health Service Act provides that the term employer has the meaning given that term in section 3(5) of the Employee Retirement Income Security Act (ERISA) (29 U.S.C. 1002(5)), that is, the common

law employer. For these reasons, the proposed regulations do not adopt this comment and instead use the common law standard for determining an employee’s employer.

As noted in Notice 2011–36, section 414(n), which treats leased employees (as defined in section 414(n)(2)) as employees of the service recipient for various purposes, does not cross-reference section 4980H (and is not cross-referenced by section 4980H) and accordingly does not apply for section 4980H purposes. In addition, for purposes of section 4980H, a sole proprietor, a partner in a partnership, or a 2-percent S corporation shareholder is not an employee; but an individual who provides services as both an employee and a non-employee (such as an individual serving as both an employee and a director) is an employee with respect to his or her hours of service as an employee.

The identification of full-time employees for purposes of determining status as an applicable large employer under section 4980H is, by statute, performed on a look-back basis using data from the prior year, taking into account the hours of service of all employees employed in the prior year (full-time employees and non-full-time employees). Therefore, the look-back measurement method that may be used to identify full-time employees for purposes of determining potential section 4980H(a) or (b) liability does not apply for purposes of determining status as an applicable large employer. Instead, the determination of whether an employer is an applicable large employer for a year is based upon the actual hours of service of employees in the prior year. But see section IX.E. of this preamble for transition relief allowing use of a shorter look-back period in 2013 for purposes of determining applicable large employer status for 2014.

#### 2. Application of Aggregation Rules

For purposes of counting the number of full-time and full-time equivalent employees for determining whether an employer is an applicable large employer, section 4980H(c)(2)(C)(i) provides that all entities treated as a single employer under section 414(b), (c), (m), or (o) are treated as a single employer for purposes of section 4980H. Thus, all employees of a controlled group under section 414(b) or (c), or an affiliated service group under section 414(m), are taken into account in determining whether the members of the controlled group or affiliated service group together constitute an applicable large employer.

Section 4980H applies to all common law employers, including an employer that is a government entity (such as Federal, State, local or Indian tribal government entities) and an employer that is an organization described in section 501(c) that is exempt from Federal income tax under section 501(a). The proposed regulations reserve on the application of the section 414(b), (c), (m), and (o) aggregation rules in section 4980H(c)(2)(C)(i) to government entities and churches, or a convention or association of churches (as defined in § 1.170A–9(b)). Until further guidance is issued, government entities, churches, and a convention or association of churches may rely on a reasonable, good faith interpretation of section 414(b), (c), (m), and (o) in determining whether a person or group of persons is an applicable large employer.

Several commenters asked for clarification of whether the aggregation rules used in determining applicable large employer status also applied for purposes of determining liability for, and the amount of, an assessable payment. The proposed regulations clarify that for a calendar year during which an employer is an applicable large employer, the section 4980H standards generally are applied separately to each person that is a member of the controlled group comprising the employer (with each such person referred to as an applicable large employer member) in determining liability for, and the amount of, any assessable payment. For example, if an applicable large employer is comprised of a parent corporation and 10 wholly owned subsidiary corporations, each of the 11 corporations, regardless of the number of employees, is an applicable large employer member. For a discussion of the related information reporting requirements for applicable large employer members under section 6056, see section VII of this preamble.

#### 3. Foreign Employers and Foreign Employees

Some commenters on Notice 2011–36 requested guidance on whether foreign employees working for foreign entities are excluded in determining status as an applicable large employer, and in determining any potential liability under section 4980H. For example, commenters asked whether a large foreign corporation with a small U.S. presence (under 50 employees) would be subject to section 4980H. These proposed regulations generally address these issues through the definition of hours of service, discussed in section II.B.2. of this preamble.

#### 4. Successor Employers

Section 4980H(c)(2)(C)(iii) provides that, for purposes of determining applicable large employer status, an employer includes a predecessor employer. The regulations reserve, and therefore do not address, the specific rules for identifying a predecessor employer (or the corresponding successor employer). Rules for identifying successor employers have been developed in the employment tax context for determining when wages paid by a predecessor may be attributed to a successor employer (see § 31.3121(a)(1)–1(b)). The Treasury Department and the IRS anticipate that rules similar to this provision may form the basis for the rule on identifying a predecessor or successor employer for purposes of the section 4980H applicable large employer determination, and invite comments on whether these employment tax rules are appropriate and whether any modifications of the rules may be necessary. Until further guidance is issued, taxpayers may rely upon a reasonable, good faith interpretation of the statutory provision on predecessor (and successor) employers for purposes of the applicable large employer determination.

For purposes of assessment and collection, and not for purposes of the applicable large employer determination, State law may provide for liability of a successor employer for a section 4980H assessable payment which has been, or could have been, imposed on a predecessor employer. In that case, the liability could be assessed, paid, and collected from the successor employer in accordance with section 6901.

#### 5. New Employers

Section 4980H(c)(2)(C)(ii) and these proposed regulations provide that an employer not in existence during an entire preceding calendar year is an applicable large employer for the current calendar year if it is reasonably expected to employ an average of at least 50 full-time employees (taking into account FTEs) on business days during the current calendar year. One commenter suggested that a new employer be exempted from any potential assessable payment under section 4980H, or alternatively, that the standard should be a minimum period of operations in the preceding calendar year. The proposed regulations do not adopt this suggestion because it is inconsistent with the statutory provision addressing new employers in section 4980H(c)(2)(C)(ii). However,

comments are requested on whether the final regulations should adopt any safe harbors or presumptions to assist a new employer in determining whether it is an applicable large employer.

#### 6. Seasonal Workers

Section 4980H(c)(2)(B)(ii) provides that if an employer's workforce exceeds 50 full-time employees for 120 days or fewer during a 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. Notice 2011–36 provided that, for this purpose only, four calendar months would be treated as the equivalent of 120 days. In response to comments, and consistent with Notice 2011–36, these proposed regulations provide that, solely for purposes of the seasonal worker exception in determining whether an employer is an applicable large employer, an employer may apply either a period of four calendar months (whether or not consecutive) or a period of 120 days (whether or not consecutive). Because the 120-day period referred to in section 4980H(c)(2)(B)(ii) is not part of the definition of the term seasonal worker, an employee would not necessarily be precluded from being treated as a seasonal worker merely because the employee works, for example, on a seasonal basis for five consecutive months. In addition, the 120-day period referred to in section 4980H(c)(2)(B)(ii) is relevant only for applying the seasonal worker exception for determining status as an applicable large employer, and is not relevant for determining whether an employee is a seasonal employee for purposes of the look-back measurement method (meaning that an employee who provides services for more than 120 days per year may nonetheless qualify as a seasonal employee). See section II.C.2. of this preamble for a discussion of the application of the look-back measurement method to seasonal employees.

For purposes of the definition of an applicable large employer, section 4980H(c)(2)(B)(ii) defines a seasonal worker as a worker who performs labor or services on a seasonal basis, as defined by the Secretary of Labor, including (but not limited to) workers covered by 29 CFR 500.20(s)(1) and retail workers employed exclusively during holiday seasons. This definition of seasonal worker is incorporated in these proposed regulations. The Department of Labor (DOL) regulations at 29 CFR 500.20(s)(1) to which section 4980H(c)(2)(B)(ii) refers, and that

interpret the Migrant and Seasonal Agricultural Workers Protection Act, provide that “[l]abor is performed on a seasonal basis where, ordinarily, 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. A worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though he may continue to be employed during a major portion of the year.”

After consultation with the DOL, the Treasury Department and the IRS have determined that the term seasonal worker, as incorporated in section 4980H, is not limited to agricultural or retail workers. Until further guidance is issued, employers may apply a reasonable, good faith interpretation of the statutory definition of seasonal worker, including a reasonable good faith interpretation of the standard set forth under the DOL regulations at 29 CFR 500.20(s)(1) and quoted in this paragraph, applied by analogy to workers and employment positions not otherwise covered under those DOL regulations.

Several commenters suggested that seasonal workers not be counted in determining whether an employer is an applicable large employer. However, because section 4980H(c)(2) requires the inclusion of seasonal workers in the applicable large employer determination (and then excludes them only if certain conditions are satisfied), this suggestion is not adopted.

#### 7. Full-Time Equivalent Employees

Solely for purposes of determining whether an employer is an applicable large employer for the current calendar year, section 4980H(c)(2)(E) provides that the employer must calculate the number of full-time equivalent employees (FTEs) it employed during the preceding calendar year and count each FTE as one full-time employee for that year. The proposed regulations apply this provision using the calculation method for FTEs that was included in Notice 2011–36. Under that method, all employees (including seasonal workers) who were not full-time employees for any month in the preceding calendar year are included in calculating the employer's FTEs for that month by (1) calculating the aggregate number of hours of service (but not more than 120 hours of service for any employee) for all employees who were not employed on average at least 30 hours of service per week for that

month, and (2) dividing the total hours of service in step (1) by 120. This is the number of FTEs for the calendar month.

In determining the number of FTEs for each calendar month, fractions are taken into account. For example, if for a calendar month employees who were not employed on average at least 30 hours of service per week have 1,260 hours of service in the aggregate, there would be 10.5 FTEs for that month. However, after adding the 12 monthly full-time employee and FTE totals, and dividing by 12, all fractions would be disregarded. For example, 49.9 full-time employees (including FTEs) for the preceding calendar year would be rounded down to 49 full-time employees (and thus the employer would not be an applicable large employer in the current calendar year).

Some commenters suggested that the definition of FTE in section 45R be used, that equivalencies be used, or that employees not averaging at least 30 hours of service per week be counted at fractions of their hours of service. Because section 4980H(c)(2)(E) prescribes specific definitions and steps in computing FTEs, these suggestions have not been adopted.

## II. Identifying Full-Time Employees for Section 4980H Purposes

### A. General Rule

Section 4980H(c)(4) provides that, for purposes of section 4980H, a full-time employee is an employee who was employed on average at least 30 hours of service per week. One commenter suggested that the proposed regulations use the term “hours of service” instead of, for example, “hours worked” (a term sometimes used in Notice 2012–58), noting that “hours of service” is the statutory term and includes not only hours when work is performed but also hours for which an employee is paid or entitled to payment even when no work is performed. This suggestion has been adopted. In addition, various commenters responding to Notice 2011–36 suggested that, for purposes of section 4980H, the term “full-time employee” should be defined by reference to a higher threshold, for example 32, 35, or 40 hours of service per week. Because section 4980H(c)(4)(A) defines a full-time employee as an employee employed on average at least 30 hours of service per week, these suggestions have not been adopted.

Pursuant to the approach initially described in Notice 2011–36, these proposed regulations would treat 130 hours of service in a calendar month as the monthly equivalent of 30 hours of

service per week ( $(52 \times 30) \div 12 = 130$ ). This monthly standard takes into account that the average month consists of more than four weeks. Some commenters argued that the 130 hour monthly standard is not an appropriate proxy for 30 hours per week during certain shorter calendar months. However, the 130 hour monthly standard may also be lower than an average of 30 hours per week during other longer months of the calendar year (for example, the seven calendar months that consist of 31 days) and, therefore, any effect of this approximation will balance out over the calendar year (for example, over a 12-month measurement period, over two successive six-month measurement periods, or over four successive three-month measurement periods). Accordingly, in the interest of administrative simplicity, the proposed regulations retain the 130-hour standard as a monthly equivalent of 30 hours per week.

Several commenters suggested that rather than calculating hours of service on a monthly basis, employers be permitted to determine hours of service on a payroll period basis using successive payroll periods as approximations of calendar months. This approach would be problematic, however, because payroll periods generally are not evenly divisible by the twelve calendar months. For example, treating two successive standard two-week payroll periods as equivalent to a calendar month generally would leave two payroll periods per year unassigned, requiring the arbitrary assignment of those two extra payroll periods to two calendar months.

The Treasury Department and the IRS anticipate that a significant majority of employers will use some form of the optional look-back measurement method described in these proposed regulations to identify full-time employees. Because the measurement periods must extend for at least three months, and may extend for as many as twelve months, the use of payroll periods to approximate months generally will not be necessary. However, for those using payroll periods, an adjustment may be needed at the beginning and end of the measurement period. The proposed regulations address this by permitting adjustments for cases in which the measurement period begins or ends in the middle of a payroll period. See section II.C.1. of this preamble.

### B. Hours of Service Rules

#### 1. In General

Hours of service are used in determining whether an employee is a full-time employee for purposes of section 4980H, and in calculating an employer’s FTEs. Section 4980H(c)(4)(B) provides that the “Secretary, in consultation with the Secretary of Labor, shall prescribe regulations, rules, and guidance as may be necessary to determine the hours of service of an employee”, including for employees who are not compensated on an hourly basis. Notice 2011–36 suggested rules for determining hours of service for purposes of section 4980H. As required by section 4980H(c)(4)(B), the Treasury Department and the IRS consulted with the DOL about the definition of hours of service in developing the rules described in Notice 2011–36 and these proposed regulations. Consistent with existing DOL regulations and other guidance under the Affordable Care Act (for example, Notice 2010–44 (2010–22 IRB 717)), and with Notice 2011–36, the proposed regulations provide that an employee’s hours of service include the following: (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 for which an employee is paid, or entitled to payment by the employer on account of a period of time during which no duties are performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence (29 CFR 2530.200b–2(a)).

Several comments requested that the definition of hours of service exclude all hours of service for paid leave. The proposed regulations do not adopt these suggestions because they are not consistent with the DOL regulations or the general concept of when employees are credited with hours of service. Notice 2011–36 described a potential rule providing that, for any single continuous period during which the employee was paid or entitled to payment but performed no duties, no more than 160 hours of service would be counted as hours of service. A number of commenters on Notice 2011–36 requested that the 160-hour limit be removed because they viewed it as restrictive, and expressed concern about the potential negative impact on employees who are on longer paid leaves, such as maternity or paternity leave. In response, these proposed regulations remove the 160-hour limit on paid leave, so that all periods of paid leave must be taken into account.

For purposes of calculating an employee's average hours of service under the look-back measurement method, the proposed regulations would limit the number of hours that an employer that is an educational organization is required to take into account in a calendar year with respect to most periods of absence with zero hours of service (as described in section II.C.4 of this preamble). The limit is 501 hours based on a longstanding 501-hour limit that applies in a different but related context under the service crediting rules applicable to retirement plans which are familiar to and administered by many employers.

For purposes of calculating an employee's hours of service, the proposed regulations provide rules for hourly employees and non-hourly employees, generally consistent with the approach outlined in Notice 2011-36. For employees paid on an hourly basis, employers must 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. For employees not paid on an hourly basis, employers are permitted to calculate the number of hours of service under any of the following three methods: (1) Counting actual hours of service (as in the case of employees paid on an hourly basis) 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; (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. These equivalents are based on DOL regulations (29 CFR 2530.200b-2(a)), modified as described in this preamble and in the proposed regulations.

Although an employer must use one of these three methods for counting hours of service for all non-hourly employees, under these proposed regulations, an employer need not use the same method for all non-hourly employees. Rather, an employer may apply different methods for different classifications of non-hourly employees, so long as the classifications are

reasonable and consistently applied. In addition, an employer may change the method of calculating non-hourly employees' hours of service for each calendar year. For example, for all non-hourly employees, an employer may use the actual hours worked method for the calendar year 2014, but may use the days-worked equivalency method for counting hours of service for the calendar year 2015.

However, consistent with Notice 2011-36, these proposed regulations prohibit use of the days-worked or weeks-worked equivalency method if the result would be to substantially understate an employee's hours of service in a manner that would cause that employee not to be treated as a full-time employee. For example, an employer may not use a days-worked equivalency in the case of an employee who generally works three 10-hour days per week, because the equivalency would substantially understate the employee's hours of service as 24 hours of service per week, which would result in the employee being treated as not a full-time employee. Rather, the number of hours of service calculated using the days-worked or weeks-worked equivalency method must reflect generally the hours actually worked and the hours for which payment is made or due.

For purposes of identifying the employee as a full-time employee, all hours of service performed for all entities treated as a single employer under section 414(b), (c), (m), or (o) must be taken into account.

## 2. Services Performed Outside of the United States

The proposed regulations provide that hours of service do not include hours of service to the extent the compensation for those hours of service constitutes foreign source income, consistent with the rules of Federal taxation for determining whether compensation for services is attributable to services performed within or outside the United States. Thus, hours of service generally do not include hours of service worked outside the United States. This rule applies without regard to the residency or citizenship status of the individual. Therefore, employees working overseas generally will not have hours of service, and will not qualify as full-time employees either for purposes of determining an employer's status as an applicable large employer or for purposes of determining and calculating any potential liability under section 4980H. However, all hours of service for which an individual receives U.S.

source income are hours of service for purposes of section 4980H.

## 3. Teachers and Other Employees of Educational Organizations

Several comments were submitted on behalf of teachers and other employees of schools, colleges, universities, and other educational organizations in response to the look-back measurement method. The comments noted that educational organizations present a special situation compared to other workplaces because they typically function on the basis of an academic year, which involves various extended periods in which the organization is not in session or is engaged in only limited classroom activities. Because the services of many of the employees of these educational organizations follow the academic year, many of the employees, while typically employed for at least 30 hours of service per week during the active portions of the academic year, are precluded from working (or from working normal hours) during periods when the organization is entirely or largely closed. The commenters were concerned that use of a 12-month measurement period for employees who provide services only during the active portions of the academic year could inappropriately result in these employees not being treated as full-time employees. The concern is that employees' average hours of service for the 12-month measurement period would be distorted (and employees therefore would be inappropriately treated as not full-time employees) by averaging in the periods during or outside of the academic year (such as, typically, the summer months) during which teachers and other similarly situated employees of educational organizations may have no hours or only a few hours of required workplace attendance, because the institution is not in session or is engaged in only limited classroom activities. Traditional breaks in the academic or school year such as winter or spring breaks will often be periods of paid leave; in those cases employees will be required to be credited with hours of service under the general hours of service rules under the look-back measurement method. See section II.B.1 of this preamble.

These proposed regulations address these special issues presented by educational institutions by providing an averaging method for employment break periods that generally would result in an employee who works full-time during the active portions of the academic year being treated as a full-time employee for section 4980H. See



section II.C.4. of the preamble. Comments are invited on any remaining issues relating to teachers, other educational organization employees, or industries with comparable circumstances.

#### 4. Employees Compensated on a Commission Basis, Adjunct Faculty, Transportation Employees and Analogous Employment Positions

One commenter expressed concern the hours of service framework underlying the measurement and stability periods did not reflect the wide variety of workplaces, schedules, and specific work patterns in different industries and sectors of the economy, and that, consequently, the look-back method could be misused to treat employees long considered full-time employees as not full-time employees. A number of commenters requested special rules for employees whose compensation is not based primarily on hours and employees whose active work hours may be subject to safety-related regulatory limits (for example, salespeople compensated on a commission basis or airline pilots whose flying hours are subject to limits). Generally, the commenters suggest determining whether such employees are full-time employees for purposes of section 4980H by using hourly standards that, for the relevant industries or occupations, would be equivalent to the 30-hour and 130-hour standards applicable to other employees. Thus, for example, some commenters noted that educational organizations generally do not track the full hours of service of adjunct faculty, but instead compensate adjunct faculty on the basis of credit hours taught. Some comments suggested that hours of service for adjunct faculty should be determined by crediting three hours of service per week for each course credit taught. Others explained that some educational organizations determine whether an adjunct faculty member will be treated as a full-time employee by comparing the number of course credit hours taught by the adjunct faculty member to the number of credit hours taught by typical non-adjunct faculty members working in the same or a similar discipline who are considered full-time employees. Commenters on behalf of airline pilots noted that the number of hours of service that a pilot is permitted to operate an aircraft is limited under Federal law. The commenters requested that the guidance provide lower hourly standards for pilots that would be treated as equivalent to the 30-hour per week or 130-hour per month standard, or

alternatively establish a special rule treating pilots as full-time employees regardless of their hours of service.

The rules for counting hours of service and applying equivalents contained in the proposed regulations should assist in addressing some of the concerns raised in the comments. The Treasury Department and the IRS are continuing to consider, and invite further comment on, how best to determine the full-time status of employees in the circumstances described in the preceding paragraph and in other circumstances that may present similar difficulties in determining hours of service. Further guidance to address potentially common challenges arising in determining hours of service for certain categories of employees may be provided in the final regulations, or through Revenue Procedures, or other forms of subregulatory guidance.

Until further guidance is issued, employers of employees in positions described in the first paragraph of this section II.B.4. of this preamble (and in other positions that raise similar issues with respect to the crediting of hours of service) must use a reasonable method for crediting hours of service that is consistent with the purposes of section 4980H. A method of crediting hours would not be reasonable if it took into account only some of an employee's hours of service with the effect of recharacterizing, as non-fulltime, an employee in a position that traditionally involves more than 30 hours of service per week. For example, it would not be a reasonable method of crediting hours to fail to take into account travel time for a travelling salesperson compensated on a commission basis, or in the case of an instructor, such as an adjunct faculty member, to take into account only classroom or other instruction time and not other hours that are necessary to perform the employee's duties, such as class preparation time.

#### C. Look-Back Measurement Method for Determination of Full-Time Employees

As described in section III.A. of this preamble, the assessable payment under section 4980H(a) and section 4980H(b) is computed for each applicable large employer member. The potential section 4980H(a) liability of an applicable large employer member is determined by reference to the number of full-time employees employed by that member for a given calendar month, and its potential section 4980H(b) liability is determined by reference to the number of full-time employees of that member with respect to whom an applicable premium tax credit or cost-sharing

reduction is allowed or paid for a given calendar month. Section 4980H(c)(4)(A) provides that "[t]he term 'full-time employee' means, with respect to any month, an employee who is employed on average at least 30 hours of service per week." As explained in Notice 2011-36 and subsequent notices, determining full-time employee status on a monthly basis may cause practical difficulties for employers, employees, and Affordable Insurance Exchanges (Exchanges). For employers, these difficulties include uncertainty and inability to predictably identify which employees are full-time employees to whom coverage must be provided to avoid a potential section 4980H liability. This problem is particularly acute if employees have varying hours or employment schedules (for example, employees whose hours vary from month to month). A month-by-month determination may also result in employees moving in and out of employer coverage (and potentially Exchange coverage) as frequently as monthly. This result would be undesirable from both the employee's and the employer's perspective, and would also create administrative challenges for the Exchanges.

To address these concerns, and to give employers flexible and workable options and greater predictability, Notice 2011-36, Notice 2012-17, and Notice 2012-58 outlined a potential optional look-back measurement method as an alternative to a month-by-month method of determining full-time employee status. See the discussion in the Background section of this preamble. The response to this look-back measurement method generally was favorable. Most commenters supported the general structure of the method, although, some expressed concern that the potential difficulties in identifying full-time employees were overstated, that the look-back measurement method might be manipulated by employers, and that there was a need to prescribe rules that would address special workplace situations to ensure that certain classes of employees would be treated as full-time employees even though their hours might not result in full-time employee treatment under the look-back measurement method described in Notice 2012-58. After considering all of the comments on the notices, the Treasury Department and the IRS have incorporated in the proposed regulations the optional look-back measurement method described and cross-referenced in Notice 2012-58,

with modifications as described in this preamble. See § 601.601(d)(2).

While the look-back measurement method prescribes minimum standards to facilitate the identification of full-time employees, employers always can treat more employees as eligible for coverage, or otherwise offer coverage more widely, than would be required to avoid an assessable payment under section 4980H, assuming they do so consistent with any other applicable law.

#### 1. Look-Back Measurement Method for Ongoing Employees

The proposed regulations define an ongoing employee as, generally, an employee who has been employed by an employer for at least one standard measurement period. For ongoing employees, the proposed regulations, consistent with Notice 2012-58, provide that an applicable large employer member has the option to determine each ongoing employee's full-time status by looking back at a measurement period (a defined time period of not less than three but not more than 12 consecutive months, as chosen by the employer). The measurement period that the employer chooses to apply to ongoing employees is referred to as the standard measurement period. If the employer determines that an employee was employed on average at least 30 hours of service per week during the standard measurement period, then the employer treats the employee as a full-time employee during a subsequent stability period, regardless of the employee's number of hours of service during the stability period, so long as he or she remains an employee. The applicable large employer member, at its option, may also elect to add an administrative period between the measurement period and the stability period as part of this method.

For an employee whom the employer determines to be a full-time employee during the standard measurement period, the stability period would be a period that immediately followed the standard measurement period (and any applicable administrative period), the duration of which would be at least the greater of six consecutive calendar months or the length of the standard measurement period. If the employer determines that the employee did not work full-time during the standard measurement period, the employer would be permitted to treat the employee as not a full-time employee during the immediately following stability period (which may be no longer than the associated standard measurement period).

Generally, the standard measurement period and stability period selected by the applicable large employer member must be uniform for all employees; however, the applicable large employer member may apply different measurement periods, stability periods, and administrative periods for the following categories of employees: (1) Each group of collectively bargained employees covered by a separate collective bargaining agreement, (2) collectively bargained and non-collectively bargained employees, (3) salaried employees and hourly employees, and (4) employees whose primary places of employment are in different states. Notice 2012-58 had also included "employees of different entities" as a separate category of employees. However, because section 4980H generally is applied on an applicable large employer member-by-member basis, including the method of identifying full-time employees, there is no need for a distinct category for employees of different entities, as each such member is a separate entity. The applicable large employer member may change its standard measurement period and stability period for subsequent years, but generally may not change the standard measurement period or stability period once the standard measurement period has begun.

Comments have included requests that, in the interest of administrative convenience, the regulations permit employers to adjust the starting and ending dates of their three-to-twelve-month measurement periods in order to avoid splitting employees' regular payroll periods. The proposed regulations accommodate these requests to begin and end measurement periods with the beginning and ending of regular payroll periods if each of the payroll periods is one week, two weeks, or semi-monthly in duration. Pursuant to this accommodation, employers may make certain adjustments at the beginning and end of the measurement period. For example, an employer using the calendar year as a measurement period could exclude the entire payroll period that included January 1 (the beginning of the year) if it included the entire payroll period that included December 31 (the end of that same calendar year), or, alternatively, could exclude the entire payroll period that included December 31 if it included the entire payroll period that included January 1.

Because employers may need time between the end of the standard measurement period and the beginning of the associated stability period to determine which ongoing employees are

eligible for coverage, and to notify and enroll employees, the proposed regulations, consistent with Notice 2012-58, allow an applicable large employer member the option of having an administrative period between the end of a measurement period and the start of a stability period. The administrative period may last up to 90 days. However, any administrative period between the standard measurement period and the stability period may neither reduce nor lengthen the measurement period or the stability period. Also, to prevent this administrative period from creating any potential gaps in coverage, it must overlap with the prior stability period, so that, for ongoing employees, during any such administrative period applicable following a standard measurement period, those employees who are enrolled in coverage because of their status as full-time employees based on a prior measurement period will continue to be covered.

#### 2. New Employees

These proposed regulations also provide rules for determining the full-time employee status of new employees, including an optional look-back measurement method for certain new employees generally based upon the approach outlined in Notice 2012-58. The methods for new employees vary depending upon whether the new employees are reasonably expected to work full-time (and are not seasonal) or are variable hour employees or seasonal employees.

##### a. New Full-Time Employees

The proposed regulations provide that, for an employee who is reasonably expected at his or her start date to be employed on average 30 hours of service per week (and who is not a seasonal employee), an employer that sponsors a group health plan that offers coverage to the employee at or before the conclusion of the employee's initial three calendar months of employment will not be subject to an assessable payment under section 4980H by reason of its failure to offer coverage to the employee for up to the initial three calendar months of employment. This rule continues the approach outlined in Notice 2012-17 and Notice 2012-58.

Notice 2012-58 requested comments on whether the Treasury Department and the IRS should develop additional guidance for determining whether an employee is reasonably expected, as of the employee's start date, to be employed on average at least 30 hours of service per week or whether the employee is a variable hour employee.

The commenters suggested that the following factors could be used to determine whether an employee is reasonably expected to be employed on average at least 30 hours of service per week: (1) Whether the employee is replacing an employee who is a full-time employee; and (2) whether the hours of service of ongoing employees in the same or comparable positions actually vary. The Treasury Department and the IRS are continuing to consider whether such factors are appropriate or useful and welcome any additional comments on this issue.

**b. Look-Back Measurement Method for New Variable Hour and Seasonal Employees**

If an applicable large employer member uses the look-back measurement method for its ongoing employees, the employer may also use the optional method for new variable hour employees and for seasonal employees. The proposed regulations, consistent with Notice 2012–58, provide that a new employee is a variable hour employee if, based on the facts and circumstances at the start date, it cannot be determined that the employee is reasonably expected to be employed on average at least 30 hours per week. A new employee who is expected to be employed initially at least 30 hours per week may be a variable hour employee if, based on the facts and circumstances at the start date, the period of employment at more than 30 hours per week is reasonably expected to be of limited duration and it cannot be determined that the employee is reasonably expected to be employed on average at least 30 hours per week over the initial measurement period. Effective as of January 1, 2015, and except in the case of seasonal employees, the employer will be required to assume for this purpose that although the employee's hours of service might be expected to vary, the employee will continue to be employed by the employer for the entire initial measurement period; accordingly, the employer will not be permitted to take into account the likelihood that the employee's employment will terminate before the end of the initial measurement period. See section IX.G. of the preamble for transition relief for the effective date of the rule described in the immediately preceding sentence.

Notice 2012–58 provides that, through at least 2014, employers are permitted to use a reasonable, good faith interpretation of the term “seasonal employee” for purposes of this notice. Notice 2012–58 also requested comments on the definition of “seasonal

worker” as set forth in section 4980H(c)(2)(B)(ii) for purposes of determining status as an applicable large employer. Specifically, the request for comments asked about the practicability of using different definitions for different purposes (such as for determining status as an applicable large employer versus determining the full-time employee status of a new employee); and whether other, existing legal definitions should be considered in defining a seasonal worker under section 4980H (such as the safe harbor for seasonal employees in the final sentence of § 1.105–11(c)(2)(iii)(C)).

The proposed regulations reserve the definition of seasonal employee, and provide that, as set forth in Notice 2012–58, employers are permitted, through 2014, to use a reasonable, good faith interpretation of the term seasonal employee for purposes of section 4980H. It is not a reasonable good faith interpretation of the term seasonal employee to treat an employee of an educational organization, who works during the active portions of the academic year, as a seasonal employee. The Treasury Department and the IRS contemplate that the final regulations may add to the definition of seasonal employee a specific time limit in the form of a defined period. For example, the limit specified in the current safe harbor for treatment as a seasonal employee under regulations for self-insured medical reimbursement plans (see final sentence of § 1.105–11(c)(2)(iii)(C)) could be adapted to the definition of seasonal employee in the final regulations by prescribing, in the interest of simplicity and clarity, a specific time limit of not more than six months. Comments are requested on this approach, including any necessary modifications for purposes of section 4980H and any alternative approaches that should be considered.

As provided in Notice 2012–58, in general, an employer may use both an initial measurement period of between three and 12 months (the same as allowed for ongoing employees) and an administrative period of up to 90 days for variable hour and seasonal employees. However, the initial measurement period and the administrative period combined may not 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).

If the employer complies with these requirements, no assessable payment under section 4980H will be due with respect to the variable hour or seasonal

employee during the initial measurement period or the administrative period. Note that an employee or related individual is not considered eligible for minimum essential coverage under the employer's plan (and therefore may be eligible for a premium tax credit or cost-sharing reduction through an Exchange) during any period when coverage is not offered, including any measurement period or administrative period prior to when coverage takes effect, even if the employer is not subject to an assessable payment for this period.

During the initial measurement period, the employer measures the hours of service for the new employee or seasonal employee and determines whether the employee was employed an average of 30 hours of service per week or more during this period. The stability period for that employee must be the same length as the stability period for ongoing employees. As in the case of a standard measurement period, if an employee is determined to be a full-time employee during the initial measurement period, the stability period must be a period of at least six consecutive calendar months that is no shorter in duration than the initial measurement period and that begins immediately after the initial measurement period (and any associated administrative period).

If a new variable hour or seasonal employee is determined not to be a full-time employee during the initial measurement period, the employer is permitted to treat the employee as not a full-time employee during the stability period that follows the initial measurement period. This stability period must not be more than one month longer than the initial measurement period and, as explained herein, must not exceed the remainder of the standard measurement period (plus any associated administrative period) in which the initial measurement period ends. In these circumstances, allowing a stability period to exceed the initial measurement period by one month is intended to give additional flexibility to employers that wish to use a 12-month stability period for new variable hour and seasonal employees and an administrative period that exceeds one month. To that end, such an employer could use an 11-month initial measurement period (in lieu of the 12-month initial measurement period that would otherwise be required) and still comply with the general rule that the initial measurement period and administrative period combined may not extend beyond the last day of the

first calendar month beginning on or after the one-year anniversary of the employee's start date.

For purposes of applying the look-back measurement method, the proposed regulations provide that an employee's start date is the first date for which the employee would be required to be credited with at least one hour of service under the hours of service rules. See section II.B.1. of this preamble for a discussion of those rules. See also section II.C.4. of this preamble for a description of the proposed rules on when an employee who has experienced a period with no hours of service is treated as a newly rehired employee rather than as a continuing employee. As indicated, this rule applies solely for purposes of determining the employee's start date for determining hours of service under section 4980H, and not for determining the beginning of an employment relationship for any other purpose under the Code or other applicable law.

### 3. Change in Employment Status

The proposed regulations address the treatment of new variable or seasonal employees who have a change in employment status during the initial measurement period (for example, in the case of a new variable hour employee who is promoted during the initial measurement period to a position in which employees are reasonably expected to be employed on average 30 hours of service per week). The proposed regulations define a change in employment status as a material change in the position of employment or other employment status that, had the employee begun employment in the new position or status, would have resulted in the employee being reasonably expected to be employed on average at least 30 hours of service per week. The proposed regulations provide that a new variable hour or seasonal employee who has a change in employment status during an initial measurement period is treated as a full-time employee under section 4980H as of the first day of the fourth month following the change in employment status 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 (including any optional administrative period applicable to the initial measurement period). The change in employment status rule only applies to new variable hour and seasonal employees. A change in employment status for an ongoing employee does not change the

employee's status as a full-time employee or non full-time employee during the stability period.

### 4. Employees Rehired After Termination of Employment or Resuming Service After Other Absence

An employee might work for the same applicable large employer on and off during different periods. For example, an employee's employment could terminate but the employee could later be rehired by the same employer. Alternatively, even without a termination of employment, there might be a continuous period during which an employee is not credited with any hours of service under the hours of service rules described in these proposed regulations (for example, in the case of a period of unpaid leave of absence). When such an employee is rehired or returns from unpaid leave, this raises the issue of whether the employee may be treated as a new employee. A number of commenters requested clarification regarding how to treat rehired employees, in particular whether employees who are rehired during a measurement period are treated as new hires or whether their prior service must be taken into account in determining their status. In addition, several commenters expressed concern that employers might terminate an employee with an intent to later rehire that employee in order to delay offering health coverage to employees working full-time.

The proposed regulations include rules designed to prevent this type of period without credited hours of service from inappropriately restarting an employee's initial measurement period, or causing the employee to be subject to a new 90-day waiting period for new full-time employees. For example, a variable hour employee terminated near the end of his or her initial measurement period and then rehired shortly thereafter, if treated again as a new variable hour employee, could be left out of coverage for an entire new initial measurement period without resulting in 4980H liability.

Under the proposed regulations, if the period for which no hours of service is credited is at least 26 consecutive weeks, an employer may treat an employee who has an hour of service after that period, for purposes of determining the employee's status as a full-time employee, as having terminated employment and having been rehired as a new employee of the employer. The employer may also choose to apply a rule of parity for periods of less than 26 weeks. Under the rule of parity, an employee may be

treated as having terminated employment and having been rehired as a new employee if the period with no credited hours of service (of less than 26 weeks) is at least four weeks long and is longer than the employee's period of employment immediately preceding that period with no credited hours of service (with the length of that previous period determined with application to that period of these rules governing employee rehires or other resumptions of service). For example, under the optional rule of parity if an employee works three weeks for an applicable large employer, terminates employment, and is rehired by that employer ten weeks after terminating employment, that rehired employee is treated as a new employee because the ten-week period with no credited hours of service is longer than the immediately preceding three-week period of employment.

Note that this rule applies solely for purposes of determining the full-time employee status for employers using the look-back measurement method and not for any other purpose under the Code or other applicable law (including for determining status as an applicable large employer and for applying the 90-day waiting period limitation under section 2708 of the Affordable Care Act).

For an employee who is treated as a continuing employee (as opposed to an employee who is treated as terminated and rehired), the measurement and stability period that would have applied to the employee had the employee not experienced the period of no credited hours of service would continue to apply upon the employee's resumption of service. For example, if the continuing employee returns during a stability period in which the employee is treated as a full-time employee, the employee is treated as a full-time employee upon return and through the end of that stability period. For this purpose, the proposed regulations provide that a continuing employee treated as a full-time employee will be treated as offered coverage upon resumption of services if the employee is offered coverage as of the first day that employee is credited with an hour of service, or, if later, as soon as administratively practicable.

The proposed regulations propose a method for averaging hours when applying the look-back measurement method to measurement periods that include special unpaid leave. This method applies only to an employee treated as a continuing employee upon the resumption of services, and not to an employee treated as terminated and rehired. For this purpose, special

unpaid leave refers to a period of unpaid leave subject to the Family and Medical Leave Act of 1993 (FMLA), Public Law 103-3, 20 U.S.C. 2601 *et seq.*, unpaid leave subject to the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), Public Law 103-353, 38 U.S.C. 4301 *et seq.*, and unpaid leave on account of jury duty.

Under this proposed averaging method, the employer determines the average hours of service per week for the employee during the measurement period excluding special unpaid leave period and uses that average as the average for the entire measurement period. Alternatively, the employer may choose to treat employees as credited with hours of service for special unpaid leave at a rate equal to the average weekly rate at which the employee was credited with hours of service during the weeks in the measurement period that are not special unpaid leave.

Additional requirements apply to employment break periods for employees of an educational organization (meaning an organization described in § 1.170A-9(c)(1), whether or not described in section 501(c)(3) and exempt under section 501(a), and an educational organization owned, controlled, or operated by a government entity (as defined in § 54.4980H-1(a)(20)). For this purpose, an employment break period is a period of at least four consecutive weeks (disregarding special unpaid leave) during which an employee is not credited with an hour of service. As noted above, educational organizations are different than other workplaces because they typically function on the basis of an academic year, which involves various extended periods in which the organization is not in session or is engaged in only limited classroom activities. The proposed regulations provide that the educational organization must apply one of the methods in the preceding paragraph to employment break periods related to or arising out of non-working weeks or months under the academic calendar. Accordingly, the educational organization must either determine the average hours of service per week for the employee during the measurement period excluding the employment break period and use that average as the average for the entire measurement period, or treat employees as credited with hours of service for the employment break period at a rate equal to the average weekly rate at which the employee was credited with hours of service during the weeks in the measurement period that are not part of

an employment break period. However, the educational organization is not required to credit an employee in any calendar year with more than 501 hours of service for any employment break period (although this 501-hour limit does not apply to, or take into account, hours of service required to be credited for special unpaid leave). The rules governing employment break period for educational organizations apply only to an employee treated as a continuing employee upon the resumption of services, and not to an employee treated as terminated and rehired.

The Treasury Department and the IRS are considering whether final regulations should extend the employment break period rules described in the preceding paragraph to all employers (not only educational organizations) and request comments. Any such extension of the rule would not take effect prior to 2015. Comments are invited in particular on how the proposed averaging methods should apply to employment break periods or other periods of absence, how the proposed approach would affect employees and employers, and whether the proposed treatment of employment break periods would be appropriate.

The proposed regulations also contain an anti-abuse rule to address practices that have the effect of circumventing or manipulating the application of the employee rehire rules.

#### 5. New Short-Term Employees

Notice 2012-58 requested comments on the application of section 4980H to employees hired for short-term periods but expected to be employed on average 30 hours of service per week or more for the duration of the short-term employment. Section 4980H would not apply to full-time employees employed for three months or less because, if the applicable large employer member were otherwise offering coverage, the section 4980H assessable payment would not apply to a failure to offer coverage during that period. However, section 4980H issues may arise for short-term employment exceeding three months.

Some comments were received requesting special rules for determining the full-time employee status of short-term employees. The Treasury Department and the IRS have been concerned that the potential for abuse and manipulation of any special rules addressing short-term employees might outweigh the considerations of avoiding churning and inefficiency associated with offering coverage to employees whose employment is anticipated to last, for example, no more than four or five months. Commenters that wish to

submit additional comments on whether any special rules would be appropriate with respect to short-term employees, and if so, whether there are any methods that could be used to determine the full-time status of these employees that are consistent with the provisions of section 4980H, are requested to take these concerns into account.

#### 6. New Employees Hired Into High-Turnover Positions

Notice 2012-58 also requested comments on the application of section 4980H to new hires of full-time employees in high-turnover positions. An employer that otherwise offers coverage is not subject to a section 4980H assessable payment with respect to an employee whose employment terminates within three months of the employee's start date. However, some commenters raised concerns that employers with employees working full-time in typically high-turnover positions who, because of the high turnover, have a high probability of not being employed for the entire measurement period (for example, employees, a significant portion of whom are expected to remain employed for more than three months, but not more than six months) will be required to offer coverage for only a relatively brief period of time for a significant portion of the high-turnover employees.

The proposed regulations do not contain special rules for high-turnover positions for several reasons. As noted by comments in response to Notice 2012-58, "high-turnover" is a category that would require a complex definition (for example, how to define classes of employees and how much turnover of employment would be required over what period) and that could be subject to manipulation. In addition, any special treatment that is provided for employees hired into a high-turnover position could provide an incentive for employers to terminate employees to ensure that the position remains a high-turnover position under whatever standard was used to make that determination. Commenters who wish to provide additional comments on this issue are requested to address the concerns identified in this paragraph.

#### D. Temporary Staffing Agencies

##### 1. Application of Rules to Temporary Staffing Agencies

The Treasury Department and the IRS recognize that the application of section 4980H may be particularly challenging for temporary staffing agencies because of the distinctive nature of their

employees' work schedules. In particular, several commenters discussed the challenges involved in applying the look-back measurement method to employees of temporary staffing agencies. It is anticipated that many new employees of temporary staffing agencies will be variable hour employees under the rules in these proposed regulations because, based on the facts and circumstances, their periods of employment at 30 or more hours per week are reasonably expected to be of limited duration with the potential for significant gaps between assignments, and there is often considerable uncertainty as to the likelihood and duration of assignments and as to whether an individual will accept any given assignment and will continue in it. For instance, as illustrated in Example 12 in § 54.4980H-3(c)(5) of the proposed regulations, if an individual hired by a temporary staffing agency as its common law employee can be expected to be offered one or more assignments with different clients each generally lasting no more than two or three months, and if the agency can expect the clients to have different requests with respect to hours of service (some above and some below 30 hours of service per week) and for there to be gaps of time between assignments during which the employee is not requested to provide services, then the employee generally would be a variable hour employee. For these and other reasons, it often cannot be determined that the employees are reasonably expected to be employed on average at least 30 hours per week over the initial measurement period.

Some commenters have suggested that, in view of the structure of the employment relationship, employees of temporary staffing agencies should be deemed to be variable hour employees, or at least that a presumption of status as a variable hour employee be established in the regulations. While, as noted, the Treasury Department and the IRS agree that many employees of temporary staffing agencies will likely be variable hour employees, we do not anticipate that all employees of a temporary staffing agency are inherently variable hour employees (especially employees on longer-term assignments with predictable requests for hours of service, as may be the case, for example, with particularly high-skilled technical or professional workers). In addition, the Treasury Department and the IRS are concerned that such a conclusion or presumption could lead employers to purport to use temporary staffing

agencies (or other staffing agencies that may attempt to fit within such a presumption) in situations in which the employer "client" is the individual's common law employer and the staffing agency is inserted solely in an attempt to avoid application of section 4980H.

For these reasons, comments are invited on whether and, if so, how a special safe harbor or presumption should or could be developed with respect to the variable hour employee classification of the common law employees of temporary staffing agencies that would contain restrictions or safeguards intended to address these concerns while still providing useful guidance for employers and employees in this industry. More generally, further comments are invited on whether special rules for identifying full-time employees or any other issues relating to section 4980H may be necessary in the case of temporary staffing agencies, especially in light of the employment break period rules proposed in these regulations.

For purposes of this discussion, a temporary staffing agency refers only to an entity that is the common law employer of the individual that is providing services to a client of the temporary staffing agency. For an illustration of the facts and circumstances under which a temporary staffing agency (rather than its client) is the individual's common law employer, see Rev. Rul. 70-630 (1970-2 CB 229). In considering any requests for special consideration for temporary staffing agencies or other staffing agencies, the Treasury Department and the IRS will take into account the factual nature of the common law analysis in determining who is the common law employer of the workers providing the services and the potential implications for other Code sections, including employment tax liability provisions, for which the determination of common law employer status is necessary. See § 601.601(d)(2).

## 2. Separation From Service and Employment Break Period Rules

Commenters have also noted that, because of the intermittent nature of temporary staffing agency assignments, including employees' ability to accept or decline such assignments and the fact that some individuals are on multiple temporary staffing agencies' lists of potential workers, a temporary staffing agency may not be able in all cases to readily determine the date on which the individual separated from service as an employee of the agency. For instance, an individual may remain on an agency's list of potential workers even after the

individual has decided (without necessarily informing the agency) not to take any further assignments from that agency. The Treasury Department and the IRS request comments on particular situations involving temporary staffing agencies that these proposed rules fail to address and on whether special consideration may be needed.

## 3. Anti-Abuse Rules

The Treasury Department and the IRS are aware of various structures being considered under which employers might use temporary staffing agencies (or other staffing agencies) purporting to be the common law employer to evade application of section 4980H. In one structure, the employer (referred to in this section as the "client") would purport to employ its employees for only part of a week, such as 20 hours, and then to hire those same individuals through a temporary staffing agency (or other staffing agency) for the remaining hours of the week, thereby resulting in neither the "client" employer nor the temporary staffing agency or other staffing agency appearing to employ the individual as a full-time employee. In another structure, one temporary staffing agency (or other staffing agency) would purport to employ an individual and supply the individual as a worker to a client for only part of a week, such as 20 hours, while a second temporary staffing agency or other staffing agency would purport to employ the same individual and supply that individual as a worker to the same client for the remainder of the week, thereby resulting in neither the temporary staffing agencies or the other staffing agencies, nor the client, appearing to employ the individual as a full-time employee. The Treasury Department and the IRS anticipate that only in rare circumstances, if ever, would the "client" under these fact patterns not employ the individual under the common law standard as a full-time employee. Rather, the Treasury Department and the IRS believe that the primary purpose of using such an arrangement would be to avoid the application of section 4980H.

It is anticipated that the final regulations will contain an anti-abuse rule to address the situations described in this section of the preamble. Under that anticipated rule, if an individual performs services as an employee of an employer, and also performs the same or similar services for that employer in the individual's purported employment at a temporary staffing agency or other staffing agency of which the employer is a client, then all the hours of service are attributed to the employer for purposes

of applying section 4980H. Similarly, to the extent an individual performs the same or similar services for the same client of two or more temporary staffing agencies or other staffing agencies, it is anticipated that all hours of service for that client are attributed to the client, if the client is the common law employer, or, if not, one of the temporary staffing agencies (or other staffing agencies) that purports to employ the individual with respect to services performed for that client.

### III. Compliance With Section 4980H—In General

#### A. No Aggregation in Determining Liability of an Applicable Large Employer Member

The proposed regulations address the application of section 4980H to an applicable large employer member. As noted in section I.A.2. of this preamble, under section 4980H(c)(2), the determination of applicable large employer status is made on a controlled group basis applying the aggregation rules under section 414(b), (c), (m), and (o). Section 4980H(c)(2)(D) provides that, in calculating the liability under section 4980H(a), the applicable large employer, as determined applying these same aggregation rules, is permitted one reduction of 30 full-time employees, and that the reduction must be allocated ratably among the members of the applicable large employer based on each member's number of full-time employees.

The proposed regulations provide that, although applicable large employer status and the 30-employee reduction is determined on an aggregated basis, 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. Therefore, the liability for, and the amount of, any assessable payment under section 4980H is computed and assessed separately for each applicable large employer member, taking into account that member's offer of coverage (or lack thereof) and based on that member's number of full-time employees. For example, if a parent corporation owns 100 percent of all classes of stock of 20 subsidiary corporations, and the controlled group is an applicable large employer, each of the 21 members of this controlled group (the parent corporation plus 20 subsidiary corporations) is considered separately in computing and assessing a section 4980H payment. In addition, each of the 21 group members is liable only for its separate section 4980H assessable payment.

#### B. Certification of Payment of Subsidy

Under section 4980H, an applicable large employer member is subject to an assessable payment if at least one full-time employee of that member has been certified to the member under section 1411 of the Affordable Care Act as having enrolled in a qualified health plan with respect to which a premium tax credit is allowed or paid. Section 1411(a) of the Affordable Care Act gives the Secretary of Health and Human Services the authority to determine whether individuals are eligible to enroll in qualified health plans through the Exchange and whether they are eligible for a premium tax credit. It is anticipated that, in upcoming regulations to be proposed under section 1411(a) of the Affordable Care Act, the Department of Health and Human Services (HHS) will establish a process under which employees who have enrolled for a month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee will be certified to the employer and that, pursuant to the proposed regulations, the certification to the employer will consist of methods adopted by the IRS to provide this information to an employer as part of its determination of liability under section 4980H. Existing HHS regulations also provide for a separate process for notification of employers.

### IV. Compliance With Section 4980H(a)

#### A. In General

Section 4980H(a) provides that an applicable large employer is liable for an assessable payment under section 4980H(a) if, for any month, any full-time employee is certified to receive an applicable premium tax credit (section 4980H(c)(3)) or cost-sharing reduction and the applicable large employer fails to offer its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage (MEC) (as defined in section 5000A(f)) under an eligible employer-sponsored plan. If an employer offers MEC under an eligible employer-sponsored plan to its full-time employees (and their dependents), it will not be subject to the penalty under section 4980H(a), regardless of whether the coverage it offers is affordable to the employees or provides minimum value. For any calendar month, an applicable large employer member may be liable for an assessable payment under section 4980H(a) or under section 4980H(b), but cannot be liable under both section

4980H(a) and section 4980H(b) for the same calendar month.

#### B. Offer of Coverage to the Employee and the Employee's Dependents

Under section 4980H(a), an applicable large employer member is subject to an assessable payment if the member fails to offer its full-time employees (and their dependents) the opportunity to enroll in MEC under an eligible employer-sponsored plan and any full-time employee receives a premium tax credit or cost-sharing reduction. Commenters have asked whether coverage must be offered to the employee's dependents, and if so, to which individuals the term "dependents" refers. Some commenters argued that an offer of dependent coverage is not required under section 4980H because the statutory reference to dependents is in parentheses, and others noted that the liability under section 4980H is triggered only by a full-time employee receiving a premium tax credit (regardless of whether any dependents are eligible for, or receive, a premium tax credit).

The fundamental rules of statutory construction provide that effect must be given, to the extent possible, to every word, clause and sentence. *See* 2A Sutherland Statutory Construction 46:6 (7th ed. 2007). Applying these principles to the words "employees (and their dependents)," the language cannot be construed to mean only employees. To accept the commenters' argument that the statute requires an offer of coverage only to full-time employees would require ignoring the words "and their dependents" in their entirety. Accordingly, the proposed regulations provide that the words "and their dependents" in section 4980H refer to an offer of coverage to dependents.

Section 4980H does not contain a statutory definition of the term dependents for purposes of the references to dependents in section 4980H(a) and (b). The proposed regulations define an employee's *dependents* for purposes of section 4980H as an employee's child (as defined in section 152(f)(1)) who is under 26 years of age. A child attains age 26 on the 26th anniversary of the date the child was born. For example, a child born on April 10, 1986 attained age 26 on April 10, 2012. Employers may rely on employees' representations concerning the identity and ages of the employees' children. The term *dependents*, as defined in these proposed regulations for purposes of section 4980H, does not include any individual other than children as



described in this paragraph of the preamble, including an employee's spouse. Thus, an offer of coverage to an employee's spouse is not required for purposes of section 4980H because section 4980H refers only to dependents (and not spouses). This definition of dependents applies only for purposes of section 4980H and does not apply for purposes of any other section of the Code. But see section IX.F. of the preamble for transition relief with respect to the requirement to offer coverage to dependents.

### C. Offer of Coverage

#### 1. In General

For an employee to be treated as having been offered coverage for a month (or any day in that month), the coverage offered, if accepted, must be applicable for that month (or that day). These regulations clarify that if an applicable large employer member fails to offer coverage to a full-time employee for any day of a calendar month during which the employee was employed by the employer, the employee is treated as not being offered coverage during that entire month. However, in a calendar month when a full-time employee terminates employment, if the employee would have been offered coverage for the entire month if the employee had been employed for the entire month, the employee is treated as having been offered coverage during that month.

Several commenters requested clarification of what an employer would be required to provide to adequately demonstrate that it had offered coverage to an employee. These regulations do not propose any new specific rules for demonstrating that an offer of coverage was made. The otherwise generally applicable substantiation and recordkeeping requirements in section 6001 would apply, including Rev. Proc. 98-25 (1998-1 CB 689), (see § 601.601(d)(2)(ii)(b) of this chapter). In addition, the provision of the offer generally could be made electronically. Section 1.401(a)-21 provides a safe harbor method for use of electronic media. See also Notice 99-1 (1999-1 CB 269).

However, these regulations provide that if an employee has not been offered an effective opportunity to accept coverage, the employee will not be treated as having been offered the coverage for purposes of section 4980H. The employee must also have an effective opportunity to decline an offer of coverage that is not minimum value coverage or that is not affordable. Thus, an employer may not render an employee ineligible for a premium tax

credit by providing an employee with mandatory coverage (that is, coverage which the employee is not offered an effective opportunity to decline) that does not meet minimum value. For an analogous provision relating to the effective opportunity to participate (or refuse participation) in an employee benefit arrangement, see § 1.401(k)-1(e)(2)(ii).

#### 2. Offer of Coverage in the Case of Nonpayment or Late Payment of Premiums

Some commenters noted that in certain instances the employee share of the premium is not collected through withholding from the employee's salary but instead is billed to the employee. This may arise, for example, with respect to tipped employees, and may apply with respect to employees who were full-time employees during a measurement period but who work very few hours during the corresponding stability period. These commenters stated that in some instances employees do not pay their share of the premium on a timely basis and requested guidance on whether the employer would still be required to continue to provide coverage to those employees to avoid potential liability under section 4980H. The proposed regulations provide that, if an employee enrolls in coverage but fails to pay the employee's share of the premium on a timely basis, the employer is not required to provide coverage for the period for which the premium is not timely paid, and that employer is treated as having offered that employee coverage for the remainder of the coverage period (typically the remainder of the plan year) for purposes of section 4980H. The regulations generally adopt the provisions applicable for purposes of payment for COBRA continuation coverage under Q&A-5 of § 54.4980B-8, which generally provides a 30-day grace period for payment and also provides rules with respect to timely payments that are not significantly less than the amount required to be paid and for responding to requests by health care providers for confirmation of coverage during the grace period.

#### D. Section 4980H(a) Relief for Failure To Offer Coverage to a Limited Number of Full-time Employees

Section 4980H(a) liability is predicated on an applicable large employer member failing to offer its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an employer-sponsored plan. If section 4980H(a) liability is triggered, the

amount of the assessable payment is determined by reference to a member's total number of full-time employees (including full-time employees offered employer-sponsored coverage). The Treasury Department and the IRS contemplate that the assessable payment should not apply in the case of a member that intends to offer coverage to all its full-time employees, but fails to offer coverage with respect to a few full-time employees. Notice 2011-36 initially addressed this issue by indicating that the Treasury Department and the IRS were contemplating providing in the proposed regulations that an employer offering coverage to all, or substantially all, of its full-time employees would not be subject to a section 4980H(a) assessable payment. Commenters generally welcomed the prospect of some flexibility or margin in lieu of an absolute standard that the employer offer coverage to all full-time employees (and their dependents). Many comments supported a "substantially all" standard, but many requested that the regulations prescribe a more definitive rule, specifying a particular percentage of full-time employees and their dependents (with comments suggesting various percentages) who need not be offered coverage for this purpose.

After further study and consideration of the comments, the Treasury Department and the IRS believe that they should exercise their administrative authority to allow recognition of a margin of error consistent with an intent to recognize the possibility of inadvertent errors together with the specificity and administrability of a specific percentage, and therefore have concluded that a clear and definitive 95 percent standard would be an administrable and appropriate interpretation of the statutory provision. Accordingly, the proposed regulations provide that an applicable large employer member will be treated as offering coverage to its full-time employees (and their dependents) for a calendar month if, for that month, it offers coverage to all but five percent or, if greater, five of its full-time employees (provided that an employee is treated as having been offered coverage only if the employer also offered coverage to that employee's dependents). The alternative margin of five full-time employees (and their dependents), if greater than five percent of full-time employees (and their dependents), is designed to accommodate relatively small applicable large employer members because a failure to offer coverage to a



handful of full-time employees (and their dependents) might exceed five percent of the applicable large employer member's full-time employees. This relief applies to a failure to offer coverage to the specified number or percentage of employees (and their dependents), regardless of whether the failure to offer was inadvertent.

#### E. Application of the Section 4980H(c)(2)(D) 30-Employee Reduction

Section 4980H(c)(2)(D)(i) provides that the number of individuals employed by an applicable large employer as full-time employees during any month shall be reduced by 30 solely for purposes of calculating the assessable payment under section 4980H(a) and the overall limit on the liability under section 4980H(b)(2) for any calendar month (which is equal to the product of the applicable payment amount described in section 4980H(c)(1) and the number of individuals employed by the employer as full-time employees during that calendar month). Section 4980H(c)(2)(D)(ii) further provides that in the case of persons treated as a single applicable large employer under the aggregation rules, only one 30-employee reduction is allowed with respect to those persons and the reduction is allocated among them ratably on the basis of the number of full-time employees employed by each. If an applicable large employer has more than 30 applicable large employer members, with some or all of the applicable large employer members receiving a ratable allocation of more than zero but less than one full-time employee, the proposed regulations provide that the applicable large employer member's share of the 30-employee reduction will be rounded up to one full-time employee (which may result in an overall reduction to all members of the applicable large employer of more than 30 employees).

#### F. Section 4980H(a) Assessable Payment Amount

The assessable payment amount under section 4980H(a) equals, with respect to any calendar month, the number of full-time employees of the applicable large employer member (reduced by the allocable share of the 30-employee reduction) multiplied by the section 4980H(a) applicable payment amount. The initial section 4980H(a) applicable payment amount for a calendar month equals 1/12th of \$2,000. For subsequent years, that amount is adjusted for inflation pursuant to section 4980H(c)(5) based upon the premium adjustment percentage (as defined in section

1302(c)(4) of the Affordable Care Act) for the calendar year, rounded down to the next lowest multiple of \$10.

#### V. Section 4980H(b) Liability

##### A. In General

If an applicable large employer member offers its full-time employees (and their dependents) the opportunity to enroll in MEC under an eligible employer-sponsored plan but nonetheless one or more full-time employees have been certified for the payment of an applicable premium tax credit or cost-sharing reduction, the employer generally is liable for a section 4980H(b) penalty based on the number of its full-time employees receiving an applicable premium tax credit or cost-sharing reduction. This may occur because (1) the coverage under the plan is unaffordable within the meaning of section 36(B)(c)(2)(C)(i) for the employee (and the employer does not meet the requirements of any of the affordability safe harbors described in section V.B.2. of this preamble), (2) the coverage under the plan does not provide minimum value within the meaning of section 36(B)(c)(2)(C)(ii), or (3) the employer offers coverage to at least 95 percent (or, if greater, five) but less than 100 percent of its full-time employees (and to those employees' dependents) and one or more of those employees who are not offered coverage receive a premium tax credit or cost-sharing reduction. See section IV of the preamble; see also section 36B(c)(2)(C) and § 1.36B-2(c)(3). Regulations under section 36B were published on May 23, 2012 (77 FR 30377), as corrected on July 13, 2012 (77 FR 41270).

##### B. Affordable Coverage

###### 1. In General

Generally, section 4980H(b) liability may arise because, with respect to a full-time employee who has been certified to the employer as having received an applicable premium tax credit or cost-sharing reduction, the employer's coverage is unaffordable within the meaning of section 36B(c)(2)(C)(i) or does not provide minimum value within the meaning of section 36B(c)(2)(C)(ii). Therefore, section 4980H(b) effectively creates an affordability test based on section 36B affordability. 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 (within the meaning of section 5000A(e)(1)(B)) for self-only coverage does not exceed 9.5 percent of the employee's household income for the taxable year. See sections 36B(c)(2)(C)(i)

and 36B(d)(2), and section III.C. of the preamble.

As noted in of the Background section of the preamble, Notice 2011-73 (2011-40 IRB 474) outlined a proposed affordability safe harbor (referred to as the Form W-2 safe harbor) in connection with the assessable payment under section 4980H(b) and requested comments on other potential safe harbors. The comments with respect to the proposed safe harbor generally were favorable and some commenters outlined other potential safe harbors they argued could assist employers in their efforts to determine affordability of coverage for purposes of section 4980H. See also Notice 2012-58 regarding reliance on the Form W-2 safe harbor for 2014. In response to the comments, the proposed regulations provide for the Form W-2 safe harbor and two additional safe harbors for determining affordability, as described in section V.B.2. of the preamble.

##### 2. Affordability Safe Harbors

The three section 4980H(b) affordability safe harbors, as described in this preamble and incorporated into the proposed regulations, would apply only for purposes of determining whether an employer's coverage satisfies the 9.5 percent affordability test for purposes of the assessable payment under section 4980H(b). The section 4980H(b) safe harbors do not apply for purposes of determining the assessable payment under section 4980H(a). The safe harbors also would not affect an employee's eligibility for a premium tax credit under section 36B, which would continue to be based on the cost of employer-sponsored coverage relative to an employee's household income. Accordingly, in some instances, the effect of the safe harbor could be to treat an employer's offer of coverage to an employee as affordable (based on Form W-2 wages or one of the other affordability safe harbor standards) for purposes of determining whether the employer is subject to an assessable payment under section 4980H(b), while that same offer of coverage could be treated as unaffordable (based on household income) for purposes of determining whether the employee is eligible for a premium tax credit under section 36B.

These safe harbors are all optional. An employer may choose to use one or more of these safe harbors for all 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.

a. Form W-2 Safe Harbor

The proposed regulations provide a safe harbor under which an employer could determine affordability for purposes of section 4980H(b) liability by reference to an employee's wages from that employer. Under this proposed regulation, wages for this purpose would be the total amount of wages as defined in section 3401(a), which is the amount required to be reported in Box 1 of Form W-2, Wage and Tax Statement (referred to in this preamble as Form W-2 wages).

For the proposed Form W-2 wages safe harbor to apply, an employer must meet certain requirements, including: (1) That the employer offers its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan; and (2) that the required employee contribution toward the self-only premium for the employer's lowest cost coverage that provides minimum value (the employee contribution) not exceed 9.5 percent of the employee's Form W-2 wages for that calendar year. For this purpose, an employer may count wages paid to its employees by a third party that are reported on a Form W-2 that reflects the third party's EIN, for example because the Form W-2 was filed by an agent designated under section 3504 of the Code, or because the third party paying the wages was treated as the employer for employment tax purposes under section 3401(d)(1). If the employer satisfies both of these requirements for a particular employee (as well as any other conditions for the safe harbor), the employer will not be subject to an assessable payment under section 4980H(b) with respect to that particular employee, even if that employee receives a premium tax credit or cost sharing reduction because the employee's actual household income was less than the Form W-2 wages and, based on that household income, the coverage offered was not affordable.

Application of this safe harbor is determined after the end of the calendar year and on an employee-by-employee basis, taking into account the employee's Form W-2 wages from the employer and the employee contribution. So, for example, the employer determines whether it met the Form W-2 safe harbor for 2014 for an employee by looking at that employee's 2014 Form W-2 wages (meaning the wages reported on the 2014 Form W-2 that generally is furnished to the employee in January 2015) and comparing 9.5 percent of that amount to the employee's 2014 employee

contribution. Although the determination of whether an employer actually satisfied the safe harbor is made after the end of the calendar year, an employer could also use the safe harbor prospectively, at the beginning of the year, to set the employee contribution at a level so that the employee contribution for each employee would not exceed 9.5 percent of that employee's Form W-2 wages for that year (for example, by automatically deducting 9.5 percent, or a lower percentage, from an employee's Form W-2 wages for each pay period). See also the rate of pay affordability safe harbor and the Federal poverty line safe harbor, discussed in section V.B.2. of this preamble.

In response to Notice 2011-73, several commenters noted that Box 1 of the Form W-2 excludes elective deferrals that an employee makes into a section 401(k) plan or section 403(b) plan, and excludes amounts that an employee elects to contribute to a section 125 cafeteria plan through salary reduction (for example, for health insurance premiums,<sup>4</sup> health flexible spending arrangements, dependent care assistance, or health savings accounts). The commenters contended that the measure of an employee's total compensation for purposes of the affordability safe harbor calculation should include the employee's elective deferrals to a retirement savings plan or cafeteria plan. The proposed regulations do not adopt this comment. The determination of whether employer-sponsored coverage is affordable for an employee under section 36B(c)(2)(C)(i) is based on modified adjusted income and does not take into account any elective deferrals to a section 401(k), section 403(b) or cafeteria plan. Given that these amounts are not taken into account in determining the affordability of coverage for purposes of an employee's eligibility for a section 36B credit, it would be inconsistent to allow employers to add back those amounts in determining their liability under section 4980H(b), which is linked to that employee's section 36B credit. However, see the rate of pay affordability safe harbor described in this section V.B.2. of the preamble, which could be used regardless of the amount of an employee's elective deferrals.

Notice 2011-73 also requested comments on how wages and employee contributions would need to be

determined for employees employed for less than a full year by an employer (for example, a new employee hired during the calendar year or an employee who terminated employment during the calendar year) or an employee who was not offered coverage for the full year (for example, a new employee hired during the calendar year or an employee who switches positions of employment during the calendar year and so becomes eligible for coverage). Under section 36B, affordability for a part-year period is determined by comparing annual income to an annualized premium. See § 1.36B-2(c)(3)(v)(B). However, using this test to determine liability under section 4980H(b) could, in certain cases, result in penalizing employers that offer coverage that would be affordable based on the wages paid to, and premiums charged to, an employee for a given period. For example, if an employee was employed for six months of a calendar year by an employer, and offered coverage for those six months with an employee premium that did not exceed 9.5 percent of the employee's wages for those six months, and if the employee was not employed by the employer or any other employer for the other six months of the calendar year, the annualized premium may be higher than 9.5 percent of the employee's Form W-2 wages for the year. Commenters on Notice 2011-73 recommended several approaches, including prorating wages and premiums, using a reasonable estimate of Form W-2 wages for the year, and applying the safe harbor on a month-by-month basis.

The proposed regulations address this issue by providing that, 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, and then comparing those adjusted wages to the employee share of the premium during that period. Specifically, the amount of the employee's compensation for purposes of the safe harbor is determined by multiplying the wages for the calendar year by a fraction equal to the months for which coverage was offered to the employee over the months the employee was employed. That adjusted wage amount is then compared to the employee share of the premium for the months that coverage was offered to determine whether the Form W-2 safe harbor was satisfied for that employee. For example, if the employee worked eight months of a calendar year, during five months of which the employee was

<sup>4</sup> As a practical matter, if an employee makes a salary reduction to pay for employer-provided MEC and thus is actually receiving the employer-provided MEC, the employee will not be eligible to receive the section 36B credit for that period. See section 36B(c)(2)(C)(iii).

offered coverage, and received a Form W-2 reflecting Form W-2 wages of \$24,000, the adjusted wages would be \$24,000 multiplied by  $\frac{5}{8}$  or \$15,000. That \$15,000 is then treated as the adjusted Form W-2 wages for purposes of determining whether the employee share of the premium for each of the five months of coverage offered was affordable under the section 4980H safe harbor (meaning the employee would be treated for this purpose as earning \$3,000 per month during that five-month period).

#### b. Rate of Pay Safe Harbor

Notice 2011-73 requested comments on other possible safe harbor methods for determining the affordability of employer-sponsored coverage for purposes of section 4980H(b). Several commenters suggested a safe harbor that is based on a rate of pay (either the employer's lowest rate of pay or each employee's individual rate of pay). In response to these comments, the proposed regulations provide a rate of pay safe harbor under which the employer would (1) take the hourly rate of pay for each hourly employee who is eligible to participate in the health plan as of the beginning of the plan year, (2) multiply that rate by 130 hours per month (the benchmark for full-time status for a month under section 4980H), and (3) determine affordability based on the resulting monthly wage amount. Specifically, the employee's monthly contribution amount (for the self-only premium of the employer's lowest cost coverage that provides minimum value) is affordable if it is equal to or lower than 9.5 percent of the computed monthly wages (that is, the employee's applicable hourly rate of pay  $\times$  130 hours). For salaried employees, monthly salary would be used instead of hourly salary multiplied by 130. An employer may use this safe harbor only if, with respect to the employees for whom the employer applies the safe harbor, the employer did not reduce the hourly wages of hourly employees or the monthly wages of salaried employees during the year. The rate of pay safe harbor is a design-based safe harbor that should be easy for employers to apply and allows them to prospectively satisfy affordability without the need to analyze every employee's wages and hours.

#### c. Federal Poverty Line Safe Harbor

Some commenters suggested that determinations of affordability should disregard employees whose income would qualify the employee for coverage under Medicaid (and, accordingly, would disqualify the

employee from receiving the premium tax credit.) The suggestions reflect that employees who cannot receive a premium tax credit, which are not available by law to individuals with income below 100 percent of the Federal poverty line, cannot trigger 4980H(b) liability.

In response to these suggestions, the proposed regulations provide that an employer may also rely on a design-based safe harbor using the Federal poverty line (FPL) for a single individual. Specifically, for purposes of section 4980H, employer-provided coverage offered to an employee is affordable if the employee's cost for self-only coverage under the plan does not exceed 9.5 percent of the FPL for a single individual. For households with families, the amount that is considered to be below the poverty line is higher, so using the amount for a single individual ensures that the employee contribution for affordable coverage is minimized. In the interest of administrative convenience, employers are permitted to use the most recently published poverty guidelines as of the first day of the plan year of the applicable large employer member's health plan.

#### C. Section 4980H(b) Assessable Payment Amount

The assessable payment amount under section 4980H(b) equals, for any calendar month, 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 the section 4980H(b) applicable payment amount. The initial section 4980H(b) applicable payment amount for a calendar month equals  $\frac{1}{12}$ th of \$3,000. For subsequent years, that amount is adjusted for inflation pursuant to section 4980H(c)(5) based upon the premium adjustment percentage (as defined in section 1302(c)(4) of the Affordable Care Act) for the calendar year, rounded down to the next lowest multiple of \$10. Notwithstanding the foregoing, the assessable payment under section 4980H(b) cannot exceed the amount of the assessable payment that would have been imposed under section 4980H(a) if the applicable large employer member had failed to offer coverage to its full-time employees (and their dependents). Also, for any employee for whom the employer satisfies at least one of the affordability safe harbors described in section V.B.2. of this preamble, the employer is not subject to an assessable payment under section 4980H(b) for that employee if

the coverage offered to that employee otherwise satisfies minimum value.

#### VI. Assessment and Payment of Section 4980H Liability

Each applicable large employer member is liable for its section 4980H assessable payment, and is not liable for the section 4980H assessable payment of any other entity in the controlled group comprising the applicable large employer. With respect to a disregarded entity, as defined in § 301.7701-2, the proposed regulations regard the entity for purposes of an assessable payment under section 4980H and for purposes of reporting under section 6056. Therefore, the assessable payment and reporting requirements are imposed on the disregarded entity, and not on the owner of the disregarded entity. See proposed § 301.7701-2(c)(2)(v)(A)(5). These rules would also apply to a qualified subchapter S subsidiary. See proposed § 1.1361-4(a)(8)(i)(E).

Any assessable payment under section 4980H is payable upon notice and demand and is assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68 of the Code. Pursuant to regulations to be issued by HHS, the IRS will follow procedures that ensure employers receive certification that one or more employees have received premium tax credits or cost-sharing reductions and are provided an opportunity to respond before the issuance of any notice and demand for payment.

In complying with section 4980H, including relying on a look-back measurement method for determining full-time employees and non full-time employees and safe harbor methods for determining affordability for purposes of section 4980H(b) (as described in sections II and V.B.2. of this preamble), applicable large employer members are responsible for insuring that they comply with the recordkeeping requirements in section 6001, including Rev. Proc. 98-25 (1998-1 CB 689), (see § 601.601(d)(2)(ii)(b) of this chapter).

Pursuant to section 275(a)(6) regarding the nondeductibility of certain excise taxes, including those under chapter 43, an assessable payment imposed under section 4980H is not deductible.

#### VII. Information Reporting Under Section 6056

Applicable large employer members are required to report certain information on employer-provided health coverage under section 6056. Reporting will begin in 2015 for coverage provided on or after January 1,

2014. Notice 2012–33 (2012–20 IRB 912) requests comments on section 6056 information reporting. The Treasury Department and the IRS intend to publish separate proposed regulations implementing section 6056. For purposes of this reporting requirement, the proposed regulations are expected to apply to each applicable large employer member, as defined for purposes of section 4980H. The proposed regulations are also expected to align most definitions and rules so that, for example, if an employer is treated as offering coverage for a month for purposes of section 4980H, the employer would report the coverage was offered for that month.

*VIII. Public Health Service Act Section 2708—The 90-Day Maximum Waiting Period*

Public Health Service Act (PHS Act) section 2708 provides that, for plan years beginning on or after January 1, 2014, a group health plan or health insurance issuer offering group health insurance coverage shall not apply any waiting period that exceeds 90 days. PHS Act section 2704(b)(4), ERISA section 701(b)(4), and Code section 9801(b)(4) define a waiting period to be the period that must pass with respect to an individual before the individual is eligible to be covered for benefits under the terms of the plan. PHS Act section 2708 does not require the employer to offer coverage to any particular employee or class of employees, including part-time employees; but merely prevents an otherwise eligible employee (or dependent) from having to wait more than 90 days before coverage becomes effective.

Notice 2012–17 outlined various approaches under consideration with respect to both the 90-day waiting period limitation and the employer shared responsibility provisions under section 4980H,<sup>5</sup> and invited comments on the approaches contained in the notice, including a request for comments on how rules relating to the potential look-back measurement method for determining the full-time status of employees under Code section 4980H should be coordinated with the 90-day waiting period limitation of PHS Act section 2708. Subsequent guidance, under Notice 2012–59, provided temporary guidance on compliance with PHS Act section 2708, and provided that this temporary guidance would

remain in effect at least through the end of 2014.<sup>6</sup>

*IX. Transition Rules*

*A. Plans With Fiscal Year Plan Years*

Commenters on behalf of employers sponsoring plans with plan years other than the calendar year (fiscal year plans) addressed two issues in particular. First, these commenters noted that because the terms and conditions of coverage are difficult to change in the middle of a plan year, application of section 4980H to fiscal year plans as of January 1, 2014 would, in many cases, require compliance with section 4980H for the entire fiscal year plan year beginning in 2013 (the 2013 plan year). In addition, these commenters observed that, in order to use the look-back measurement method to determine their employees' status as full-time employees for the 2013 plan year ending in 2014, employers with fiscal year plans would be required to determine the employees' hours of service for periods before the publication of these proposed regulations.

In response to these concerns, transition relief is being provided for members of applicable large employer members with fiscal year plans. If an applicable large employer member maintains a fiscal year plan as of December 27, 2012, the relief applies with respect to employees of the applicable large employer member (whenever hired) who would be eligible for coverage, as of the first day of the first fiscal year of that plan that begins in 2014 (the 2014 plan year) under the eligibility terms of the plan as in effect on December 27, 2012. If an employee described in the preceding sentence is offered affordable, minimum value coverage no later than the first day of the 2014 plan year, no section 4980H assessable payment will be due with respect to that employee for the period prior to the first day of the 2014 plan year.

While transition relief is provided with respect to all enrollees (and other eligible employees) in fiscal year plans, further relief is also provided for employers that have a significant percentage of their employees eligible for or covered under one or more fiscal year plans that have the same plan year as of December 27, 2012 and want to offer certain other employees coverage under these plans. Specifically, if an applicable large employer member has at least one-quarter of its employees covered under one or more fiscal year

plans that have the same plan year as of December 27, 2012 or offered coverage under those plans to one-third or more of its employees during the most recent open enrollment period before December 27, 2012, no payment under section 4980H will be due for any month prior to the first day of the 2014 plan year of that fiscal year plan with respect to employees who (1) are offered affordable, minimum value coverage no later than the first day of the 2014 plan year of the fiscal year plan, and (2) would not have been eligible for coverage under any group health plan maintained by the applicable large employer member as of December 27, 2012 that has a calendar year plan year. For purposes of this transition relief, an applicable large employer member may determine the percentage of its employees covered under the fiscal year plan or plans as of the end of the most recent enrollment period or any date between October 31, 2012 and December 27, 2012.

Employers using this transition relief will still be subject to the reporting requirements under section 6056 for the entire 2014 calendar year. The concerns described in this section of the preamble with respect to the application of section 4980H do not apply with respect to reporting by a fiscal year plan under section 6056. Because no section 4980H liability will occur whether or not a full-time employee is offered coverage during the portion of the 2013 plan year falling in 2014, the applicable large employer may determine the full-time employees for that period for purposes of the section 6056 reporting requirements after the period has ended, using actual service data rather than the look-back measurement method, and use those determinations for the reporting required at the beginning of 2015 to cover the entire 2014 calendar year. In addition, the identification of whether the coverage offered provides minimum value and the employee portion of the applicable premium should be available to the employer in time to complete the required reporting. Therefore, because this reporting is essential to the administration of the premium tax credit under section 36B, applicable large employers will be required to report this information for the entire 2014 calendar year, even if during some calendar months in 2014 section 4980H liability will not apply due to application of the transition rules for fiscal year plan years.

The Treasury Department and the IRS are developing appropriate transition rules for employees of employers with fiscal year plans to account for the fact that premium tax credits will first

<sup>5</sup> Department of Labor Technical Release 2012–01, IRS Notice 2012–17, and HHS FAQs issued February 9, 2012.

<sup>6</sup> Department of Labor Technical Release 2012–02, IRS Notice 2012–59, and HHS FAQs issued August 31, 2012.

become available for the 2014 calendar year.

#### B. Salary Reduction Elections for Accident and Health Plans Provided Through Cafeteria Plans for Cafeteria Plan Years Beginning in 2013

Many employers offer health plans to employees through salary reduction under a section 125 cafeteria plan. Generally, cafeteria plan elections must be made before the start of the plan year, and are irrevocable during the plan year. See proposed § 1.125-2. However, the final regulations under § 1.125-4 permit a cafeteria plan to provide for changes in elections in certain circumstances, such as for change in status events. An employer that wishes to permit such changes in elections must incorporate the rules in § 1.125-4 in its written cafeteria plan.

In 2014, employees of an applicable large employer member covered under their employer's health plan through salary reduction under their employer's cafeteria plan may wish to enroll in coverage through an Exchange and discontinue their employer's coverage. However, the availability of health plan coverage through an Exchange beginning in 2014 does not constitute a change in status under § 1.125-4. As a result, employees would not be permitted to change their salary reduction elections for accident and health coverage during the plan year to cease salary reduction under the cafeteria plan and purchase coverage through an Exchange. Conversely, to avoid the individual responsibility payment under section 5000A, employees not covered under their employer's health plan may wish to enroll in the plan beginning after December 31, 2013.

The Treasury Department and the IRS have concluded that it is appropriate to provide transition relief from the election rules in proposed § 1.125-2 with respect to salary reduction elections under a cafeteria plan for an employer-provided accident and health plan with a fiscal year beginning in 2013. This transition relief applies only to the revocation, modification, or commencement of salary reductions for accident and health coverage offered through a cafeteria plan of an employer with a cafeteria fiscal year plan beginning in 2013 (and does not apply to any other qualified benefit offered through a cafeteria plan).

Thus, an applicable large employer member is permitted, at its election, to amend one or more of its written cafeteria plans to permit either or both of the following changes in salary reduction elections:

(1) An employee who elected to salary reduce through the cafeteria plan for accident and health plan coverage with a fiscal plan year beginning in 2013 is allowed to prospectively revoke or change his or her election with respect to the accident and health plan once, during that plan year, without regard to whether the employee experienced a change in status event described in § 1.125-4; and

(2) An employee who failed to make a salary reduction election through his or her employer's cafeteria plan for accident and health plan coverage with a fiscal plan year beginning in 2013 before the deadline in proposed § 1.125-2 for making elections for the cafeteria plan year beginning in 2013 is allowed to make a prospective salary reduction election for accident and health coverage on or after the first day of the 2013 plan year of the cafeteria plan, without regard to whether the employee experienced a change in status event described in § 1.125-4.

An applicable large employer member that wants to permit the change in election rules under this transition relief for fiscal plan years must incorporate these rules in its written cafeteria plan. Pursuant to proposed § 1.125-1(c), a plan may be amended at any time on a prospective basis. Notwithstanding the general rule that amendments to cafeteria plans may only be effective prospectively from the date of the plan amendment, a cafeteria plan may be amended retroactively to implement these transition rules. The retroactive amendment must be made by December 31, 2014, and be effective retroactively to the date of the first day of the 2013 plan year of the cafeteria plan.

#### C. Measurement Periods for Stability Periods Starting in 2014

Section 4980H is effective for months beginning after December 31, 2013. Employers that intend to utilize the look-back measurement method for determining full-time status for 2014 will need to begin their measurement periods in 2013 to have corresponding stability periods for 2014. The Treasury Department and the IRS recognize, however, that employers intending to adopt a 12-month measurement period, and in turn a 12-month stability period, will face time constraints in doing so. Consequently, solely for purposes of stability periods beginning in 2014, employers may adopt a transition measurement period that is shorter than 12 months but that is no less than 6 months long and that begins no later than July 1, 2013 and ends no earlier than 90 days before the first day of the plan year beginning on or after January

1, 2014 (90 days being the maximum permissible administrative period). For example, an employer with a calendar year plan could use a measurement period from April 15, 2013 through October 14, 2013 (six months), followed by an administrative period ending on December 31, 2013. An employer with a plan with a fiscal plan year beginning April 1 that also elected to implement a 90-day administrative period could use a measurement period from July 1, 2013 through December 31, 2013 (six months), followed by an administrative period ending on March 31, 2014. However, an employer with a fiscal plan year beginning on July 1, 2014 must use a measurement period that is longer than 6 months in order to comply with the requirement that the measurement period begin no later than July 1, 2013 and end no earlier than 90 days before the stability period. For example, the employer could have a 10-month measurement period from June 15, 2013 through April 14, 2014, followed by an administrative period from April 15, 2014 through June 30, 2014. This transition relief is solely for the application of a stability period beginning in 2014 through the end of that stability period (including any portion of the stability period falling in 2015).

Note that employers who use a full 12-month measurement period are not required to begin the measurement period by July 1, 2013. For example, an employer with a fiscal plan year beginning on November 1, 2014 could use a 12-month measurement period from September 1, 2013 through August 31, 2014, followed by an administrative period from September 1, 2014 through October 31, 2014.

See section II.C.1. of this preamble for rules on changing measurement periods from year to year.

#### D. Applicable Large Employer Members Participating in Multiemployer Plans

Several comments requested a special rule for employers participating in multiemployer plans in view of such plans' unique operating structures. Multiemployer plans are maintained pursuant to collective bargaining agreements, and have joint boards of trustees representing employees and employers. Each participating employer's relationship with the plan and the employee's participation in the plan differs from the typical single-employer-sponsored arrangement. For example, service at participating employers generally is aggregated to determine an employee's eligibility to participate in the multiemployer plan, even though the participating employers

generally are not related. Because many of the collective bargaining agreements governing multiemployer plans provide that contributions be made to the multiemployer fund based on requirements other than hours worked, such as on a days worked, projects completed, or percentage of earnings basis, contributing employers may not be in a position to know how many hours any individual employee worked. This problem is exacerbated by the fact that covered employees often work for multiple employers and it is thus impracticable for any one employer, or the fund, to determine how many hours any individual employee worked. For these reasons, further comments are requested on how section 4980H should apply to employers participating in multiemployer plans.

The transition rule described in this section X.D. applies through 2014 for contributions made by applicable large employers participating in a multiemployer plan. The rule is intended to provide an administratively feasible means for employers that contribute to multiemployer plans to comply with section 4980H. If any assessable payment were due under section 4980H, it would be payable by a participating applicable large employer 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 applicable large employer contributes to one or more multiemployer plans and also maintains a single employer plan, the rule applies to each multiemployer plan but not to the single employer plan.

Under this transition rule, an applicable large employer member will not be treated as failing to offer the opportunity to enroll in minimum essential coverage to a full-time employee (and the employee's dependents) for purposes of section 4980H(a), and will not be subject to a penalty under section 4980H(b) with respect to a full-time employee if (i) the employer is required to make a contribution to a multiemployer plan with respect to the full-time employee pursuant to a collective bargaining agreement or an appropriate related participation agreement, (ii) coverage under the multiemployer plan is offered to the full-time employee (and the employee's dependents), and (iii) the coverage offered to the full-time employee is affordable and provides minimum value. For purposes of the preceding sentence, whether the employee is a full-time employee is determined under section 4980H(c)(4),

whether coverage is affordable is determined under section 36(c)(2)(C)(i), and whether coverage provides minimum value is determined under section 36B(c)(2)(C)(ii). Notwithstanding this transition relief, any waiting period for coverage under the plan must separately comply with 90-day limitation on waiting periods in section 2708 of the Public Health Service Act. Further guidance under section 2708 of the Public Health Service Act will address this limitation.

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 set forth in the proposed regulations (and described in section V.B.2. of this preamble). 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 percent 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.

#### E. Applicable Large Employer Determination for 2014

Section 4980H(c)(2) defines an applicable large employer with respect to a calendar year as an employer that employed an average of at least 50 full-time employees on business days during the preceding calendar year. For purposes of determining whether an employer is an applicable large employer, full-time equivalents (FTEs), which are determined based on the hours of service of employees who are not full-time employees, are taken into account. For most employers, their status as an applicable large employer will be evident without the need for an actual employee calculation (for example, employers with a number of employees that is well in excess of the 50-employee threshold). However, for some employers (those sufficiently close to the 50-employee threshold), a calculation will be required and will be performed for the first time. The Treasury Department and the IRS have concluded that transition relief is appropriate for those employers because they will be becoming familiar with the applicable large employer determination method and applying it for the first time in 2013. Specifically, transition relief is provided for purposes of the applicable large employer determination for the 2014 calendar year that allows an employer the option to determine its status as an applicable large employer

by reference to a period of at least six consecutive calendar months, as chosen by the employer, in the 2013 calendar year (rather than the entire 2013 calendar year). Thus, an employer may determine whether it is an applicable large employer for 2014 by determining whether it employed an average of at least 50 full-time employees on business days during any consecutive six-month period in 2013.

This will allow these employers to choose to use either, or both, a period to prepare to count their employees and a period afterward to ascertain and implement the results of the determination. For example, an employer could use the period from January to February, 2013 to establish its counting method, the period from March through August, 2013 to determine its applicable large employer status and, if it is an applicable large employer, the period from September through December, 2013 to make any needed adjustments to its plan (or to establish a plan) in order to comply with section 4980H.

#### F. Coverage for Dependents

A number of employers currently offer coverage only to their employees, and not to dependents. For these employers, expanding their health plans to add dependent coverage will require substantial revisions to their plans and to their procedures for administration of the plans. To provide employers sufficient time to implement these changes, it is appropriate to provide transition relief with respect to dependent coverage for plan years that begin in 2014. Accordingly, any employer that takes steps during its plan year that begins in 2014 toward satisfying the section 4980H provisions relating to the offering of coverage to full-time employees' dependents will not be liable for any assessable payment under section 4980H solely on account of a failure to offer coverage to the dependents for that plan year.

#### G. Variable Hour Employee Definition

The proposed regulations, consistent with Notice 2012-58, provide that a new employee is a variable hour employee if, based on the facts and circumstances at the start date, it cannot be determined that the employee is reasonably expected to be employed on average at least 30 hours per week. A new employee who is expected to be employed initially at least 30 hours per week may be a variable hour employee if, based on the facts and circumstances at the start date, the period of employment at more than 30 hours per week is reasonably expected to be of

limited duration and it cannot be determined that the employee is reasonably expected to be employed on average at least 30 hours per week over the initial measurement period. Effective as of January 1, 2015, and except in the case of seasonal employees, the employer will be required to assume for this purpose that although the employee's hours of service might be expected to vary, the employee will continue to be employed by the employer for the entire initial measurement period; accordingly, the employer will not be permitted to take into account the likelihood that the employee's employment will terminate before the end of the initial measurement period. The effective date of the rule described in the immediately preceding sentence is delayed until 2015 to provide transition relief because some plan sponsors may have interpreted Notice 2012-58 (which gave reliance for 2014) more broadly. Even with respect to 2014, however, the status of any individual employee as a variable hour employee cannot be based on employer expectations regarding aggregate turnover. Rather there must be objective facts and circumstances specific to the newly hired employee at the start date demonstrating that the individual employee's employment is reasonably expected to be of limited duration within the initial measurement period.

#### X. Effective Dates and Reliance

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

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

#### Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required.

It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to this regulation, and because the regulation does not impose a collection of information on small

entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply.

Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

#### Comments and Public Hearing

Before the proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The Treasury Department and the IRS request comments on all aspects of the proposed rules. All comments will be available for public inspection and copying.

A public hearing has been scheduled for April 23, 2013, beginning at 10:00 a.m. in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue NW, Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit electronic or written comments by March 18, 2013, and an outline of the topics to be discussed and the time to be devoted to each topic (signed original and eight (8) copies) by April 3, 2013. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

#### Drafting Information

These proposed regulations were drafted by the Office of Tax Exempt and Government Entities. Other personnel from the Treasury Department and the IRS participated in the development of the regulations.

#### List of Subjects

##### 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

##### 26 CFR Part 54

Excise taxes, Pensions, Reporting and recordkeeping requirements.

##### 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

#### Proposed Amendments to the Regulations

Accordingly, 26 CFR parts 1, 54, and 301 are proposed to be amended as follows:

#### PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

**Authority:** 26 U.S.C. 7805 \* \* \*

■ **Par. 2.** Section 1.1361-4 is amended as follows:

■ 1. In paragraph (a)(8)(i)(C), the language “and 4412; and” is removed and “and 4412;” is added in its place.

■ 2. In paragraph (a)(8)(i)(D), the language “or 6427.” is removed and “or 6427; and” is added in its place.

■ 3. Paragraphs (a)(8)(i)(E) is added.

■ 4. In paragraph (a)(8)(ii), the language “January 1, 2008.” is removed and “January 1, 2008, except that paragraph (a)(8)(i)(E) of this section applies for months after December 31, 2013.” is added in its place.

The additions read as follows:

##### § 1.1361-4 Effect of QSub election.

(a) \* \* \*

(8) \* \* \*

(i) \* \* \*

(E) Assessment and collection of an assessable payment imposed by section 4980H and reporting required by section 6056.

\* \* \* \* \*

#### PART 54—PENSION EXCISE TAXES

■ **Par. 3.** The authority citation for part 54 is amended by adding entries in numerical order to read as follows:

**Authority:** 26 U.S.C. 7805 \* \* \*

Section 54.4980H-3 is also issued under 26 U.S.C. 4980H(c)(4)(B).

■ **Par. 4.** Sections 54.4980H-0, 54.4980H-1, 54.4980H-2, 54.4980H-3, 54.4980H-4, 54.4980H-5, and 54.4980H-6 are added to read as follows:

##### § 54.4980H-0 Table of contents.

This section lists the table of contents for §§ 54.4980H-1 through 54.4980H-6.

Section 54.4980H-1 Definitions.

(a) Definitions.



- (1) Administrative period.
- (2) Advance credit payment.
- (3) Affordable Care Act.
- (4) Applicable large employer.
- (5) Applicable large employer member.
- (6) Applicable premium tax credit.
- (7) Calendar month.
- (8) Church, or a convention or association of churches.
- (9) Collective bargaining agreement.
- (10) Cost sharing reduction.
- (11) Dependent.
- (12) Eligible employer-sponsored plan.
- (13) Employee.
- (14) Employer.
- (15) Exchange.
- (16) Federal poverty line.
- (17) Form W-2 wages.
- (18) Full-time employee.
- (19) Full-time equivalent employee (FTE).
- (20) Government entity.
- (21) Hour of service.
- (22) Initial measurement period.
- (23) Minimum essential coverage.
- (24) Minimum value.
- (25) Month.
- (26) New employee.
- (27) Ongoing employee.
- (28) Period of employment.
- (29) Person.
- (30) Plan year.
- (31) Predecessor employer.
- (32) Qualified health plan.
- (33) Seasonal employee.
- (34) Seasonal worker.
- (35) Section 1411 certification.
- (36) Section 4980H(a) applicable payment amount.
- (37) Section 4980H(b) applicable payment amount.
- (38) Self-only coverage.
- (39) Stability period.
- (40) Standard measurement period.
- (41) Start date.
- (42) United States.
- (43) Variable hour employee.
- (44) Week.
- (b) Effective/applicability date.

Section 54.4980H-2 Applicable large employer and applicable large employer member.

- (a) In general.
- (b) Determining applicable large employer status.
  - (1) In general.
  - (2) Seasonal worker exception.
  - (3) Employers not in existence in preceding calendar year.
  - (4) Special rules for government entities, churches, and conventions and associations of churches.
- (c) Full-time equivalent employees (FTEs).
  - (1) In general.
  - (2) Calculating the number of FTEs.
  - (d) Examples.
  - (e) Effective/applicability date.

Section 54.4980H-3 Determining full-time employees.

- (a) In general.
- (b) Hours of service.
  - (1) Hourly employee calculation.
  - (2) Non-hourly employee's calculation.
- (c) Look-back measurement method.
  - (1) Ongoing employees.
  - (2) New non-variable hour and non-seasonal employees.

- (3) New variable hour and new seasonal employees.
- (4) Transition from new employee to ongoing employee.
- (5) Examples.
  - (d) Change in employment status.
    - (1) In general.
    - (2) Examples.
  - (e) Employee rehires.
    - (1) Treatment as a new employee.
    - (2) Employment break period defined.
    - (3) Special unpaid leave defined.
    - (4) Averaging method for employment break periods and certain other unpaid leave.
    - (5) Anti-abuse rule.
    - (6) Examples.
    - (f) Nonpayment or late payment of premiums.
    - (g) Effective/applicability date.

Section 54.4980H-4 Assessable payments under section 4980H(a).

- (a) In general.
- (b) Offer of coverage.
- (c) Partial calendar month.
- (d) Allocated reduction of 30 full-time employees.
- (e) Example.
- (f) Effective/applicability date.

Section 54.4980H-5 Assessable payments under section 4980H(b).

- (a) In general.
- (b) Offer of coverage.
- (c) Partial calendar month.
- (d) Applicability to applicable large employer member.
- (e) Affordability.

(1) In general.  
(2) Affordability safe harbors for section 4980H(b) purposes.

- (f) Effective/applicability date.

Section 54.4980H-6 Administration and procedure.

- (a) Reserved.
- (b) Effective/applicability date.

#### § 54.4980H-1 Definitions.

(a) *Definitions.* The definitions in this section apply to this section and §§ 54.4980H-2 through 54.4980H-6.

(1) *Administrative period.* The term *administrative period* is an optional period, selected by an applicable large employer member, of no longer than 90 days beginning immediately following the end of a measurement period and ending immediately before the start of the associated stability period.

(2) *Advance credit payment.* The term *advance credit payment* means an advance payment of the premium tax credit as provided in Affordable Care Act section 1412 (42 U.S.C. 18082).

(3) *Affordable Care Act.* The term *Affordable Care Act* means the Patient Protection and Affordable Care Act, Public Law 111-148 (124 Stat. 119 (2010)), and the Health Care and Education Reconciliation Act of 2010, Public Law 111-152, (124 Stat. 1029 (2010)), as amended by the Medicare and Medicaid Extenders Act of 2010 Public Law 111-309 (124 Stat. 3285

(2010)), the Comprehensive 1099 Taxpayer Protection and Repayment of Exchange Subsidy Overpayments Act of 2011, Public Law 112-9 (125 Stat. 28, (2011)), the Department of Defense and Full-Year Continuing Appropriations Act, 2011, Public Law 112-10 (125 Stat. 38, (2011)), and the 3% Withholding Repeal and Job Creation Act, Public Law 112-56 (125 Stat. 711 (2011)).

(4) *Applicable large employer.* The term *applicable large employer* means, with respect to a calendar year, an employer that employed an average of at least 50 full-time employees (including full-time equivalent employees) on business days during the preceding calendar year. For rules relating to the determination of applicable large employer status, see § 54.5980H-2.

(5) *Applicable large employer member.* The term *applicable large employer member* means a person that, together with one or more other persons, is treated as a single employer that is an applicable large employer. For this purpose, if a person, together with one or more other persons, is treated as a single employer that is an applicable large employer on any day of a calendar month, that person is an applicable large employer member for that calendar month. If the applicable large employer comprises one person, that one person is the applicable large employer member. An applicable large employer member does not include a person that is not an employer or only an employer of employees with no hours of service for the calendar year. For rules for government entities, and churches, or conventions or associations of churches, see § 54.4980H-2(b)(4).

(6) *Applicable premium tax credit.* The term *applicable premium tax credit* means any premium tax credit that is allowed or paid under section 36B and any advance payment of such credit.

(7) *Calendar month.* The term *calendar month* means one of the 12 full months named in the calendar, such as January, February, or March.

(8) *Church, or a convention or association of churches.* The term *church, or a convention or association of churches* has the same meaning as provided in § 1.170A-9(b) of this chapter.

(9) *Collective bargaining agreement.* The term *collective bargaining agreement* means an agreement that the Secretary of Labor determines to be a collective bargaining agreement, provided that the health benefits provided under the collective bargaining agreement are the subject of good faith bargaining between employee representatives and one or more employers, and the agreement between



employee representatives and one or more employers satisfies section 7701(a)(46).

(10) *Cost-sharing reduction*. The term *cost-sharing reduction* means a cost-sharing reduction and any advance payment of the reduction as defined under section 1402 of the Affordable Care Act.

(11) *Dependent*. The term *dependent* means a child (as defined in section 152(f)(1)) of an employee who has not attained age 26. A child attains age 26 on the 26th anniversary of the date the child was born. Absent knowledge to the contrary, applicable large employer members may rely on an employee's representation about that employee's children and the ages of those children. Dependent does not include the spouse of an employee.

(12) *Eligible employer-sponsored plan*. The term *eligible employer-sponsored plan* has the same meaning as provided under section 5000A(f)(2) and any applicable guidance thereunder.

(13) *Employee*. The term *employee* means an individual who is an employee under the common-law standard. See § 31.3401(c)-1(b) of this chapter. For purposes of this paragraph, a leased employee (as defined in section 414(n)(2)), a sole proprietor, a partner in a partnership, or a 2-percent S corporation shareholder is not an employee.

(14) *Employer*. The term *employer* means the person that is the employer of an employee under the common-law standard. See § 31.3121(d)-1(c) of this chapter. For purposes of determining whether an employer is an applicable large employer, all persons treated as a single employer under section 414(b), (c), (m), or (o) are treated as a single employer. Thus, all employees of a controlled group of entities under section 414(b) or (c), an affiliated service group under section 414(m), or under section 414(o) are taken into account in determining whether the members of the controlled group or affiliated service group together are an applicable large employer. For purposes of determining applicable large employer status, the term employer also includes a predecessor employer and a successor employer.

(15) *Exchange*. The term *Exchange* means an Exchange as defined in 45 CFR 155.20.

(16) *Federal Poverty Line*. The term *Federal poverty line* means the most recently published poverty guidelines (updated periodically in the **Federal Register** by the Secretary of Health and Human Services under the authority of 42 U.S.C. 9902(2)) as of the first day of

the plan year of the applicable large employer member's health plan.

(17) *Form W-2 wages*. The term *Form W-2 wages* with respect to an employee refers to the amount of wages as defined under section 3401(a) for the applicable calendar year (required to be reported in Box 1 of the Form W-2) received from an applicable large employer.

(18) *Full-time employee*. The term *full-time employee* means, with respect to a calendar month, an employee who is employed an average of at least 30 hours of service per week with an employer. For this purpose, 130 hours of service in a calendar month is treated as the monthly equivalent of at least 30 hours of service per week, provided the employer applies this equivalency rule on a reasonable and consistent basis. For rules on the determination of whether an employee is a full-time employee, including the look-back measurement method for purposes of determining and computing liability under section 4980H (but not for the purpose of determining status as an applicable large employer), see § 54.4980H-3.

(19) *Full-time equivalent employee (FTE)*. The term *full-time equivalent employee*, or *FTE*, means a combination of employees, each of whom individually is not treated as a full-time employee because he or she is not employed on average at least 30 hours of service per week with an employer, who, in combination, are counted as the equivalent of a full-time employee solely for purposes of determining whether the employer is an applicable large employer. For rules on the method for determining the number of an employer's full-time equivalent employees, or FTEs, see § 54.4980H-2(c).

(20) *Government entity*. The term *government entity* means the government of the United States, any State or political subdivision thereof, any Indian tribal government (as defined in section 7701(a)(40)) or subdivision of an Indian tribal government (determined in accordance with section 7871(d)), or any agency or instrumentality of any of the foregoing.

(21) *Hour of service*—(i) *In general*. The term *hour of service* means each hour for which an employee is paid, or entitled to payment, for the performance of duties for the employer; and each hour for which an employee is paid, or entitled to payment by the employer for 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 (as defined in 29 CFR 2530.200b-2(a)). For the rules for

determining an employee's hour of service, see § 54.4980H-3.

(ii) *Service for other applicable large employer members*. In determining hours of service and status as a full-time employee for all purposes under section 4980H, an hour of service for one applicable large employer member is treated as an hour of service for all other applicable large employer members for all periods during which the applicable large employer members are part of the same group of employers forming an applicable large employer.

(iii) *Service of a nonresident alien individuals and service outside the United States*. Hours of service do not include hours of service to the extent the compensation for those hours of service constitutes income from sources without the United States (within the meaning of section 862(a)(3)).

(22) *Initial measurement period*. The term *initial measurement period* means a time period selected by an applicable large employer member of at least three consecutive calendar months but not more than 12 consecutive calendar months used by the applicable large employer as part of the process of determining whether certain new employees are full-time employees under the look-back measurement method in § 54.4980H-3(c). See § 54.4980H-3(c)(1)(ii) for rules on pay periods including the beginning and end dates of the measurement period.

(23) *Minimum essential coverage*. The term *minimum essential coverage* (or *MEC*) has the same meaning as provided in section 5000A(f) and any regulations or other administrative guidance thereunder.

(24) *Minimum value*. The term *minimum value* has the same meaning as provided in section 36B(c)(2)(C)(ii) and any regulations or other administrative guidance thereunder.

(25) *Month*. The term *month* refers to the period that begins on any date following the first day of a calendar month and that ends on the immediately preceding date in the immediately following calendar month (for example, from February 2 to March 1 or from December 15 to January 14) or that is a calendar month. See § 54.4980H-1(a)(7) for the definition of calendar month.

(26) *New employee*. The term *new employee* means an employee who has been employed by an applicable large employer for less than one complete standard measurement period. For treatment of the employee as a new employee or ongoing employee following a period for which no hours of service are earned, see the

employment break period rules at § 54.4980H-3(e).

(27) *Ongoing employee*. The term *ongoing employee* means an employee who has been employed by an applicable large employer member for at least one complete standard measurement period.

(28) *Period of employment*. The term *period of employment* means the period of time beginning on the first date for which an employee is credited with an hour of service for an applicable large employer (including any member of that applicable large employer) and ending on the last date on which the employee is credited with an hour of service for that applicable large employer, both dates inclusive. An employee may have one or more periods of employment with the same applicable large employer.

(29) *Person*. The term *person* has the same meaning as provided in section 7701(a)(1) and the regulations thereunder.

(30) *Plan year*. The plan year must be twelve consecutive months, unless a short plan year of less than twelve consecutive months is permitted for a valid business purpose. A plan year is permitted to begin on any day of a year and must end on the preceding day in the immediately following year (for example, a plan year that begins on October 15, 2014, must end on October 14, 2015). A calendar year plan year is a period of twelve consecutive months beginning on January 1 and ending on December 31 of the same calendar year. Once established, a plan year is effective for the first plan year and for all subsequent plan years, unless changed, provided that such change will only be recognized if made for a valid business purposes. A change in the plan year is not permitted if a principal purpose of the change in plan year is to circumvent the rules of section 4980H or these regulations.

(31) *Predecessor employer*. [Reserved]

(32) *Qualified health plan*. The term *qualified health plan* means a qualified health plan as defined in Affordable Care Act section 1301(a) (42 U.S.C. 18021(a)), but does not include a catastrophic plan described in Affordable Care Act section 1302(e) (42 U.S.C. 18022(e)).

(33) *Seasonal employee*. [Reserved]

(34) *Seasonal worker*. The term *seasonal worker* means a worker who performs labor or services on a seasonal basis as defined by the Secretary of Labor, including (but not limited to) workers covered by 29 CFR 500.20(s)(1), 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 29 CFR 500.20(s)(1) (including as applied by analogy to workers and employment positions not otherwise covered under 29 CFR 500.20(s)(1)).

(35) *Section 1411 Certification*. The term *Section 1411 Certification* means the certification received as part of the process established by the Secretary of Health and Human Services under which an employee is certified to the employer under section 1411 of the Affordable Care Act as having enrolled for a calendar month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee.

(36) *Section 4980H(a) applicable payment amount*. The term *section 4980H(a) applicable payment amount* means, with respect to any month, 1/12 of \$2,000, adjusted for inflation in accordance with section 4980H(c)(5) and any applicable guidance thereunder.

(37) *Section 4980H(b) applicable payment amount*. The term *section 4980H(b) applicable payment amount* means, with respect to any month, 1/12 of \$3,000, adjusted for inflation in accordance with section 4980H(c)(5) and any applicable guidance thereunder.

(38) *Self-only coverage*. The term *self-only coverage* means health insurance coverage provided to only one individual, generally the employee.

(39) *Stability period*. The term *stability period* means a time period selected by an applicable large employer member that follows, and is associated with, a standard measurement period or an initial measurement period, and is used by the applicable large employer member as part of the process of determining whether an employee is a full-time employee under the look-back measurement method in § 54.4980H-3(c).

(40) *Standard measurement period*. The term *standard measurement period* means a time period of at least three but not more than 12 consecutive months that an applicable large employer member selects and uses in determining whether an ongoing employee is a full-time employee under the look-back measurement method in § 54.4980H-3(c). See § 54.4980H-3(c)(1)(ii) for rules on payroll periods that include the beginning and end dates of the measurement period.

(41) *Start date*. The term *start date* means the first date on which an employee is required to be credited with an hour of service with an employer.

For rules relating to when, following a period for which an employee does not earn an hour of service, that employee may be treated as a new employee with a new start date rather than a continuing employee, see the averaging method for employment break periods at § 54.4980H-3(e).

(42) *United States*. The term *United States* means United States as defined in section 7701(a)(9).

(43) *Variable hour employee*. The term *variable hour employee* means an employee if, based on the facts and circumstances at the employee’s start date, the applicable large employer member cannot determine whether the 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. For this purpose, the applicable large employer member may not take into account the likelihood that the employee may terminate employment with the applicable large employer (including any member of the applicable large employer) before the end of the initial measurement period.

(44) *Week*. The term *week* means any period of seven consecutive calendar days applied consistently by the applicable large employer member.

(b) *Effective/applicability date*. This section is applicable for periods after December 31, 2013.

#### **§ 54.4980H-2 Applicable large employer and applicable large employer member.**

(a) *In general*. Section 4980H applies to an applicable large employer and to all of the applicable large employer members that comprise that applicable large employer.

(b) *Determining applicable large employer status—(1) In general*. An employer’s status as an applicable large employer for a calendar year is determined by taking the sum of the total number of full-time employees (including any seasonal workers) for each calendar month in the preceding calendar year and the total number of FTEs (including any seasonal workers) for each calendar month in the preceding calendar year, and dividing by 12. The result, if not a whole number, is then rounded to the next lowest whole number. If the result of this calculation is less than 50, the employer is not an applicable large employer for the current calendar year. If the result of this calculation is 50 or more, the employer is an applicable large employer for the current calendar year, unless the seasonal worker exception in paragraph (b)(2) of this section applies.

(2) *Seasonal worker exception.* If the sum of an employer's full-time employees and FTEs exceeds 50 for 120 days or less during the preceding calendar year, and the employees in excess of 50 who were employed during that period of no more than 120 days are seasonal workers, the employer is not considered to employ more than 50 full-time employees (including FTEs) and the employer is not an applicable large employer for the current calendar year. For purposes of this paragraph (b)(2) only, four calendar months may be treated as the equivalent of 120 days. The four calendar months and the 120 days are not required to be consecutive.

(3) *Employers not in existence in preceding calendar year.* An employer not in existence throughout the preceding calendar year is an applicable large employer for the current calendar year if it is reasonably expected to employ an average of at least 50 full-time employees (taking into account FTEs) on business days during the current calendar year and it actually employs an average of at least 50 full-time employees (taking into account FTEs) on business days during the calendar year.

(4) *Special rules for government entities, churches, and conventions and associations of churches.* [Reserved]

(c) *Full-time equivalent employees (FTEs)*—(1) *In general.* In determining whether an employer is an applicable large employer, the number of FTEs it employed during the preceding calendar year are taken into account. All employees (including seasonal workers) who were not employed on average at least 30 hours of service per week for a calendar month in the preceding calendar year are included in calculating the employer's FTEs for that calendar month.

(2) *Calculating the number of FTEs.* The number of FTEs for each calendar month in the preceding calendar year is determined by calculating the aggregate number of hours of service for that calendar month for employees who were not full-time employees (but not more than 120 hours of service for any employee) and dividing that number by 120. In determining the number of FTEs for each calendar month, fractions are taken into account.

(d) *Examples.* The following examples illustrate the rules of paragraphs (a) through (c) of this section. In these examples, hours of service are computed following the rules set forth in § 54.4980H-3, and references to years refer to calendar years unless otherwise specified. The Employers in *Examples 2* through *5* are each the sole applicable large employer member of the

applicable large employer, as determined under section 414(b), (c), (m) and (o).

*Example 1. Applicable large employer/controlled group.* (i) *Facts.* For 2015 and 2016, corporation P owns 100 percent of all classes of stock of corporation S and corporation T. P has no employees at any time in 2015. For every calendar month in 2015, S has 40 full-time employees and T has 60 full-time employees. P, S, and T are a controlled group of corporations under section 414(b).

(ii) *Conclusion.* Because P, S and T have a combined total of 100 full-time employees during 2015, P, S, and T is an applicable large employer for 2016. Each of P, S and T is an applicable large employer member for 2016.

*Example 2. Applicable large employer with FTEs.* (i) *Facts.* During each calendar month of 2015, Employer L 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 month, and no seasonal workers.

(ii) *Conclusion.* Each of the 20 employees who average 35 hours of service per week count as one full-time employee for each month. To determine the number of FTEs for each 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 FTEs for each month ( $40 \times 90 = 3,600$ , and  $3,600 \div 120 = 30$ ). Because Employer L has 50 full-time employees (the sum of 20 full-time employees and 30 FTEs) during each month in 2015, and because the seasonal worker exception is not applicable, Employer L is an applicable large employer for 2016.

*Example 3. Seasonal worker exception.* (i) *Facts.* During 2015, Employer N has 40 full-time employees for the entire calendar year, none of whom are seasonal workers. In addition, Employer N also has 80 seasonal full-time workers who work for Employer N from September through December, 2015. Employer N has no FTEs during 2015.

(ii) *Conclusion.* Before applying the seasonal worker exception, Employer N 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 66.5 employees for the year (rounded down to 66 full-time employees). However, Employer N's workforce equaled or exceeded 50 full-time employees (counting seasonal workers) for no more than four calendar months (treated as the equivalent of 120 days) in calendar year 2015, and the number of full-time employees would be less than 50 during those months if seasonal workers were disregarded. Accordingly, because after application of the seasonal worker exception in paragraph (b)(2) of this section Employer N is not considered to employ more than 50 full-time employees, Employer N is not an applicable large employer for 2016.

*Example 4. Seasonal workers and other FTEs.* (i) *Facts.* Same facts as in *Example 3*, except that Employer N has 20 FTEs in August, some of whom are seasonal workers.

(ii) *Conclusion.* The seasonal worker exception in paragraph (b)(2) of this section

does not apply if the number of an employer's full-time employees (including seasonal workers) and FTEs equals or exceeds 50 employees for more than 120 days during the calendar year. Because Employer N 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 in paragraph (b)(2) of this section does not apply. Employer N averaged 68 full-time employees in 2015:  $[(40 \times 7) + (60 \times 1) + (120 \times 4)] \div 12 = 68.33$ , rounded down to 68, and accordingly, Employer N is an applicable large employer for calendar year 2016.

*Example 5. New employer.* (i) *Facts.* Corporation A is incorporated on January 1, 2015. On January 1, 2015, Corporation A has three employees. However, prior to incorporation, Corporation A's owners purchased a factory intended to open within two months of incorporation and to employ approximately 100 employees. By March 15, 2015, Corporation A has more than 75 full-time employees.

(ii) *Conclusion.* Because Corporation A can reasonably be expected to employ on average at least 50 full-time employees on business days during 2015, and actually employs an average of at least 50 full-time employees on business days during 2015, Corporation A is an applicable large employer (and an applicable large employer member).

(e) *Effective/applicability date.* This section is applicable for periods after December 31, 2013.

#### § 54.4980H-3 Determining full-time employees.

(a) *In general.* This section sets forth the rules for determining hours of service and status as a full-time employee for all purposes of section 4980H, provided that the look-back measurement methods for determining status as a full-time employee under paragraph (c) of this section apply solely for purposes of determining and calculating liability under section 4980H(a) and (b) (and not for purposes of determining status as an applicable large employer). See § 54.4980H-1(a)(18) for the definition of full-time employee.

(b) *Hours of service*—(1) *Hourly employees calculation.* For employees paid on an hourly basis, an employer must calculate actual hours of service from records of hours worked and hours for which payment is made or due.

(2) *Non-hourly employees calculation*—(i) *In general.* For employees paid on a non-hourly basis, an employer must calculate hours of service by using one of the following methods:

(A) Using actual hours of service from records of hours worked and hours for which payment is made or due.

(B) Using a days-worked equivalency 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 in accordance with paragraph (b)(1) of this section.

(C) Using a weeks-worked equivalency whereby the employee is credited with 40 hours of service for each week for which the employee would be required to be credited with at least one hour of service in accordance with paragraph (b)(1) of this section.

(ii) *Change in method.* An employer must use one of the three methods in paragraph (b)(2) of this section for calculating the hours of service for non-hourly employees. An employer is not required to use the same method for all non-hourly employees, and may apply different methods for different classifications of non-hourly employees, provided the classifications are reasonable and consistently applied. Similarly, an applicable large employer member is not required to apply the same methods as other applicable large employer members of the same applicable large employer for the same or different classifications of non-hourly employees, provided that in each case the classifications are reasonable and consistently applied by the applicable large employer member.

(iii) *Prohibited use of equivalencies.* The number of hours of service calculated using the days-worked or weeks-worked equivalency must reflect generally the hours actually worked and the hours for which payment is made or due. An employer is not permitted to use the days-worked equivalency or the weeks-worked equivalency if the result is to substantially understate an employee's hours of service in a manner that would cause that employee not to be treated as full-time. For example, an employer may not use a days-worked equivalency in the case of an employee who generally works three 10-hour days per week, because the equivalency would substantially understate the employee's hours of service as 24 hours of service per week, which would result in the employee being treated as not a full-time employee. Rather, the number of hours of service calculated using the days-worked or weeks-worked equivalency method must reflect generally the hours actually worked and the hours for which payment is made or due.

(c) *Look-back measurement method—*  
(1) *Ongoing employees—*(i) *In general.* Under the look-back measurement method for ongoing employees, an applicable large employer determines each ongoing employee's full-time status by looking back at the standard measurement period. The applicable

large employer member determines the months in which the standard measurement period starts and ends, provided that the determination must be made on a uniform and consistent basis for all employees in the same category (see paragraph (c)(1)(v) of this section for a list of permissible categories). For example, if an applicable large employer member chooses a standard measurement period of 12 months, the applicable large employer member could choose to make it the calendar year, a non-calendar plan year, or a different 12-month period, such as one that ends shortly before the start of the plan's annual open enrollment period. If the applicable large employer member determines that an employee was employed on average at least 30 hours per week during the standard measurement period, then the applicable large employer member treats the employee as a full-time employee during a subsequent stability period, regardless of the employee's number of hours of service during the stability period, so long as he or she remains an employee.

(ii) *Use of payroll periods.* For payroll periods that are one week, two weeks, or semi-monthly in duration, an employer is permitted to treat as a measurement period a period that ends on the last day of the payroll period preceding the payroll period that includes the date that would otherwise be the last day of the measurement period, provided that the measurement period begins on the first day of the payroll period that includes the date that would otherwise be the first day of the measurement period. An employer may also treat as a measurement period a period that begins on the first day of the payroll period that follows the payroll period that includes the date that would otherwise be the first day of the measurement period, provided that the measurement period ends on the last day of the payroll period that includes the date that would otherwise be the last day of the measurement period. For example, an employer using the calendar year as a measurement period could exclude the entire payroll period that included January 1 (the beginning of the year) if it included the entire payroll period that included December 31 (the end of that same year), or, alternatively, could exclude the entire payroll period that included December 31 of a calendar year if it included the entire payroll period that included January 1 of that calendar year.

(iii) *Employee determined to be employed an average of at least 30 hours of service per week.* An employee who was employed on average at least

30 hours of service per week during the standard measurement period must be treated as a full-time employee for a stability period that begins immediately after the standard measurement period and any applicable administrative period. The stability period must be at least six consecutive calendar months but no shorter in duration than the standard measurement period.

(iv) *Employee determined not to be employed on average at least 30 hours of service per week.* If an employee was not employed an average at least 30 hours of service per week during the standard measurement period, the applicable large employer member may treat the employee as not a full-time employee during the stability period that follows, but is not longer than, the standard measurement period. The stability period must begin immediately after the end of the measurement period and any applicable administrative period.

(v) *Permissible employee categories.* Subject to the rules governing the relationship between the length of the measurement period and the stability period, applicable large employer members may use measurement periods and stability periods that differ either in length or in their starting and ending dates for the following categories of employees:

(A) Collectively bargained employees and non-collectively bargained employees.

(B) Each group of collectively bargained employees covered by a separate collective bargaining agreement.

(C) Salaried employees and hourly employees.

(D) Employees whose primary places of employment are in different States.

(vi) *Optional administrative period.* An applicable large employer member may provide for an administrative period that begins immediately after the end of a standard measurement period and that ends immediately before the associated stability period; however, any administrative period between the standard measurement period and the stability period for ongoing employees may neither reduce nor lengthen the measurement period or the stability period. The administrative period following the standard measurement period may last up to 90 days. To prevent this administrative period from creating a gap in coverage, the administrative period must overlap with the prior stability period, so that, during any such administrative period applicable to ongoing employees following a standard measurement period, ongoing employees who are

enrolled in coverage because of their status as full-time employees based on a prior measurement period must continue to be covered through the administrative period. Applicable large employer members may use administrative periods that differ in length for the categories of employees identified in paragraph (c)(1)(v) of this section.

(vii) *Change in position of employment or other employment status.* If an ongoing employee's position of employment or other employment status changes before the end of a stability period, the change will not affect the application of the classification of the employee as a full-time employee (or not a full-time employee) for the remaining portion of the stability period. For example, if an ongoing employee in a certain position of employment is not treated as a full-time employee during a stability period because the employee's hours of service during the prior measurement period were insufficient for full-time-employee treatment, and the employee changes position of employment to a position that involves an increased level of hours of service, the treatment of the employee as a non-full-time employee during the remainder of the stability period is unaffected. Similarly, if an ongoing employee in a certain position of employment is treated as a full-time employee during a stability period because the employee's hours of service during the prior measurement period were sufficient for full-time-employee treatment, and the employee changes position of employment to a position that involves a lower level of hours of service, the treatment of the employee as a full-time employee during the remainder of the stability period is unaffected.

(viii) *Example.* The following example illustrates the application of paragraph (c)(1) of this section:

(i) *Facts.* Employer W is an applicable large employer member and computes hours of service following the rules in this section. Employer W chooses to use a 12-month stability period that begins January 1 and a 12-month standard measurement period that begins October 15. Consistent with the terms of Employer W's group health plan, only employees classified as full-time employees using the look-back measurement method are eligible for coverage. Employer W chooses to use an administrative period between the end of the standard measurement period (October 14) and the beginning of the stability period (January 1) to determine which employees were employed on average 30 hours of service per week

during the measurement period, notify them of their eligibility for the plan for the calendar year beginning on January 1 and of the coverage available under the plan, answer questions and collect materials from employees, and enroll those employees who elect coverage in the plan. Previously-determined full-time employees already enrolled in coverage continue to be offered coverage through the administrative period.

Employee A and Employee B have been employed by Employer W for several years, continuously from their start date. Employee A was employed on average 30 hours of service per week during the standard measurement period that begins October 15, 2015 and ends October 14, 2016 and for all prior standard measurement periods. Employee B also was employed on average 30 hours of service per week for all prior standard measurement periods, but is not a full-time employee during the standard measurement period that begins October 15, 2015 and ends October 14, 2016.

(ii) *Conclusions.* Because Employee A was employed for the entire standard measurement period that begins October 15, 2015 and ends October 14, 2016, Employee A is an ongoing employee with respect to the stability period running from January 1, 2017 through December 31, 2017. Because Employee A was employed on average 30 hours of service per week during that standard measurement period, Employee A is offered coverage for the entire 2017 stability period (including the administrative period from October 15, 2017 through December 31, 2017). Because Employee A was employed on average 30 hours of service per week during the prior standard measurement period, Employee A is offered coverage for the entire 2016 stability period and, if enrolled, would continue such coverage during the administrative period from October 15, 2016 through December 31, 2016.

Because Employee B was employed for the entire standard measurement period that begins October 15, 2015 and ends October 14, 2016, Employee B is also an ongoing employee with respect to the stability period in 2017. Because Employee B did not work full-time during this standard measurement period, Employee B is not required to be offered coverage for the stability period in 2017 (including the administrative period from October 15, 2017 through December 31, 2017). However, because Employee B was employed on average 30 hours of service per week during the prior standard measurement period, Employee B is offered coverage through the end of the 2016 stability period and,

if enrolled, would continue such coverage during the administrative period from October 15, 2016 through December 31, 2016. Employer W complies with the standards of paragraph (c)(1) of this section because the measurement and stability periods are no longer than 12 months, the stability period for ongoing employees who work full-time during the standard measurement period is not shorter than the standard measurement period, the stability period for ongoing employees who do not work full-time during the standard measurement period is no longer than the standard measurement period, and the administrative period is no longer than 90 days.

(2) *New non-variable hour and non-seasonal employees.* If an employee is reasonably expected at his or her start date to be a full-time employee (and is not a seasonal employee), an employer that sponsors a group health plan that offers coverage to the employee at or before the conclusion of the employee's initial three full calendar months of employment will not be subject to an assessable payment under section 4980H by reason of its failure to offer coverage to the employee for up to the initial full three calendar months of employment; however, if the employer did not offer coverage to the employee by the end of the employee's initial three full calendar months of employment, the employer may be subject to a section 4980H assessable payment for those months as well as for any subsequent months for which coverage was not offered.

(3) *New variable hour and new seasonal employees—(i) In general.* For new variable hour employees and new seasonal employees, applicable large employer members are permitted to determine whether the new employee is a full-time employee using an initial measurement period of between three and 12 months (as selected by the applicable large employer member) that begins on any date between the employee's start date and the first day of the first calendar month following the employee's start date. The applicable large employer member measures the new employee's hours of service during the initial measurement period and determines whether the employee was employed on average at least 30 hours of service per week during this period. The stability period for such employees must be the same length as the stability period for ongoing employees.

(ii) *Employees determined to be employed on average at least 30 hours of service per week.* If a new variable hour employee or new seasonal employee has on average at least 30

hours of service per week during the initial measurement period, the applicable large employer member must treat the employee as a full-time employee during the stability period that begins after the initial measurement period (and any associated administrative period). The stability period must be a period of at least six consecutive calendar months that is no shorter in duration than the initial measurement period.

(iii) *Employees determined not to be employed on average of at least 30 hours of service per week.* If a new variable hour employee or new seasonal employee does not have on average at least 30 hours of service per week during the initial measurement period, the applicable large employer member is permitted to treat the employee as not a full-time employee during the stability period that follows the initial measurement period. This stability period for such employees must not be more than one month longer than the initial measurement period and, in accordance with paragraph (c)(4) of this section, must not exceed the remainder of the standard measurement period (plus any associated administrative period) in which the initial measurement period ends.

(4) *Transition from new employee to ongoing employee—(i) In general.* Once a new variable hour employee or new seasonal employee has been employed for an entire standard measurement period, the applicable large employer must test the employee for full-time employee status, beginning with that standard measurement period, at the same time and under the same conditions as apply to other ongoing employees. Accordingly, for example, an applicable large employer member with a calendar year standard measurement period that also uses a one-year initial measurement period beginning on the employee's start date would test a new variable hour employee whose start date is February 12 for full-time status first based on the initial measurement period (February 12 through February 11 of the following year) and again based on the calendar year standard measurement period (if the employee continues in employment for that entire standard measurement period) beginning on January 1 of the year after the start date.

(ii) *Employee determined to be employed an average of at least 30 hours of service per week.* An employee who was employed an average of at least 30 hours of service per week during an initial measurement period or standard measurement period must be treated as a full-time employee for the entire

associated stability period. This is the case even if the employee was employed an average of at least 30 hours of service per week during the initial measurement period but was not employed an average of at least 30 hours of service per week during the overlapping or immediately following standard measurement period. In that case, the applicable large employer member may treat the employee as not a full-time employee only after the end of the stability period associated with the initial measurement period. Thereafter, the applicable large employer member must determine the employee's status as a full-time employee in the same manner as it determines such status in the case of its other ongoing employees as described in paragraph (c)(1) of this section.

(iii) *Employee determined not to be employed an average of at least 30 hours of service per week.* If the employee was not employed an average of at least 30 hours of service per week during the initial measurement period, but was employed at least 30 hours of service per week during the overlapping or immediately following standard measurement period, the employee must be treated as a full-time employee for the entire stability period that corresponds to that standard measurement period (even if that stability period begins before the end of the stability period associated with the initial measurement period). Thereafter, the applicable large employer member must determine the employee's status as a full-time employee in the same manner as it determines such status in the case of its other ongoing employees as described in paragraph (c)(1) of this section.

(iv) *Permissible differences in measurement or stability periods for different categories of employees.* Subject to the rules governing the relationship between the length of the measurement period and the stability period, applicable large employer members may use measurement periods and stability periods that differ either in length or in their starting and ending dates for the categories of employees identified in paragraph (c)(1)(v) of this section.

(v) *Optional administrative period—(A) In general.* Subject to the limits in paragraph (c)(4)(v)(B) of this section, an applicable large employer member is permitted to apply an administrative period in connection with an initial measurement period and before the start of the stability period. This administrative period must not exceed 90 days in total. For this purpose, the administrative period includes all

periods between the start date of a new variable hour employee or new seasonal employee and the date the employee is first offered coverage under the applicable large employer member's group health plan, other than the initial measurement period. Thus, for example, if the applicable large employer member begins the initial measurement period on the first day of the first month following a new variable hour or new seasonal employee's start date, the period between the employee's start date and the first day of the next month must be taken into account in applying the 90-day limit on the administrative period. Similarly, if there is a period between the end of the initial measurement period and the date the employee is first offered coverage under the plan, that period must be taken into account in applying the 90-day limit on the administrative period. Applicable large employer members may use administrative periods that differ in length for the categories of employees identified in paragraph (c)(1)(v) of this section.

(B) *Limit on combined length of initial measurement period and administrative period.* In addition to the specific limits on the initial measurement period (which must not exceed 12 months) and the administrative period (which must not exceed 90 days), there is a limit on the combined length of the initial measurement period and the administrative period applicable to a new variable hour employee or new seasonal employee. Specifically, the initial measurement period and administrative period together cannot extend beyond the last day of the first calendar month beginning on or after the first anniversary of the employee's start date. For example, if an applicable large employer member uses a 12-month initial measurement period for a new variable hour employee, and begins that initial measurement period on the first day of the first calendar month following the employee's start date, the period between the end of the initial measurement period and the offer of coverage to a new variable hour employee who works full time during the initial measurement period must not exceed one month.

(5) *Examples.* The following examples illustrate the look-back measurement methods described in paragraphs (c)(2) through (c)(4) of this section. In all of the following examples, the applicable large employer member offers all of its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan. The coverage is affordable within the



meaning of section 36B(c)(2)(C)(i) (or is treated as affordable coverage under one of the affordability safe harbors described in § 54.4980H-5) and provides minimum value within the meaning of section 36B(c)(2)(C)(ii). In *Example 1* through *Example 8*, the new employee is a new variable hour employee, and the employer has chosen to use a 12-month standard measurement period for ongoing employees starting October 15 and a 12-month stability period associated with that standard measurement period starting January 1. (Thus, during the administrative period from October 15 through December 31 of each calendar year, the employer continues to offer coverage to employees who qualified for coverage for that entire calendar year based upon working on average at least 30 hours per week during the prior standard measurement period.) Also, the employer offers health plan coverage only to full-time employees (and their dependents). In *Example 9* and *Example 10*, the new employee is a new variable hour employee, and the employer uses a six-month standard measurement period, starting each May 15 and November 15, with six-month stability periods associated with those standard measurement periods starting January 1 and July 1.

*Example 1 (12-Month Initial Measurement Period Followed by 1+ Partial Month Administrative Period).* (i) *Facts.* For new variable hour employees, Employer B 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 first calendar month beginning on or after the end of the initial measurement period. Employer B hires Employee Y on May 10, 2015. Employee Y's initial measurement period runs from May 10, 2015, through May 9, 2016. Employee Y has an average of 30 hours of service per week during this initial measurement period. Employer B offers coverage to Employee Y for a stability period that runs from July 1, 2016 through June 30, 2017.

(ii) *Conclusion.* Employee Y has an average of 30 hours of service per week during his initial measurement period and Employer B uses an initial measurement period that does not exceed 12 months; an administrative period totaling not more than 90 days; and a combined initial measurement period and administrative period that does not last beyond the final day of the first calendar month beginning on or after the one-year anniversary of Employee Y's start date. Accordingly, from Employee Y's start date through June 30, 2017, Employer B is not subject to any payment under section 4980H with respect to Employee Y, because Employer B complies with the standards for the initial measurement period and stability periods for a new variable hour employee. Employer B must test Employee Y again

based on the period from October 15, 2015 through October 14, 2016 (Employer B's first standard measurement period that begins after Employee Y's start date).

*Example 2 (11-Month Initial Measurement Period Followed by 2+ Partial Month Administrative Period).* (i) *Facts.* Same as *Example 1*, except that Employer B uses an 11-month initial measurement period that begins on the start date and applies an administrative period from the end of the initial measurement period until the end of the second calendar month beginning after the end of the initial measurement period. Employer B hires Employee Y on May 10, 2015. Employee Y's initial measurement period runs from May 10, 2015, through April 9, 2016. Employee Y has an average of 30 hours of service per week during this initial measurement period. Employer B offers coverage to Employee Y for a stability period that runs from July 1, 2016 through June 30, 2017.

(ii) *Conclusion.* Same as *Example 1*.

*Example 3 (11-Month Initial Measurement Period Preceded by Partial Month Administrative Period and Followed by 2-Month Administrative Period).* (i) *Facts.* Same as *Example 1*, except that Employer B uses an 11-month initial measurement period that begins on the first day of the first calendar month beginning after the start date and applies an administrative period that runs from the end of the initial measurement period through the end of the second calendar month beginning on or after the end of the initial measurement period. Employer B hires Employee Y on May 10, 2015. Employee Y's initial measurement period runs from June 1, 2015, through April 30, 2016. Employee Y has an average of 30 hours of service per week during this initial measurement period. Employer B offers coverage to Employee Y for a stability period that runs from July 1, 2016 through June 30, 2017.

(ii) *Conclusion.* Same as *Example 1*.

*Example 4 (12-Month Initial Measurement Period Preceded by Partial Month Administrative Period and Followed by 2-Month Administrative Period).* (i) *Facts.* For new variable hour employees, Employer B uses a 12-month initial measurement period that begins on the first day of the first month following the start date and applies an administrative period that runs from the end of the initial measurement period through the end of the second calendar month beginning on or after the end of the initial measurement period. Employer B hires Employee Y on May 10, 2015. Employee Y's initial measurement period runs from June 1, 2015, through May 31, 2016. Employee Y has an average of 30 hours of service per week during this initial measurement period. Employer B offers coverage to Employee Y for a stability period that runs from August 1, 2016 through July 31, 2017.

(ii) *Conclusion.* Employer B does not satisfy the standards for the look-back measurement method in paragraph (c)(4)(v) of this section because the combination of the initial partial month delay, the 12-month initial measurement period, and the two month administrative period means that the coverage offered to Employee Y does not

become effective until after the first day of the second calendar month following the first anniversary of Employee Y's start date. Accordingly, Employer B is potentially subject to a payment under section 4980H.

*Example 5 (Continuous Full-Time Employee).* (i) *Facts.* Same as *Example 1*; in addition, Employer B tests Employee Y again based on Employee Y's hours of service from October 15, 2015 through October 14, 2016 (Employer B's first standard measurement period that begins after Employee Y's start date), determines that Employee Y has an average of 30 hours of service a week during that period, and offers Employee Y coverage for July 1, 2017 through December 31, 2017. (Employee Y already has an offer of coverage for the period of January 1, 2017 through June 30, 2017 because that period is covered by the initial stability period following the initial measurement period, during which Employee Y was determined to be a full-time employee.)

(ii) *Conclusion.* Employer B is not subject to any payment under section 4980H for 2017 with respect to Employee Y.

*Example 6 (Initially Full-Time Employee, Becomes Non-Full-Time Employee).* (i) *Facts.* Same as *Example 1*; in addition, Employer B tests Employee Y again based on Employee Y's hours of service from October 15, 2015 through October 14, 2016 (Employer B's first standard measurement period that begins after Employee Y's start date), and determines that Employee Y has an average of 28 hours of service a week during that period. Employer B continues to offer coverage to Employee Y through June 30, 2017 (the end of the stability period based on the initial measurement period during which Employee Y was determined to be a full-time employee), but does not offer coverage to Employee Y for the period of July 1, 2017 through December 31, 2017.

(ii) *Conclusion.* Employer B is not subject to any payment under section 4980H for 2016 with respect to Employee Y, provided that it offers coverage to Employee Y from July 1, 2016 through June 30, 2017 (the entire stability period associated with the initial measurement period).

*Example 7 (Initially Non-Full-Time Employee).* (i) *Facts.* Same as *Example 1*, except that Employee Y has an average of 28 hours of service per week during the period from May 10, 2015 through May 9, 2016 and Employer B does not offer coverage to Employee Y in 2016.

(ii) *Conclusion.* From Employee Y's start date through the end of 2016, Employer B is not subject to any payment under section 4980H, because Employer B complies with the standards for the measurement and stability periods for a new variable hour employee with respect to Employee Y.

*Example 8 (Initially Non-Full-Time Employee, Becomes Full-Time Employee).* (i) *Facts.* Same as *Example 7*; in addition, Employer B tests Employee Y again based on Employee Y's hours of service from October 15, 2015 through October 14, 2016 (Employer B's first standard measurement period that begins after Employee Y's start date), determines that Employee Y has an average of 30 hours of service per week during this standard measurement period, and offers coverage to Employee Y for 2017.

(ii) *Conclusion.* Employer B is not subject to any payment under section 4980H for 2017 with respect to Employee Y.

*Example 9 (Initially Full-Time Employee).*

(i) *Facts.* For new variable hour employees, Employer C uses a six-month initial measurement period that begins on the start date and applies an administrative period that runs from the end of the initial measurement period through the end of the first full calendar month beginning after the end of the initial measurement period.

Employer C hires Employee Z on May 10, 2015. Employee Z's initial measurement period runs from May 10, 2015, through November 9, 2015, during which Employee Z has an average of 30 hours of service per week. Employer C offers coverage to Employee Z for a stability period that runs from January 1, 2016 through June 30, 2016.

(ii) *Conclusion.* Employer C uses an initial measurement period that does not exceed 12 months; an administrative period totaling not more than 90 days; and a combined initial measurement period and administrative period that does not last longer than the final day of the first calendar month beginning on or after the one-year anniversary of Employee Z's start date. From Employee Z's start date through June 30, 2016, Employer C is not subject to any payment under section 4980H, because Employer C complies with the standards for the measurement and stability periods for a new variable hour employee with respect to Employee Z. Employer C must test Employee Z again based on Employee Z's hours of service during the period from November 15, 2015 through May 14, 2016 (Employer C's first standard measurement period that begins after Employee Z's start date).

*Example 10 (Initially Full-Time Employee, Becomes Non-Full-Time Employee).* (i) *Facts.* Same as *Example 9*; in addition, Employer C tests Employee Z again based on Employee Z's hours of service during the period from November 15, 2015 through May 14, 2016 (Employer C's first standard measurement period that begins after Employee Z's start date), during which period Employee Z has an average of 28 hours of service per week. Employer C continues to offer coverage to Employee Z through June 30, 2016 (the end of the initial stability period based on the initial measurement period during which Employee Z has an average of 30 hours of service per week), but does not offer coverage to Employee Z from July 1, 2016 through December 31, 2016.

(ii) *Conclusion.* Employer C is not subject to any payment under section 4980H with respect to Employee Z for 2016.

*Example 11 (Seasonal Employee, 12-Month Initial Measurement Period; 1+ Partial Month Administrative Period).* (i) *Facts.* Employer D offers health plan coverage only to full-time employees (and their dependents). Employer D uses a 12-month initial measurement period for new variable hour employees and seasonal employees that begins on the start date and applies an administrative period from the end of the initial measurement period through the end of the first calendar month beginning after the end of the initial measurement period. Employer D hires Employee S, a ski instructor, on November

15, 2015 with an anticipated season during which Employee S will work running through March 15, 2016. Employer D determines that Employee S is a seasonal employee based upon a reasonable good faith interpretation of that term. Employee S's initial measurement period runs from November 15, 2015, through November 14, 2016. Employee S is expected to have 50 hours of service per week from November 15, 2015 through March 15, 2016, but is not reasonably expected to average 30 hours of service per week for the 12-month initial measurement period.

(ii) *Conclusion.* Employer D cannot determine whether Employee S is reasonably expected to average at least 30 hours of service per week for the 12-month initial measurement period. Accordingly, Employer D may treat Employee S as a variable hour employee during the initial measurement period.

*Example 12 (Variable Hour Employee).* (i) *Facts.* Employer E is in the trade or business of providing temporary workers to numerous clients that are unrelated to Employer E and to one another. Employer E is the common law employer of the temporary workers based on all of the facts and circumstances. Employer E offers health plan coverage only to full-time employees (including temporary workers who are full-time employees) and their dependents. Employer E uses a 12-month initial measurement period for new variable hour employees and new seasonal employees that begins on the start date and applies an administrative period from the end of the initial measurement period through the end of the first calendar month beginning after the end of the initial measurement period. Employer E hires Employee T on January 1, 2015 and anticipates that it will assign Employee T to provide services for various clients. As of the beginning of the initial measurement period, Employer E reasonably expects that, over the initial measurement period, Employee T is likely to be offered short-term assignments with several different clients, with significant gaps between the assignments and that the assignments will differ in the average hours of service per week (meaning averaging both above and below 30 hours of service per week), all depending on client needs and Employee T's availability. The number of actual assignments that Employee T will be offered, the number that Employee T will accept, the duration of assignments, the length of the gaps between assignments, and whether various assignments will result in Employee T being employed on average at least 30 hours of service per week during the assignment, are all uncertain.

(ii) *Conclusion.* Employer E cannot determine whether Employee T is reasonably expected to average at least 30 hours of service per week for the 12-month initial measurement period. Accordingly, Employer E may treat Employee T as a variable hour employee during the initial measurement period.

*Example 13 (Variable Hour Employee).* (i) *Facts.* Employee A is hired on an hourly basis by Employer Y to fill in for employees who are absent and to provide additional staffing at peak times. Employer Y expects

that Employee A will average 30 hours of service per week or more for A's first few months of employment, while assigned to a specific project, but also reasonably expects that the assignments will be of unpredictable duration, that there will be gaps of unpredictable duration between assignments, that the hours per week required by subsequent assignments will vary, and that A will not necessarily be available for all assignments.

(ii) *Conclusion.* Employer Y cannot determine whether Employee A is reasonably expected to average at least 30 hours of service per week for the initial measurement period. Accordingly, Employer Y may treat Employee A as a variable hour employee.

(d) *Change in employment status—(1) In general.* If the position of employment or other employment status of a new variable hour employee or new seasonal employee materially changes before the end of the initial measurement period in such a way that, if the employee had begun employment in the new position or status, the employee would have reasonably been expected to be employed on average at least 30 hours of service per week, the employer is not required to treat the employee as a full-time employee for purposes of determining and calculating any liability under section 4980H until the first day of the fourth month following the change in employment status 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 (including any optional administrative period associated with the initial measurement period).

(2) *Example.* The following example illustrates the provisions of paragraph (d)(1) of this section. In the following example, the applicable large employer member offers all of its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan. The coverage is affordable within the meaning of section 36B(c)(2)(C)(i) (or is treated as affordable coverage under one of the affordability safe harbors described in § 54.4980H-5) and provides minimum value within the meaning of section 36B(c)(2)(C)(ii).

*Example (Change in employment from variable hour employee to non-variable hour employee).* (i) *Facts.* For new variable hour employees, Employer A 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 first calendar month beginning on or after the end of the initial measurement period. Employer A hires Employee Z on May 10,



2015. Employer A's initial measurement period runs from May 10, 2015, through May 9, 2016, with the optional administrative period ending June 30, 2016. At Employee Z's May 10, 2015 start date, Employee Z is a variable hour employee. On September 15, 2015, Employer A promotes Employee Z to a position that can reasonably be expected to average at least 30 hours of service per week.

(ii) *Conclusion.* For purposes of determining Employer A's potential liability under section 4980H, Employee Z must be treated as a full-time employee as of January 1, 2016, because that date is the earlier of the first day of the fourth calendar month following the change in position (January 1, 2016) or the first day of the calendar month after the end of the initial measurement period plus the optional administrative period (July 1, 2016).

(e) *Employees rehired after termination of employment or resuming service after other absence—(1) Treatment as a new employee after a period of absence.* Solely for purposes of section 4980H, an employee who resumes providing services to (or is otherwise credited with an hour of service for) an applicable large employer after a period during which the employee was not credited with any hours of service may be treated as having terminated employment and having been rehired, and therefore may be treated as a new employee upon the resumption of services only if the employee did not have an hour of service for the applicable large employer for a period of at least 26 consecutive weeks immediately preceding the resumption of services or, if chosen by the applicable large employer, for a shorter period (measured in weeks) of at least four consecutive weeks that exceeds the number of weeks of that employee's period of employment with the applicable large employer immediately preceding the period during which the employee was not credited with any hours of service. For purposes of the preceding sentence, the duration of the period of employment immediately preceding the period during which the employee was not credited with any hours of service is determined after application to that period of employment of the averaging methods described in paragraph (e)(4) of this section, if applicable. An employee treated as a continuing employee retains, upon resumption of services, the status that employee had with respect to the application of any stability period (for example, if the continuing employee returns during a stability period in which the employee is treated as a full-time employee, the employee is treated as a full-time employee upon return and through the end of that stability period). For purpose

of the preceding sentence, a continuing employee treated as a full-time employee will be treated as offered coverage upon resumption of services if the employee is offered coverage as of the first day that employee is credited with an hour of service, or, if later, as soon as administratively practicable. This rule set forth in this paragraph (e)(1) applies solely for the purpose of determining whether the employee, upon the resumption of services, is treated as a new employee or as a continuing employee, and does not determine whether the employee is treated as a continuing full-time employee or a terminated employee during the period during which no hours of service are credited.

(2) *Employment break period defined.* An employment break period is a period of at least four consecutive weeks (disregarding special unpaid leave as defined in paragraph (e)(3) of this section) during which an employee of an educational organization is not credited with hours of service for an applicable large employer.

(3) *Definitions—(i) Special unpaid leave defined.* For purposes of this paragraph (e), special unpaid leave refers to—

(A) Unpaid leave that is subject to the Family and Medical Leave Act of 1993 (FMLA), Public Law 103–3, 20 U.S.C. 2601 et seq.,

(B) Unpaid leave that is subject to the Unifed Services Employment and Reemployment Rights Act of 1994 (USERRA), Public Law 103–353, 38 U.S.C. 4301 et seq., or

(C) Unpaid leave on account of jury duty.

(ii) *Educational organization.* For purposes of this paragraph (e), educational organization means an entity described in § 1.170A–9(c)(1) of this chapter, whether or not described in section 501(c)(3) and exempt under section 501(a). Thus, the term educational organization includes taxable entities, tax-exempt entities and government entities.

(4) *Averaging method for special unpaid leave and employment break periods.* For purposes of applying the look-back measurement method described in paragraph (c) of this section to an employee who is not treated as a new employee under paragraph (e)(1) of this section, the employer determines the employee's average hours of service for a measurement period by computing the average after excluding any special unpaid leave (and, in the case of an employer that is an educational organization, also excluding any employment break period) during that

measurement period and by using that average as the average for the entire measurement period. Alternatively, for purposes of determining the employee's average hours of service for the measurement period, the employer may choose to treat the employee as credited with hours of service for any periods of special unpaid leave (and, in the case of an employer that is an educational organization, any employment break period) during that measurement period at a rate equal to the average weekly rate at which the employee was credited with hours of service during the weeks in the measurement period that are not part of a period of special unpaid leave (or, in the case of an employer that is an educational organization, an employment break period). Notwithstanding the preceding two sentences, no more than 501 hours of service during employment break periods in a calendar year are required to be excluded (under the first sentence) or credited (under the second sentence) by an educational organization, provided that this 501-hour limit does not apply to hours of service required to be excluded or credited (as the case may be) in respect of special unpaid leave. In applying the preceding sentence, an employer that uses the method described in the first sentence of this paragraph (e)(4) determines the number of hours excluded by multiplying the average weekly rate for the measurement period (determined as in the second sentence of this paragraph (e)(4)) by the number of weeks in the employment break period and periods of special unpaid leave. For purposes of this paragraph (e)(4), in computing the average weekly rate, employers are permitted to use any reasonable method if applied on a consistent basis. In addition, if an employee's average weekly rate under this paragraph (e)(4) is being computed for a measurement period and that measurement period is shorter than six months, the six-month period ending with the close of the measurement period is used to compute the average hours of service.

(5) *Averaging rules for employment break periods for employers other than educational organizations.* [RESERVED]

(6) *Anti-abuse rule.* For purposes of this paragraph (e), any hour of service will be disregarded if the hour of service is credited, or the services giving rise to the crediting of the hour of service are requested or required of the employee, for a purpose of avoiding or undermining the application of the employee rehire rules under paragraph (e)(1) of this section, or the application of the averaging method for employment break periods under paragraph (e)(4) of

this section. For example, if an employee of an educational organization would otherwise have a period with no hours of service to which the rules under paragraph (e)(4) of this section would apply, but for the employer's request or requirement that the employee perform one or more than one hour of service for a purpose of avoiding the application of those rules, any such hours of service for the week are disregarded, and the rules under paragraphs (e)(4) of this section will apply.

(7) *Examples.* The following examples illustrate the provisions of paragraph (e) of this section. All employers in these examples are applicable large employer members, each is in a different applicable large employer group, and each computes hours of service under the rules in paragraphs (a) through (e) of this section. None of the periods during which an employee is not credited with an hour of service for an employer involve special unpaid leave (as defined in paragraph (e)(3) of this section) or the employee being credited with hours of service for any applicable large employer member in the same applicable large employer as the employer.

*Example 1. (i) Facts.* As of April 1, 2015, Employee A has been an employee of Employer Z (which is not an educational organization as defined in paragraph (e)(3) of this section) for 10 years. On April 1, 2015, Employee A terminates employment and is not credited with an hour of service until September 1, 2015 when Employer Z rehires Employee A and Employee A continues as an employee through December 31, 2015, which is the close of the measurement period as applied by employer Z.

(ii) *Conclusion.* Because Employee A's period for which he is not credited with any hour of service is not longer than Employee A's prior period of employment and is less than 26 weeks, Employee A is not treated as having terminated employment and been rehired for purposes of determining whether Employee A is treated as a new employee upon resumption of services. Therefore, Employee A's hours of service prior to termination are required to be taken into account for purposes of the measurement period, and, Employee A's period with no hours of service is taken into account as a period of zero hours of service during the measurement period.

*Example 2. (i) Facts.* Same facts as *Example 1*, except that Employee A is rehired on December 1, 2015.

(ii) *Conclusion.* Because the period during which Employee A is not credited with an hour of service for Employer Z, exceeds 26 weeks, Employee A may be treated as having terminated employment on April 1, 2015 and having been rehired as a new employee on December 1, 2015, for purposes of determining Employee A's full-time employee status. Because Employee A is

treated as a new employee, Employee A's hours of service prior to termination are not required to be taken into account for purposes of the measurement period, and the period between termination and rehire with no hours of service is not taken into account in the new measurement period that begins after the employee is rehired.

*Example 3. (i) Facts.* Employee B is employed by Employer X, an educational organization as defined in paragraph (e)(3) of this section. Employee B is employed for 38 hours of service per week on average from September 7, 2013 through May 22, 2014, and then does not provide services (and is not otherwise credited with an hour of service) during the summer break when the school is generally not in session except for limited summer classes and activities. Employee B resumes providing services for Employer X on September 5, 2014, when the new school year begins.

(ii) *Conclusion.* Because the period from May 23 through September 4, 2014 (a total of 15 weeks) during which Employee B is not credited with an hour of service does not exceed 26 weeks, and also does not exceed the number of weeks of Employee B's immediately preceding period of employment, Employee B is not treated as having terminated employment on May 23, 2014 and having been rehired on September 5, 2014. Also, for purposes of determining Employee B's average hours per week for the measurement period, Employee B is credited, under the averaging method for employment break periods applicable to educational organizations, as having an average of 38 hours per week for the 15 weeks between May 23 and September 4, 2014, during which Employee B otherwise was credited with no hours of service.

(f) *Nonpayment or late payment of premiums.* An applicable large employer member will not be treated as failing to offer to a full-time employee (and his or her dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan for an employee whose coverage under the plan is terminated during the coverage period solely due to the employee failing to make a timely payment of the employee portion of the premium. This treatment continues only through the end of the coverage period (typically the plan year). For this purpose, the rules in § 54.4980B-8, Q&A-5(a), (c), (d) and (e) apply under this section to the payment for coverage with respect to a full-time employee in the same manner that they apply to payment for COBRA continuation coverage under § 54.4980B-8.

(g) *Effective/applicability date.* This section is applicable for periods after December 31, 2013.

#### **§ 54.4980H-4 Assessable payments under section 4980H(a).**

(a) *In general.* If an applicable large employer member fails to offer to its

full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan for any calendar month, and the applicable large employer member has received a Section 1411 Certification with respect to at least one full-time employee, an assessable payment is imposed. For the calendar month, the applicable large employer member will owe an assessable payment equal to the product of the section 4980H(a) applicable payment amount and the number of full-time employees of the applicable large employer member (adjusted in accordance with paragraph (d) of this section). For purposes of this paragraph (a), an applicable large employer member is treated as offering such coverage to its full-time employees (and their dependents) for a calendar month if, for that month, it offers such coverage to all but five percent (or, if greater, five) of its full-time employees (provided that an employee is treated as having been offered coverage only if the employer also offers coverage to that employee's dependents).

(b) *Offer of coverage.* An applicable large employer member will not be treated as having made an offer of coverage to a full-time employee for a plan year if the employee does not have an effective opportunity to elect to enroll (or decline to enroll) in the coverage no less than once during the plan year. Whether an employee has an effective opportunity is determined based on all the relevant facts and circumstances, including adequacy of notice of the availability of the offer of coverage, the period of time during which acceptance of the offer of coverage may be made, and any other conditions on the offer.

(c) *Partial calendar month.* If an applicable large employer member fails to offer coverage to a full-time employee for any day of a calendar month, that employee is treated as not offered coverage during that entire month. However, in a calendar month in which the employment of a full-time employee terminates, if the employee would have been offered coverage for the entire month had the employee been employed for the entire month, the employee is treated as having been offered coverage for that entire month.

(d) *Allocated reduction of 30 full-time employees.* For purposes of the liability calculation under paragraph (a) of this section, an applicable large employer member's number of full-time employees is reduced by that member's allocable share of 30. The applicable large employer member's allocation is equal to 30 allocated ratably among all

members of the applicable large employer on the basis of the number of full-time employees employed by each applicable large employer member during the calendar year. If an applicable large employer member's total allocation is a fractional number that is less than one, it will be rounded up to one. This rounding rule may result in the aggregate reduction for the entire group of applicable large employer members exceeding 30.

(e) *Example.* The following example illustrates the provisions of paragraphs (a) and (b) of this section.

*Example.* (i) *Facts.* Applicable large employer member A and applicable large employer member B are the two members of an applicable large employer. Applicable large employer member A employs 40 full-time employees in each calendar month of 2015. Applicable large employer member B employs 35 full-time employees in each calendar month of 2015. For 2015, the applicable payment amount for a calendar month is \$2,000 divided by 12. Applicable large employer member A does not sponsor an eligible employer-sponsored plan for any calendar month of 2015, and receives a Section 1411 Certification for 2015 with respect to at least one of its full-time employees. Applicable large employer member B sponsors an eligible employer-sponsored plan under which all of its full-time employees are eligible for minimum essential coverage.

(ii) *Conclusion.* Pursuant to section 4980H(a) and this section, applicable large employer member A is subject to an assessable payment under section 4980H(a) for 2015 of \$48,000, which is equal to  $24 \times \$2,000$  (40 full-time employees reduced by 16 (its allocable share of the 30-employee offset  $((40/75) \times 30 = 16)$ ) and then multiplied by \$2,000). Applicable large employer member B is not subject to an assessable payment under section 4980H(a) for 2015.

(f) *Effective/applicability date.* This section is applicable for periods after December 31, 2013.

**§ 54.4980H-5 Assessable payments under section 4980H(b).**

(a) *In general.* If an applicable large employer member offers to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan for any calendar month (including an offer of coverage to all but five percent or less (or, if greater, five or less) of its full-time employees (and their dependents)) and the applicable large employer member has received a Section 1411 Certification with respect to one or more full-time employees of the applicable large employer, then there is imposed on the applicable large employer member an assessable payment equal to the product of the number of full-time

employees of the applicable large employer member for which it has received a Section 1411 Certification (minus the number of those employees who are new full-time employees during their first three months of employment, who are new variable hour or new seasonal employees during the months of that employee's initial measurement period (and associated administrative period) under § 54.4980H-3(c)(3), or who were offered the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan that satisfied minimum value and met one or more of the affordability safe harbors described in paragraph (e) of this section) and the section 4980H(b) applicable payment amount.

Notwithstanding the foregoing, the aggregate amount of assessable payment determined under this paragraph (a) with respect to all employees of an applicable large employer for any calendar month may not exceed the product of the section 4980H(a) applicable payment amount and the number of full-time employees of the applicable large employer member during that calendar month (reduced by the applicable large employer member's ratable allocation of the 30 employee reduction under § 54.4980H-4(d).

(b) *Offer of coverage.* For purposes of this section, the same rules, with respect to an offer of coverage for purposes of section 4980H(a), apply. See § 54.4980H-4(b).

(c) *Partial calendar month.* If an applicable large employer member fails to offer coverage to a full-time employee for any day of a calendar month, that employee is treated as not offered coverage during that entire month. However, in a calendar month in which a full-time employee's employment terminates, if the employee would have been offered coverage if the employee had been employed for the entire month, the employee is treated as having been offered coverage during that month.

(d) *Applicability to applicable large employer member.* The liability for an assessable payment under section 4980H(b) for a calendar month with respect to a full-time employee applies solely to the applicable large employer member that was the employer of that employee for that calendar month, provided that, if the employee was an employee of more than one applicable large employer member during that calendar month, the liability for the assessable payment under section 4980H(b) is allocated among the different members in accordance with the number of hours of service the employee had from each such member

for that calendar month. For a calendar month, an applicable large employer member may be liable for an assessable payment under section 4980H(a) or under section 4980H(b), but may not be liable for an assessable payment under both section 4980H(a) and section 4980H(b).

(e) *Affordability—(1) In general.* An employee who is offered coverage by an applicable large employer member may be eligible for a premium tax credit or cost reduction if that offer of coverage is not affordable within the meaning of section 36B(c)(2)(C)(i). Under section 36B(c)(2)(C)(i), coverage under an employer-sponsored plan is affordable to a particular employee if the employee's required contribution (within the meaning of section 5000A(e)(1)(B)(i)) to the plan does not exceed 9.5 percent of the employee's household income for the taxable year. For this purpose, section 36B(d)(2)(A) defines the term *household income* to mean the modified adjusted gross income of the employee and any members of the employee's family (which would include any spouse and dependents) who are required to file a federal income tax return. Section 36B(d)(2)(B) and § 1.36B-1(e)(2) of this chapter define the term *modified adjusted gross income* for this purpose as adjusted gross income (within the meaning of section 62) increased by—

(i) Amounts excluded from gross income under section 911,

(ii) The amount of any tax-exempt interest a taxpayer receives or accrues during the taxable year, and

(iii) An amount equal to the portion of the taxpayer's social security benefits (as defined in section 86(d)) which is not included in gross income under section 86 for the taxable year.

(2) *Affordability safe harbors for section 4980H(b) purposes.* The following affordability safe harbors apply solely for purposes of section 4980H(b), so that an applicable large employer member that offers minimum essential coverage providing minimum value will not be subject to an assessable payment under section 4980H(b) with respect to any employee receiving the premium tax credit or cost sharing reduction for a period for which the coverage is determined to be affordable under the requirements of an affordability safe harbor. This rule applies even if the applicable large employer member's offer of coverage that meets the requirements of an affordability safe harbor is not affordable for a particular employee under section 36B(c)(2)(C)(i) and a premium tax credit or cost-sharing is

allowed or paid with respect to that employee

(i) *Conditions of using an affordability safe harbor.* An applicable large employer member may use one or more of the affordability safe harbors described in paragraph (e)(2) of this section only if the employer offers its full-time employees and their dependents the opportunity to enroll in MEC under an eligible employer-sponsored plan that provides minimum value with respect to the self-only coverage offered to the employee. Use of any of the safe harbors is optional for an applicable large employer, and an applicable large employer member may choose to apply the safe harbors for any reasonable category of employees, provided it does so on a uniform and consistent basis for all employees in a category.

(ii) *Form W-2 safe harbor –(A) Full-year offer of coverage.* An employer will not be subject to an assessable payment under section 4980H(b) with respect to a full-time employee if that employee's required contribution for the calendar year for the employer's lowest cost self-only coverage that provides minimum value during the entire calendar year (excluding COBRA or other continuation coverage) does not exceed 9.5 percent of that employee's Form W-2 wages from the employer for the calendar year. Application of this safe harbor is determined after the end of the calendar year and on an employee-by-employee basis, taking into account the Form W-2 wages and the required employee contribution for that year. In addition, to qualify for this safe harbor, the employee's required contribution must remain a consistent amount or percentage of all Form W-2 wages during the calendar year (or for plans with fiscal year plan years, within the portion of each plan year during the calendar year) so that an applicable large employer member is not permitted to make discretionary adjustments to the required employee contribution for a pay period. A periodic contribution that is based on a consistent percentage of all Form W-2 wages may be subject to a dollar limit specified by the employer.

(B) *Adjustment for partial-year offer of coverage.* For an employee not offered coverage for an entire calendar year, the Form W-2 safe harbor is applied by adjusting the Form W-2 wages to reflect the period for which coverage was offered, then determining whether the employee's required contribution for the employer's lowest cost self-only coverage that provides minimum value, totaled for the periods during which coverage was offered, does not exceed 9.5 percent of the adjusted amount of

Form W-2 wages. To adjust Form W-2 wages for this purpose, the Form W-2 wages are multiplied by a fraction equal to the number of calendar months for which coverage was offered over the number of calendar months in the employee's period of employment with the employer during the calendar year. For this purpose, if coverage is offered during at least one day during the calendar month, or the employee is employed for at least one day during the calendar month, the entire calendar month is counted in determining the applicable fraction.

(iii) *Rate of pay safe harbor.* An applicable large employer member satisfies the rate of pay safe harbor with respect to an employee for a calendar month if the employee's required contribution for the month for the applicable large employer member's lowest cost self-only coverage that provides minimum value does not exceed 9.5 percent of an amount equal to 130 hours multiplied by the employee's hourly rate of pay as of the first day of the coverage period (generally the first day of the plan year). For salaried employees, monthly salary is used instead of 130 multiplied by the hourly rate of pay, and, solely for purposes of this paragraph (e)(2)(iii), an applicable large employer member may use any reasonable method for converting payroll periods to monthly salary. An applicable large employer member may use this safe harbor only to the extent it does not reduce the hourly wage of hourly employees or the monthly wages of salaried employees during the calendar year (including through the transfer of employment to another applicable large employer member of the same applicable large employer). For this purpose, if coverage is offered during at least one day during the calendar month, the entire calendar month is counted both for purposes of determining the assumed income for the calendar month and for determining the employee's share of the premium for the calendar month.

(iv) *Federal poverty line safe harbor.* An applicable large employer member satisfies the Federal poverty line safe harbor with respect to an employee for a calendar month if the employee's required contribution for the calendar month for the applicable large employer member's lowest cost self-only coverage that provides minimum value does not exceed 9.5 percent of a monthly amount determined as the Federal poverty line for a single individual for the applicable calendar year, divided by 12. For this purpose, if coverage is offered during at least one day during the calendar month, the entire calendar month is

counted both for purposes of determining the assumed income for the calendar month and for determining the employee's share of the premium for the calendar month. For this purpose, the applicable Federal poverty line is the Federal poverty line for the State in which the employee is employed.

(v) *Examples.* The following examples illustrate the application of the affordability safe harbors described in paragraph (e)(2) of this section:

*Example 1. (Form W-2 wages safe harbor).*

(i) *Facts.* Employee A is employed by applicable large employer member Z consistently from January 1, 2015 through December 31, 2015. In addition, Z offers Employee A and his dependents minimum essential coverage during that period that meets the minimum value requirements. The employee contribution for self-only coverage is \$100 per calendar month, or \$1,200 for the calendar year. For 2015, Employee A's Form W-2 wages with respect to employment with Z are \$24,000.

(ii) *Conclusion.* Because the employee contribution for 2015 is less than 9.5% of Employee A's Form W-2 wages for 2015, the coverage offered is treated as affordable with respect to Employee A for 2015 (\$1,200 is 5% of \$24,000).

*Example 2. (Form W-2 wages safe harbor).*

(i) *Facts.* Employee B is employed by applicable large employer member Y from January 1, 2015 through September 30, 2015. In addition, Y offers Employee B and his dependents minimum essential coverage during that period that meets the minimum value requirements. The employee contribution for self-only coverage is \$100 per calendar month, or \$900 for Employee B's period of employment. For 2015, Employee B's Form W-2 wages with respect to employment with Y are \$18,000. For purposes of applying the affordability safe harbor, the Form W-2 wages are multiplied by  $\frac{9}{12}$  (9 calendar months of coverage offered over 9 months of employment during the calendar year) or 1. Accordingly, affordability is determined by comparing the adjusted Form W-2 wages (\$18,000) to the employee contribution for the period for which coverage was offered (\$900).

(ii) *Conclusion.* Because the result is less than 9.5% of Employee B's Form W-2 wages for 2015, the coverage offered is treated as affordable with respect to Employee B for 2015 (\$900 is 5% of \$18,000).

*Example 3. (Form W-2 wages safe harbor).*

(i) *Facts.* Employee C is employed by applicable large employer member X from May 15, 2015 through December 31, 2015. In addition, X offers Employee C and her dependents minimum essential coverage during the period from August 1, 2015 through December 31, 2015 that meets the minimum value requirements. The employee contribution for self-only coverage is \$100 per calendar month, or \$500 for Employee C's period of employment. For 2015, Employee C's Form W-2 wages with respect to employment with X are \$15,000. For purposes of applying the affordability safe harbor, the Form W-2 wages are multiplied

by 5/8 (5 calendar months of coverage offered over 8 months of employment during the calendar year). Accordingly, affordability is determined by comparing the adjusted Form W-2 wages (\$9,375 or \$15,000 x 5/8) to the employer contribution for the period for which coverage was offered (\$500).

(ii) *Conclusion.* Because \$500 is less than 9.5% of \$9,375 (Employee C's adjusted Form W-2 wages for 2015), the coverage offered is treated as affordable with respect to Employee C for 2015 (\$500 is 5.33% of \$9,375).

*Example 4. (Rate of pay safe harbor). (i) Facts.* Employee D is employed by applicable large employer member W from January 1, 2015 through December 31, 2015. In addition, W offers Employee D and his dependents minimum essential coverage during that period that meets the minimum value requirements. The employee contribution for self-only coverage is \$85 per calendar month. Employee D is paid at a rate of \$7.25 per hour (the minimum wage in Employee W's jurisdiction), for the entire year 2015. For purposes of applying the affordability safe harbor, W may assume that Employee D earned \$942.50 per calendar month (130 hours of service multiplied by \$7.25 per hour). Accordingly, affordability is determined by comparing the assumed income per month (\$942.50) to the employee contribution per month (\$85).

(ii) *Conclusion.* Because \$85 is less than 9.5% of Employee D's assumed income, the coverage offered is treated as affordable with respect to Employee D for 2015 (\$85 is 9.01% of \$942.50).

*Example 5. (Rate of pay safe harbor). (i) Facts.* Employee E is employed by applicable large employer member V from May 15, 2015 through December 31, 2015. In addition, V offers Employee E and her dependents minimum essential coverage from August 1, 2015 through December 31, 2015 that meets the minimum value requirements. The employee contribution for self-only coverage is \$100 per calendar month. From May 15, 2015 through October 31, 2015, Employee E is paid at a rate of \$10 per hour. From November 1, 2015 through December 31, 2015, Employee E is paid at a rate of \$12 per hour. For purposes of applying the affordability safe harbor V may assume that

Employee E earned \$1,300 per calendar month (130 hours of service multiplied by the lowest hourly rate of pay for the calendar year, or \$10). Accordingly, affordability is determined by comparing the assumed income (\$1,300 per month) to the employee contribution (\$100 per month).

(ii) *Conclusion.* Because \$100 is less than 9.5% of Employee E's assumed monthly income, the coverage offered is treated as affordable with respect to Employee E for 2015 (\$100 is 7.69% of \$1,300).

*Example 6. (Federal poverty line safe harbor). (i) Facts.* Employee F is employed by applicable large employer member W from January 1, 2015 through December 31, 2015. In addition, W offers Employee F and his dependents minimum essential coverage during that period that meets the minimum value requirements. W uses the look-back measurement method. Under that method as applied by W, Employee F is treated as a full-time employee for the entire calendar year 2015. Employee F is regularly credited with 35 hours of service per week but is credited with only 20 hours of service during the month of March, 2015 and only 15 hours of service during the month of August, 2015. Assume for this purpose that the Federal poverty line for 2015 for an individual is \$11,170. With respect to Employee F, W determines the monthly employee contribution for employee single-only coverage for each calendar month of 2015 as an amount equal to 9.5% multiplied by \$11,170, which is \$1,061.15, and that amount is then divided by 12, and the result is \$88.43.

(ii) *Conclusion.* Regardless of Employee F's actual wages for any calendar month, including the months of March, 2015 and August, 2015 when Employee F has lower wages because of significantly lower hours of service, the coverage under the plan is treated as affordable with respect to Employee F.

(f) *Effective/applicability date.* This section is applicable for periods after December 31, 2013.

**§ 54.4980H-6 Administration and Procedure**

(a) *In general.* [Reserved]

(b) *Effective/applicability date.* This section is applicable for periods after December 31, 2013.

**PART 301—PROCEDURE AND ADMINISTRATION**

■ **Par. 5.** The authority citation for part 301 continues to read in part as follows:

**Authority:** 26 U.S.C. 7805 \* \* \*

■ **Par. 6.** Section 301.7701-2 is amended as follows:

■ 1. In paragraph (c)(2)(v)(A)(3), the language “and 4412; and” is removed and “and 4412;” is added in its place.

■ 2. In paragraph (c)(2)(v)(A)(4), the language “or 6427.” is removed and “or 6427; and” is added in its place.

■ 3. Paragraphs (c)(2)(v)(A)(5) and (e)(6)(iii) are added.

The additions read as follows:

**§ 301.7701-2 Business entities; definitions.**

\* \* \* \* \*  
(c) \* \* \*  
(2) \* \* \*  
(v) \* \* \*  
(A) \* \* \*

(5) Assessment and collection of an assessable payment imposed by section 4980H and reporting required by section 6056.

\* \* \* \* \*  
(e) \* \* \*  
(6) \* \* \*

(iii) Paragraph (c)(2)(v)(A)(5) of this section applies for periods after December 31, 2013.

\* \* \* \* \*

**Steven T. Miller,**  
*Deputy Commissioner for Services and Enforcement.*

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