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Affordable Care Act (ACA): Employer Shared Responsibility Determinations and Potential Penalties

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Summary

The Affordable Care Act (ACA) creates shared responsibilities for both employers and individuals with regard to health insurance coverage. Additionally, the ACA expands federal private health insurance market requirements and requires the creation of health insurance exchanges to provide individuals and small employers with access to insurance. This report examines the new employer responsibilities.

To ensure that employers continue to provide some degree of health coverage, the ACA includes a "shared responsibility" provision. This provision does not require that an employer offer employees health insurance; however, the ACA imposes penalties on a "large" employer if at least one of its full-time employees obtains a premium credit through the newly established exchange.

Beginning in 2015, employers employing at least 50 full-time equivalent (FTE) employees are subject to the shared responsibility provisions. However, in 2015 there is transition relief for employers employing between 50 and 100 FTE employees if certain criteria are met.

The ACA sets out a multi-stage process for determining, first, which firms may be subject to the penalty (i.e., definition of *large*), and second, which workers within a firm would trigger the penalty. The complex calculations and multiple definitions of full-time work have led to confusion among policymakers and employers. This report discusses these definitions and the application to the employer penalty in greater detail.

The potential employer penalty applies to all common law employers, including government entities (such as federal, state, local, or Indian tribal government entities) and nonprofit organizations that are exempt from federal income taxes. If multiple businesses are owned by one individual or entity, employees in each of the franchises must be aggregated to determine the number of both full-time equivalent and full-time employees.

The actual amount of the penalty varies depending on whether an employer currently offers insurance coverage and the number of full-time employees. In order for employers who do provide health insurance coverage to avoid paying a penalty, the coverage must be both affordable and adequate. Coverage is considered affordable if the employee's required contribution to the plan does not exceed 9.5% of the employee's household income for the taxable year. However, the Internal Revenue Service (IRS) allows employers to use the employee's W-2 income in lieu of household income for this calculation (since most employers do not readily have information on an employee's household income). A health plan is considered to provide adequate coverage if the plan's actuarial value (i.e., the share of the total allowed costs that the plan is expected to cover) is at least 60%.

The total penalty for any applicable large employer is based on its number of full-time employees. The ACA specified that working 30 hours or more per week is considered full-time. Employers have some flexibility to designate certain measurement or look-back periods (up to 12 months) during which they will calculate whether a worker is full-time or not. Once an employee is determined to be full-time, there is an administrative period to enroll employees in a health plan, if necessary. If an employer penalty is levied under the ACA requirements, it applies only for the time period following the administrative period, which is called the stability period. An employer is not penalized if an employee enters the exchange and receives a premium credit during the measurement period.

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The Patient Protection and Affordable Care Act (ACA; P.L. 111-148, as amended) expands insurance coverage in the United States through its "shared responsibility" provisions: Employers either provide health coverage or face potential employer tax penalties; likewise, individuals purchase health coverage or face potential individual tax penalties.[1] The ACA does not require employers to provide health coverage, but it does impose employer penalties in the form of a monthly tax on employers that do not provide adequate and affordable health coverage to certain employees. This is known as the employer "shared responsibility" provision. This report describes the potential employer penalties as well as regulations to implement the ACA employer provisions. The regulations address insurance coverage requirements, methodologies for determining whether a worker is considered full time, provisions relating to seasonal workers and corporate franchises, and other reporting requirements.

For an economic analysis of the employer penalty and policy options to modify the penalty, see CRS Report R43181, *The Affordable Care Act and Small Business: Economic Issues*, by Sean Lowry and Jane G. Gravelle.

Beginning in 2015, employers employing at least 50 full-time equivalent (FTE) employees are subject to the employer shared responsibility provisions under Section 4908H of the Internal Revenue Code (IRC) as amended by the ACA. However, in 2015 there is transition relief for employers employing between 50 and 100 FTE employees if certain criteria are met.

Employer Shared Responsibility Determinations

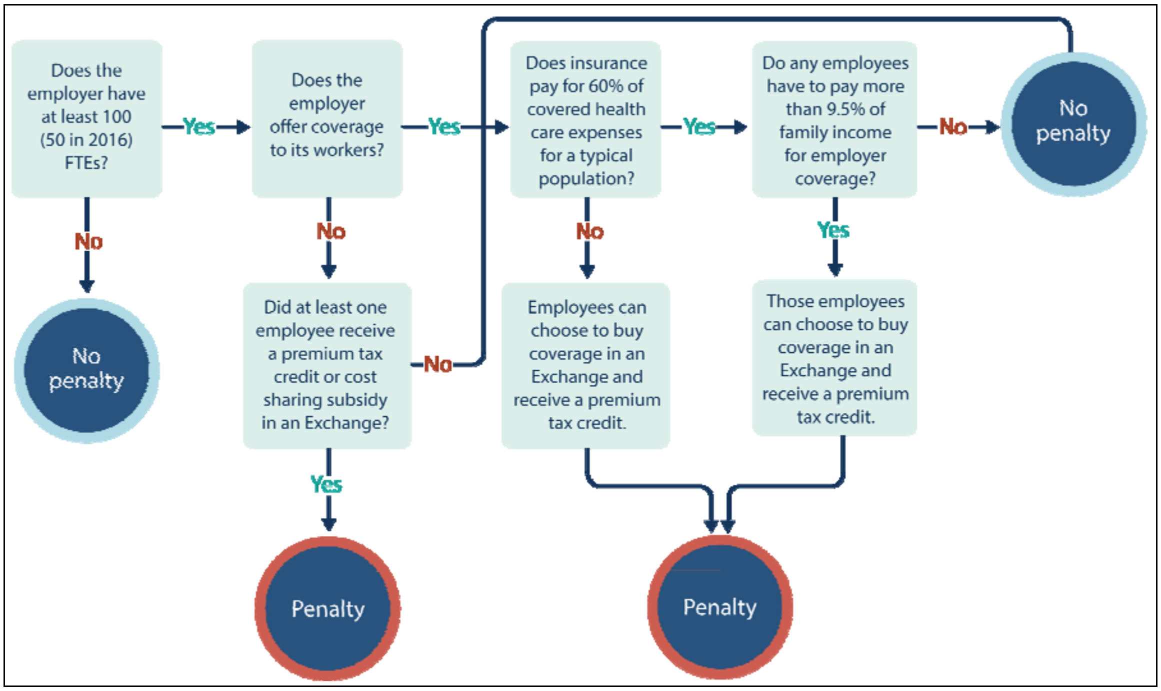
The ACA employer shared responsibility provisions do not explicitly require that employers offer their employees acceptable health coverage. However, it does impose penalties on certain firms with at least 50 FTE employees if one or more of their full-time employees obtain a premium tax credit through the newly established health insurance exchanges.[2] An individual may be eligible for a premium tax credit if his or her income is below certain thresholds and the individual's employer does not offer health coverage or offers insurance that is "not affordable" or does not provide "minimum value," as defined by the ACA. As shown in **Figure 1**, determining the potential exposure to the employer penalty is a multi-stage process.

- First, the firm must be a large employer with at least 50 FTEs (100 FTEs beginning for 2015 only) to be potentially subject to the penalty.
- Second, only workers who are considered to be full-time (generally, averaging 30 hours or more per week) may trigger the penalty.
- Finally, the actual calculation of the penalty will depend upon whether the employer currently provides health coverage to its full-time employees, if the coverage is considered adequate and affordable as defined by the ACA, and the number of full-time employees.

[1] For information on the individual shared responsibility provisions, see CRS Report R41331, *Individual Mandate Under ACA*, by Annie L. Mach.

[2] For more information about exchanges under the ACA, see CRS Report R42663, *Health Insurance Exchanges Under the Patient Protection and Affordable Care Act (ACA)*, by Bernadette Fernandez and Annie L. Mach. For more information on premium credits in particular, see CRS Report R41137, *Health Insurance Premium Credits in the Patient Protection and Affordable Care Act (ACA) in 2014*, by Bernadette Fernandez and CRS Report R43833, *Premium Tax Credits and Federal Health Insurance Exchanges: Questions and Answers*, by Jennifer A. Staman et al.

Figure 1. Determining If an Employer Is Subject to Shared Responsibility (Penalty) Provisions


Does the employer have at least 100 (50 in 2016) FTEs?
Yes
No
No penalty
Does the employer offer coverage to its workers?
Yes
No
Did at least one employee receive a premium tax credit or cost sharing subsidy in an Exchange?
No
Yes
Penalty
Does insurance pay for 60% of covered health care expenses for a typical population?
Yes
No
Employees can choose to buy coverage in an Exchange and receive a premium tax credit.
Do any employees have to pay more than 9.5% of family income for employer coverage?
No
No penalty
Yes
Those employees can choose to buy coverage in an Exchange and receive a premium tax credit.
Penalty

Source: CRS analysis of P.L. 111-148 and P.L. 111-152.

Large Employers, Shared Responsibility Provisions, and Potential Penalty Determinations

Only large employers may be subject to penalties regarding employer-sponsored health insurance. The ACA defines a large employer as one who employed an average of at least 50 FTEs on business days during the preceding calendar year.[3] (See the section "Employers with Fewer Than 100 FTEs" for information on how transition relief may apply to firms with under 100 FTEs in 2015.)

Large Employer Status: Determined by Full-Time Equivalent Calculation

As depicted in **Figure 1**, the determination of whether an employer is a "large employer" requires the hours worked by both full-time and part-time employees to be calculated. "Full-time" is defined as having worked on average at least 30 hours per week.[4] Hours worked by part-time

[3] Internal Revenue Code (IRC) §4980H(c)(2), as amended by §1513 and §10106 of the ACA, and as amended and renumbered by §1003 of P.L. 111-152. The statute uses the term *full-time employee* in the definition of large employer but then expands on the definition of *large employer* to include both full- and part-time workers. For employers not in existence throughout the preceding calendar year, the determination of whether an employer is large is based on the average number of employees a firm reasonably expected to be employed on business days in the current calendar year. Any reference to an employer includes a reference to any predecessor of that employer.

[4] IRC §4980H(c)(4).

employees (i.e., those working less than 30 hours per week) are converted into FTEs and are included in the calculation used to determine whether a firm is a large employer. Generally, hours worked by seasonal employees are included in this calculation. Overall hours worked by part-time employees during a month are added up, and the total is divided by 120 and added to the number of full-time employees to get the number of FTE workers.[5] This calculation determines only whether an employer is considered "large" for purposes of potentially being subject to a penalty.[6] The actual penalty is applicable solely to health coverage status of full-time workers and is discussed in the "How to Determine an Employee's Full-Time Status" section of this report.

Example: Full-Time Equivalent Calculation

A firm has 35 full-time employees (averaging 30 or more hours per week, or 120 hours per month). Additionally the firm has 20 part-time employees who each work 24 hours per week (96 hours per month). These part-time employees' hours would be treated as equivalent to 16 full-time employees for the month based on the following calculation:

20 part-time employees x 96 hours = 1,920 total hours worked by part-time employees

1,920 ÷ 120 = 16 FTEs

The 16 FTEs added to the 35 full-time employees will result in the firm being considered a "large" employer based on the number of part-time hours worked:

16 FTEs + 35 full-time employees = 51 FTEs.

Because 51 > 50, the employer is considered to be a large employer under the ACA employer penalty provisions.

The process to determine the underlying employer may be a complicated determination. Owners or part-owners in multiple businesses must follow Internal Revenue Service (IRS) aggregation rules. Firms that use independent contractors must follow IRS rules for determining whether the contractor is an employee. Firms that have contracted with a temporary help agency may also need to determine if they are the employer for ACA purposes. Finally, businesses that hire seasonal workers have special rules on how to count hours worked by seasonal employees.[7]

Employers Such as Franchise Owners or Multiple Business Owners

The ACA large-employer calculation requires that an employer of multiple entities (such as a franchise owner with several restaurants) must follow the IRS aggregation rules governing *controlled groups*.[8] Specifically, if one individual or entity owns (or has a substantial ownership

[5] Section 4980H(c)(2)(E) specifies that for purposes of determining FTEs, the aggregate number of hours of service of employees who are not full-time employees for the month is divided by 120 to get an FTE. However, for purposess of determining who is a full-time worker for the assessment of the actual penalty, proposed regulations released on December 28, 2012, would treat 130 hours of service in a calendar month as the monthly equivalent of 30 hours of service per week (52 x 30). Thus, a worker who worked 130 hours a month would be considered full-time for purposes of the penalty payment.

[6] For information on a potential impact of the ACA provisions on smaller (but potentially determined to be large for the purpose of the ACA) businesses, see CRS Report R43181, *The Affordable Care Act and Small Business: Economic Issues*, by Sean Lowry and Jane G. Gravelle.

[7] IRC §4980H(c)(2)(B). An employer will not be considered a large employer if its number of FTEs exceeds 50 for 120 days or less and it is solely the employment of seasonal workers that pushes the employer into the large employer designation.

[8] The controlled group rule applies under §414(b), (c), (m), or (o) of the IRC and includes employees of partnerships, (continued...)

interest in) several franchises, all those franchises are essentially considered one entity. In this case, for purposes of the 50-FTE rule, the employees in each of the franchises must be added together to determine the number of FTEs.

Independent Contractors

The ACA definition of an employer is based on the common law standard where a worker is considered to be an employee if the worker is subject to the will and control of the employer not only as to what shall be done but how it shall be done. The potential employer penalty applies to all common law employers, including government entities (such as federal, state, local, or Indian tribal government entities) and nonprofit organizations that are exempt from federal income taxes.

An independent contractor is a worker who controls what will be done and how it will be done and for whom the contract dictates the desired result of the work. The IRS provides further guidance on the distinction between employees and independent contractors.[9] An independent contractor would not be considered an employee for the purposes of the employer penalty calculation.

Temporary Staffing Firm Workers

Generally, the employer of a temporary agency worker is the agency rather than the firm that has contracted with the agency to provide workers on a temporary basis.[10]

Calculating Large Employer Status When the Firm Employs Seasonal Workers

When determining whether a firm meets the ACA definition of an applicable large employer, the hours worked by seasonal employees[11] may be treated differently if (1) an employer would be considered a large employer for fewer than 120 days, and (2) for those days the hours worked by seasonal employees are what push the employer's FTE calculation above 50 FTEs.

If these two conditions are met, the employer may exclude the hours worked by seasonal employees and thus would not be considered a large employer. Otherwise, all hours by all employees (including seasonal workers) are applied to determine large employer status.

(...continued)

proprietorships, etc., which are under common control by one owner or a group of owners.

[9] See http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Independent-Contractor-Self-Employed-or-Employee. When in doubt, a business should file an IRS form SS-8 "Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding," available at http://www.irs.gov/pub/irs-pdf/fss8.pdf.

[10] For details, see the discussion of "temporary staffing firms" within the *Internal Revenue Service Bulletin* 2014-9, February 24, 2014, http://www.irs.gov/irb/2014-9_IRB/ar05.html.

[11] An employee may be a seasonal employee if the employee is hired into a position for which the customary annual employment is six months or less and the period of employment begins each calendar year in approximately the same part of the year (e.g., summer or winter).

Potential Penalties on Large Employers

Regardless of whether a large employer offers coverage, it will be potentially liable for a shared responsibility tax (penalty) *only if* at least one of its full-time employees obtains coverage through an exchange and receives a premium tax credit. For purposes of determining the penalty, a "full-time employee" includes only those individuals working on average 30 hours or more per week. As shown in **Figure 1**, part-time workers are *not* included in the penalty calculations (even though they are included in the determination of a "large employer"). An employer will *not* pay a penalty for any part-time worker even if that part-time employee receives a premium credit. As discussed under implementation issues below, employers are not likely to pay a penalty based upon seasonal workers receiving a premium credit if they work less than 30 hours on average over a pre-specified time period (up to 12 months).

Large Employers Determined to Not Offer Health Coverage

A large employer that does not offer health coverage will be subject to the ACA employer penalty only if any of its full-time employees obtain coverage through an exchange and receive a premium tax credit.[12]

The *monthly* penalty assessed to an employer that does not offer coverage is equal to the number of its full-time employees minus 30 (the penalty waives the first 80 full-time employees for 2015 only) multiplied by one-twelfth of $2,000 for any applicable month.

That penalty will be indexed by a premium adjustment percentage for each calendar year.[13] Beginning in 2016, the penalty payment amount will be equal to the number of its full-time employees minus 30 multiplied by one-twelfth of the annual penalty.

Example 1: Calculating an Employer Penalty When the Employer Does Not Offer Health Coverage

An employer of 200 FTEs (of which 120 are full-time employees) does not offer adequate health coverage to at least 70% of its full-time employees (95% beginning in 2016). In one month, total of 177 employees receive premium subsidies. However, only 77 of those employees were considered full-time. (The 100 part-time employees do not directly enter into the calculation for the determination of the penalty.)

In 2015, the monthly employer penalty would be calculated as:

1/12 x (number of full-time employees less 80) x $2,000 = monthly penalty

1/12 x (120 - 80) x $2,000 = $6,667.

[12] Individuals who are not offered employer-sponsored coverage and who are not eligible for Medicaid or other programs may be eligible for premium tax credits for coverage through an exchange. Eligible individuals will generally have income of at least 100% and up to 400% of the federal poverty level. For details, see CRS Report R41137, *Health Insurance Premium Credits in the Patient Protection and Affordable Care Act (ACA) in 2014*, by Bernadette Fernandez.

[13] The premium adjustment percentage is the national average premium growth rate (IRC §4980H(c)(5) and ACA §1302(c)(4)).

Large Employers Determined to Offer Health Coverage

Large employers that offer health coverage may face a penalty if the employer's coverage fails to meet one of two criteria: affordability and adequacy.

- Affordability: The individual's required contribution toward the plan premium for self-only coverage cannot exceed 9.5% of his/her household income.
- Adequacy: The health plan must pay for at least 60%, on average, of covered health care expenses to be considered adequate.

Employers that offer health insurance coverage that is inadequate or unaffordable will *not* be treated as meeting the employer requirements if at least one full-time employee declines his or her coverage and obtains a premium credit in an exchange plan.

If a penalty is assessed, the (health-coverage providing) employer's monthly penalty is based upon the lesser of two calculations:

- The number of full-time employees *who receive a premium credit* multiplied by one-twelfth of $3,000 for any applicable month.
- The *total* number of the firm's full-time employees minus 80 in 2015 (30 in subsequent years), multiplied by one-twelfth of $2,000 for any applicable month.

After 2015, the penalty amounts will be indexed by a premium adjustment percentage for each subsequent calendar year.[14]

Example 2: Calculating an Employer Penalty When the Employer Offers Health Coverage

A large employer of 200 FTEs (of which 120 are full-time employees) offers adequate (but not perhaps not affordable to some employees) health coverage to at least 70% of its full-time employees (95% beginning in 2016). In one month, a total of 177 employees receive premium subsidies (either because the health coverage is unaffordable or not offered to that employee). However, only 77 of those employees were considered full-time.

The monthly employer penalty in 2015 would be calculated as the lesser of:

1/12 x (number of full-time employees receiving subsidy) x $3,000 or

1/12 x (number of full-time employees less 80) x $2,000

Since [1/12 x (77) x $3,000] = $19,250 > $6,667 = [1/12 x (120 - 80) x $2,000], the monthly employer penalty would be $6,667.

How to Determine an Employee's Full-Time Status

As discussed above, the total ACA employer penalty is based on its number of full-time employees. The ACA specified that working 30 hours or more per week is considered full-time. However, the statute did not specify what time period (i.e., monthly or annually) employers would use to determine if a worker is full-time. The ACA directed the Health and Human

[14] Ibid.

Services Secretary and the Labor Secretary to provide regulatory guidance to employers to determine full-time status of their employees.[15]

As a result, 130 hours of service in a calendar month is treated as the monthly equivalent of at least 30 hours of service per week, and these 130 hours of service monthly equivalency applies for both the look-back measurement method and the monthly measurement method for determining full-time employee status.

Full-Time Work and Full-Time Equivalency: Federal Law, Statistics, and the ACA Definitions

In federal law, there is no universal standard for full-time work. In certain targeted situations (such as a tax credit), federal law might rely upon the employer definition to determine full-time status, or the law may use a full-time equivalency calculation based upon a standard of 2,080 hours per year (which assumes 52 weeks per year with an average of 40 hours each week).

Some federal statistics (such as the Current Population Survey) classify individuals who work fewer than 35 hours per week to be part-time workers. In other federal statistics (such as the National Compensation Survey), full-time or part-time status is not determined by the number of hours worked but is based instead on the establishment's definition of those terms.

Some individuals have suggested that the overtime wage requirements of the Fair Labor Standards Act (FLSA) would be a good reason to define full-time employment as 40 hours per week. The FLSA does not define full-time employment; rather, it sets the conditions (which include working over 40 hours) that would require an employer to pay an employee 1.5 times the hourly wage.[16]

The ACA includes a precise measure of full-time employment in 26 U.S. Code §4980H(c)(4), where it defines a full-time employee as an employee who averages at least 30 hours per week during a month. The FTE calculation for purposes of determining "large" employer status generally parallels this definition; work hours of all variable hour workers are summed then divided by 120 to determine a monthly FTE.[17] CRS has searched the *Congressional Record* for any statement of intent in the ACA for defining 30 hours or more as full-time for the employer penalty calculation and has not found any direct statement explaining congressional intent.

Elsewhere within the ACA (26 U.S. Code §45R), the small employer health insurance credit uses a different calculation for full-time work. The calculation of FTEs for determining if the employer is eligible for the credit is based upon 2,080 hours/year (or approximately 40 hours/week).

IRS Notice 2014-9 describes methods that an employer may use to determine which employees are considered full-time employees for purposes of administering the ACA employer penalty provision.[18] There are three distinct periods in the determination process: measurement, administrative and stability:

- The measurement period is the number of months when an employer calculates the total number of hours worked by the employee to determine whether the employee must be considered full-time under the ACA.

[15] IRC §4980H(c)(4)(B).

[16] For more information on FLSA, see CRS Report R42713, *The Fair Labor Standards Act (FLSA): An Overview*, by Gerald Mayer, Benjamin Collins, and David H. Bradley.

[17] For information on the potential impact of changing the ACA's definition of FTE in the employer size calculation, see CRS Report IF10039, *Proposals to Change the ACA's Definition of "Full Time,"* by Sean Lowry and Jane G. Gravelle.

[18] See *Internal Revenue Service Bulletin* 2014-9, http://www.irs.gov/irb/2014-9_IRB/ar05.html.

- The administrative period is the amount of time an employer may take to identify and enroll full-time employees into the health care coverage.
- The stability period is the amount of time an employer is required to treat all employees who were determined to be full-time during the measurement period as full-time under the ACA. An employer may be subject to an ACA penalty during this stability period if those designated as full-time employees (from the hours worked during the measurement period) qualify for a health coverage subsidy during this period (regardless of hours worked during the stability period).

The IRS notice then allows the employer to choose different methods of determining the measurement, administrative, and stability periods for three groups of workers:

- ongoing employees;
- new employees who are reasonably expected to work full-time; and
- new employees who work variable hours or seasonal jobs.

Table 1. Time Frame for Determining Full-Time Status

	Measurement Period	**Administrative Period**	**Stability Period**
Definition	Measure (on average) whether employees are full time	Identify and enroll full-time employees	Penalty may be due relative to employees found to be full time during measurement period
Ongoing employees	3 to 12 months[a]	Up to 90 days (may neither reduce nor lengthen the measurement or stability period—can overlap prior stability period)	At least 6 months but cannot be shorter in duration than measurement period
New employees hired as full-time	Not applicable	Up to 90 days to enroll	Not applicable
New variable hour and seasonal employees	3 to 12 months[b]	Up to 90 days (measurement period and administrative period cannot exceed 13 months)[c]	3 to 12 months but cannot be longer than measurement period

Source: CRS interpretation of Internal Revenue Service Notice 2014-9 http://www.irs.gov/irb/2014-9_IRB/ar05.html.

a. For ongoing employees, this is referred to as the "standard" measurement period.

b. For new employees, this is referred to as the "initial" measurement period.

c. The initial measurement and administrative period cannot last beyond the final day of the first calendar month beginning on or after the first anniversary of the employee's hiring (approximately 13 months).

Ongoing Employees

An ongoing employee is an employee who has been employed for at least one complete standard measurement period. This is a defined period of between three and 12 consecutive months. (See the transition relief subsection "Measurement Period" for an alternative measurement for 2015 only.)

An employer determines each ongoing employee's status by looking back at the standard measurement period. The employer has the flexibility to determine the months when the standard measurement period starts and ends, provided that the determination is made on a uniform and consistent basis for all employees in the same category. During a measurement period, the employer determines if the employee worked on average at least 30 hours per week per month.

If the employer determines that an employee averaged at least 30 hours per week, then the employer treats the employee as a full-time employee during a subsequent "stability period" regardless of the number of hours the employee works during the stability period—so long as he or she remains an employee.[19] An employer can be subject to a penalty only during the stability period.[20]

Employers may create different measurement and stability periods for the following categories of ongoing employees:

- collectively bargained and non-collectively bargained employees,
- salaried and hourly employees,
- employees of different entities (i.e., controlled groups), and
- employees located in different states.

Employers may opt to use an administrative period (between the measurement and stability periods) to determine which ongoing employees are eligible for coverage and to notify and enroll employees in health care plans.[21]

New Employees Reasonably Expected to Work Full-Time

If an employee is reasonably expected at his or her start date to work full-time, an employer must either offer affordable health coverage within three calendar months of the worker's start date or face a potential shared responsibility penalty. This applies to new workers who are expected to work full-time.

[19] A stability period must be at least six consecutive calendar months and may not be shorter than the standard measurement period designated by the employer.

[20] This would require that the employer had at least one full-time employee who entered the exchange and received a premium tax credit and any health insurance coverage offered was not adequate or affordable.

[21] Any administrative period between the standard measurement period and stability period may neither reduce nor lengthen the measurement period or stability period. The administrative period following the standard measurement period may last up to 90 days, and it overlaps with the prior stability period to prevent any gaps in coverage.

Full-Time Status Determination of Variable Hour Work and Seasonal Workers

Variable Hour Employees

The regulations provide that a new employee is a variable hour employee if it cannot be determined that the employee is reasonably expected to be employed on average at least 30 hours per week. In some cases, variable hour employees might not work the necessary 30 hours on average over a specified time period (up to 12 months) to be considered full-time.

A new employee who is expected to be employed initially at least 30 hours per week may be a variable hour employee as long as the period of employment at more than 30 hours per week is reasonably expected to be of limited duration.

Seasonal Workers

In general, under the ACA an employee may be a seasonal employee if the employee is hired into a position for which the customary annual employment is six months or less and the period of employment begins each calendar year in approximately the same part of the year (e.g., summer or winter). The ACA treats work hours done by seasonal employees differently when determining large employer status (where all hours done by seasonal workers are included in the calculation except as described in the "Calculating Large Employer Status When the Firm Employs Seasonal Workers" section) and when calculating whether an employee is a full-time worker.

Determining Full-Time Worker Status for Seasonal Workers

When determining how many employees are considered full-time for purposes of applying the employer penalty, the final regulations allow employers to employ a look-back measurement period of up to 12 months for determining if seasonal employees are full-time employees. The ability of employers to use a 12-month measurement period for seasonal employees (who by definition work usually fewer than six months per year at the job) effectively allows most firms to not consider seasonal workers as full-time workers even if the worked hours counted toward the calculation of whether the employer is a large employer.

Full-Time Status Determination of Adjunct Faculty, Employees with Layover Hours or On-Call Hours, Employees with Difficult to Identify or Track Hours

The Treasury Department and the IRS continue to consider additional rules for the determination of hours of service for purposes of Section 4980H with respect to certain categories of employees. As of the date of this report, the IRS guidance for employers to determine full-time status for adjunct faculty, employees with layover hours (including the airline industry), and employers with on-call hours is that employers are required to use a "reasonable method" of crediting hours of service that is consistent with Section 4980H.

The guidance states that it would not be reasonable for an employer to not credit an employee with an hour of service for any on-call hour if

- the employer pays the employee for that hour,
- the employee is required to remain on-call on the employer's premises, or
- the employee's activities while remaining on-call are subject to substantial restrictions that prevent the employee from using the time effectively for the employee's own purposes.

Additionally, employers of other employees whose hours of service are particularly challenging to identify or track or for whom the final regulations' general rules for determining hours of service present special difficulties (e.g., commissioned sales) are also required to use a "reasonable method" of crediting hours.

Exclusions from Definition of Hour of Service: Volunteers, Student Workers in Certain Types of Employment, Members of Religious Orders

Volunteers (Including Some Volunteer Firefighters)

The hours of service performed in certain capacities do not count as an hour of service for determining either employer size or full-time status. In particular, the hours worked by unpaid volunteers and certain nominally compensated volunteers (including some volunteer firefighters[22]) are excluded from ACA calculations.

Student Workers

The hours worked by students in positions subsidized through the federal work study program (or equivalent) are excluded in ACA calculations. However, the final regulations do not expand this exclusion into a general exception for all student employees. All hours of service for which a student employee of an educational organization (or of an outside employer) is paid or entitled to payment in a capacity other than through the federal work study program (or equivalent) are required to be counted as hours of service for Section 4980H purposes.

[22] The final regulations provide that hours of service do not include hours worked as a "bona fide volunteer." For this purpose, the definition of "bona fide volunteer" is generally based on the definition of that term for purposes of §457(e)(11)(B)(i), which provides special rules for length-of-service awards offered to certain volunteer firefighters and emergency medical providers under a municipal deferred compensation plan. For purposes of §4980H, however, bona fide volunteers include any volunteer who is an employee of a government entity or an organization described in §501(c) that is exempt from taxation under §501(a) whose only compensation from that entity or organization is in the form of (1) reimbursement for (or reasonable allowance for) reasonable expenses incurred in the performance of services by volunteers, or (2) reasonable benefits (including length of service awards), and nominal fees, customarily paid by similar entities in connection with the performance of services by volunteers.

Religious Orders

The Treasury Department and the IRS continue to consider additional rules for the determination of hours of service for purposes of Section 4980H with respect to hours worked by members of religious orders for the orders to which they belong. Until further guidance is issued, a religious order is permitted, for purposes of determining whether an employee is a full-time employee under Section 4980H, to not count as an hour of service any work performed by an individual who is subject to a vow of poverty as a member of that order when the work is in the performance of tasks usually required (and to the extent usually required) of an active member of the order.

Health Insurance Coverage Requirements for Employer Plans

In order to fulfill the shared responsibility requirements, employers must provide health insurance coverage that is both affordable and adequate coverage to employees and their dependents.

Dependent Coverage: Children Under 26 but Not Spouse

For purposes of the employer shared responsibility provision, the term *dependent* means a child of an employee under 26 years old.[23] Absent knowledge to the contrary, applicable large employers may rely on an employee's representation about that employee's children and the ages of those children. The term *dependent* does not include the spouse of an employee.

Affordable Coverage

Employers and employees face different determinations of "affordable" coverage.

- Employer coverage would be deemed affordable if the employee's portion of the self-only premium for the employer's lowest-cost health coverage plan does not exceed 9.5% of *the employee's W-2 wages*.[24]
- However, in order for the employee to receive a premium credit, the employee's contribution must be greater than 9.5% of his or her *household income* in order to be considered not affordable.

[23] For more information about dependent coverage under ACA, see CRS Report R41220, *Preexisting Condition Exclusion Provisions for Children and Dependent Coverage under the Patient Protection and Affordable Care Act (ACA)*, by Bernadette Fernandez.

[24] Although the determination of whether an employer met the safe-harbor provision would be made after the end of the calendar year, an employer could also use the safe harbor prospectively, at the beginning of the year, by structuring its plan and operations to set the employee contribution at a level so that the employee contribution for each employee would not exceed 9.5% of the employee's W-2 wages for that year.

How Could an Employee's Household Income Be Less Than Wages?

An employee's household income may be less than the employee's W-2 wages because of adjustments to gross income for items such as alimony paid or losses due to self-employment. An employer may rely on an employee's W-2 wages for analyzing the affordability of the employer's health coverage with respect to that employee. This safe harbor, however, does not affect an employee's eligibility for a premium credit, which would continue to be based on the affordability of employer-sponsored coverage relative to an employee's household income.

Affordability and Family Health Insurance Coverage: The "Family Glitch"

Affordability is determined at an individual level. The definition of "affordable"—for both an individual employee and a family—is based only on the cost of individual-only coverage and does not take into consideration the often significantly higher cost of a family plan.

Adequate Coverage (Minimum Value)

Under the ACA, a plan is considered to provide adequate coverage (also called minimum value) if the plan's actuarial value (i.e., share of the total allowed costs that the plan is expected to cover) is at least 60%.[25]

The actuarial value calculation for determining minimum value includes the *employer* contributions to health savings accounts and health reimbursement accounts that are part of a high deductible health plan.

Transition Relief for 2015

There are up to three forms of transition relief available for employers in 2015.[26] First, large employer status determination may use a measurement period as short as six consecutive months. There is an additional year to expand the 2015 health plans to include dependent coverage. Finally, for employers with fewer than 100 FTEs, the ACA employer penalty will not apply.

Measurement Period

Rather than being required to use the full 12 months of 2014 to measure whether an employer has 50 FTEs, an employer may measure any consecutive six-month period during 2014.

[25] Actuarial value is a summary measure of a plan's generosity, expressed as a percentage of medical expense estimated to be paid by the issuer for a standard population and set of allowed charges. Actuarial value reflects the relative share of cost-sharing that may be imposed. On average, the higher the actuarial value of a plan, the lower the cost-sharing for the enrollee. Actuarial value does not consider the cost of premiums and the adequacy of provider networks. Plans with the same actuarial value do not necessarily include the same set of covered benefits.

[26] See Internal Revenue Service (IRS), "26 CFR Parts 1, 54, and 301, Shared Responsibility for Employers," 79 *Federal Register* 8544-8601, February 12, 2014. For details on transition relief for 2014 and 2015, see IRS, "Questions and Answers on Employer Shared Responsibility Provisions Under the Affordable Care Act," http://www.irs.gov/Affordable-Care-Act/Employers/Questions-and-Answers-on-Employer-Shared-Responsibility-Provisions-Under-the-Affordable-Care-Act#Transition.

Dependent Coverage

An employer that takes steps toward offering dependent health coverage in 2015 will not be subject to the ACA employer penalty solely on account of a failure to offer coverage to dependents for that plan year. This transition relief applies to health plans if

- dependent coverage is not offered,
- dependent coverage is not adequate, or
- dependent coverage is offered for some but not all dependents.

Employers can qualify for the dependent coverage transition relief only for those dependents who were without an offer of coverage from the employer in both the 2013 and 2014 plan years and if the employer has taken steps in either the 2014 or 2015 plan year (or both) to extend coverage to dependents not offered coverage in 2013 or 2014.

Employers with Fewer Than 100 FTEs

For employers with fewer than 100 FTEs in 2014, the ACA employer penalty will not apply for any calendar month during the 2015 plan year, including the months during the plan year that fall in 2015. This transition relief applies only if the workforce size is fewer than 100 FTEs, the employer has not reduced its workforce size to qualify for relief, and the employer maintains health care coverage in 2015 that had been offered in 2014.

Limited Workforce Size

The employer must employ on average at least 50 FTEs but fewer than 100 FTEs on business days during 2014 in order to qualify for transition relief. The number of full-time employees (including FTEs) is determined in accordance with the otherwise applicable rules in the final regulations for determining status as an applicable large employer.

Maintenance of Workforce and Aggregate Hours of Service

The employer cannot reduce the size of its workforce or the overall hours of service of its employees in order to qualify for the transition relief. However, an employer that reduces workforce size or overall hours of service for bona fide business reasons is still eligible for the relief.

Maintenance of Previously Offered Health Coverage

In order to qualify for transition relief, the employer cannot eliminate or materially reduce the health coverage, if any, it offered as of February 9, 2014. The maintenance requirement must be met for the period beginning on February 9, 2014 and ending on December 31, 2015. (Employers with non-calendar-year plans must meet the maintenance requirement through the last day of the 2015 plan year.)

An employer will not be treated as eliminating or materially reducing health coverage if any of these conditions are met:

- It continues to offer each employee who is eligible for coverage an employer contribution toward the cost of employee-only coverage that either (A) is at least 95% of the dollar amount of the contribution toward such coverage that the employer was offering on February 9, 2014, or (B) is at least the same percentage of the cost of coverage that the employer was offering to contribute toward coverage on February 9, 2014;
- In the event of a change in benefits under the employee-only coverage offered, that coverage provides minimum value after the change; and
- It does not alter the terms of its group health plans to narrow or reduce the class or classes of employees (or the employees' dependents) to whom coverage under those plans was offered on February 9, 2014.

Appendix. Employer Reporting and Other Requirements

Under Section 6056 of the IRC, a large employer must file a return with the IRS reporting certain information about the health care coverage the employer offered to each full-time employee (or alternatively, that the employer did not offer health care coverage to that employee).[27] Additionally, Section 6051(a)(14) of the IRC requires that large employers must furnish a similar statement to each full-time employee by January 31 of the following calendar year.[28]

In summary, large employers must provide the following information to their full-time employees[29] in 2015:

- The existence of an exchange, including services and contact information;
- The employee's potential eligibility for premium credits and cost-sharing subsidies if the employer plan's share of covered health care expenses is less than 60%; and
- The employee's potential loss of any employer contribution if the employee purchases a plan through an exchange.

Large employers must provide the following to the IRS:

- A return including the name, address, and employer identification number;
- A certification as to whether the employer offers its full-time employees (and dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan;
- The length of any waiting period;
- Months coverage was available;
- Monthly premiums for the lowest-cost option;
- The employer plan's share of covered health care expenses;
- The number of full-time employees;
- The name, address, and tax identification number of each full-time employee; and
- Information about the plan for which the employer pays the largest portion of the costs (and the amount for each enrollment category).

[27] See https://www.federalregister.gov/articles/2014/03/10/2014-05050/information-reporting-by-applicable-large-employers-on-health-insurance-coverage-offered-under.

[28] See http://www.irs.gov/Affordable-Care-Act/Form-W-2-Reporting-of-Employer-Sponsored-Health-Coverage.

[29] For model coverage notices see http://www.dol.gov/ebsa/healthreform/regulations/coverageoptionsnotice.html.

Additionally, the employer must also provide each full-time employee the following:

- A written statement showing contact information for the person required to make the above IRS return and the specific information included in the W-2 return for that individual.[30]

If an employer's workers are covered by the FLSA and the employer has more than 200 full-time employees, the employer will face additional requirements in Section 18B the FLSA once regulations are finalized. The employers will be required to automatically enroll new full-time employees in one of the employer's health coverage plans and to continue the enrollment of current employees in health coverage plans offered through the employer. Additionally, requiring employers must provide adequate notice and the opportunity for an employee to opt out of any coverage in which the employee was automatically enrolled.[31]

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[30] For a detailed example see http://www.irs.gov/Affordable-Care-Act/Form-W-2-Reporting-of-Employer-Sponsored-Health-Coverage.

[31] Employee Benefits Security Administration, *EBSA Technical Release No. 2012-01*, 2012, http://www.dol.gov/ebsa/newsroom/tr12-01.html. It remains the Department of Labor's view that, until final regulations under FLSA §18A are issued and become applicable, employers are not required to comply with FLSA §18A.