

### Part III – Administrative, Procedural, and Miscellaneous

#### Request for Comments on Shared Responsibility for Employers Regarding Health Coverage (Section 4980H)

Notice 2011-36 --

Many provisions of the Patient Protection and Affordable Care Act (Affordable Care Act) that are designed to promote expanded, affordable health coverage become effective beginning in 2014. These include provisions for shared responsibility for employers regarding health coverage, coverage to be offered by State Exchanges, premium tax credits to assist individuals in purchasing coverage through State Exchanges, and related provisions. As part of the process of planning for implementation of these provisions, the Department of the Treasury (Treasury), the Department of Labor (DOL) and the Department of Health and Human Services (HHS) (collectively, the three Departments) are working in concert to develop regulations and other administrative guidance that will respond to questions and assist stakeholders with implementation.

#### I. PURPOSE

This request for comments is intended to initiate and inform the process of developing regulatory guidance regarding the shared employer responsibility provisions in § 4980H of the Internal Revenue Code (Code). Those provisions, which apply for months beginning after December 31, 2013, refer to certain standards relating to the offering of health coverage by employers to their full-time employees. Under § 4980H, an “applicable large employer” that does not meet those standards may be liable for an

“assessable payment” if at least one of its full-time employees is certified as having enrolled in health insurance through a State Exchange with respect to which a premium tax credit under § 36B of the Code, a cost-sharing reduction under § 1402 of the Affordable Care Act, or an advance payment of such credit or reduction under § 1412 of the Affordable Care Act is allowed or paid.

This notice does not constitute guidance. Instead, it describes potential approaches, which could be incorporated in future proposed regulations, to certain discrete issues under § 4980H, particularly the issue of who is a full-time employee, and invites comments on these approaches. Treasury and the Internal Revenue Service (IRS) intend to publish such proposed regulations both on the § 4980H issues addressed in this notice and on a broader set of issues under § 4980H. This notice also invites comments on the interpretation of the 90-day limitation on waiting periods for group health plans and health insurance issuers offering group health insurance coverage under § 2708 of the Public Health Service (PHS) Act, and on how the interpretations of that section and of § 4980H should be coordinated. The three Departments are coordinating their efforts in developing the regulations and other guidance on the shared employer responsibility provisions (Treasury/IRS guidance), the 90-day limitation on waiting periods (three Department guidance), automatic enrollment for employees of large employers (DOL guidance),<sup>1</sup> and other Affordable Care Act provisions.

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<sup>1</sup> Section 18A of the Fair Labor Standards Act (FLSA), as added by § 1511 of the Affordable Care Act, requires employers subject to the FLSA that have more than 200 full-time employees and that offer enrollment in one or more health benefit plans to automatically enroll new full-time employees in one of the plans offered (subject to any waiting period authorized by law), and to continue the enrollment of current employees in the employer’s plan. Under FLSA § 18A, which is enforced by the DOL, any automatic enrollment program must include adequate notice and the opportunity to opt out of any

## II. BACKGROUND

Section 4980H was added to the Code by § 1513 of the Affordable Care Act enacted March 23, 2010, Pub. L. No. 111-148, and amended by § 1003 of the Health Care and Education Reconciliation Act of 2010, enacted March 30, 2010, Pub. L. No. 111-152. Section 4980H is effective for months beginning after December 31, 2013.

Generally, § 4980H provides that an applicable large employer is liable for an assessable payment if any full-time employee is certified to receive an applicable premium tax credit or cost-sharing reduction and either (1) the employer fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage (MEC) under an eligible employer-sponsored plan (§ 4980H(a) liability)<sup>2</sup>; or (2) the employer offers its full-time employees (and their dependents) the opportunity to enroll in MEC under an eligible employer-sponsored plan that, with respect to a full-time employee who has been certified for the advance payment of an applicable premium tax credit or cost-sharing reduction, either is unaffordable within the meaning of § 36(B)(c)(2)(C)(i) or does not provide minimum value within the meaning of § 36(B)(c)(2)(C)(ii) (§ 4980H(b) liability). The definition of full-time employee is key in determining whether and, if so, to what extent, an employer may incur § 4980H(a) liability or § 4980H(b) liability. The annual assessable payment under § 4980H(a) is based on all (excluding the first 30) full-time employees, while the annual assessable payment under § 4980H(b) is based on the number of full-time employees who are

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coverage in which the individual was automatically enrolled. Treasury/IRS and the DOL are coordinating the development of their respective guidance on the definitions of full-time employee for purposes of § 4980H and FLSA § 18A.

<sup>2</sup> MEC is defined in § 5000A(f) of the Code. The definition of “eligible employer-sponsored plan” in § 5000A(f)(2) applies for purposes of § 4980H.

certified to receive an advance payment of an applicable premium tax credit or cost-sharing reduction.

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 who employed an average of at least 50 full-time employees on business days during the preceding calendar year.<sup>3</sup> For purposes of determining whether an employer is an applicable large employer, full-time equivalent employees (FTEs), which are determined based on the hours of service of employees who are not full-time, are taken into account.

This notice invites comments on a number of possible rules, definitions and approaches for interpreting and applying § 4980H. Section III of the notice addresses potential definitions of employer, employee and hours of service. Section IV describes a possible method for determining whether an employer is an applicable large employer for a calendar year, and thereby subject to § 4980H. Section V outlines possible rules that could be used to determine an employee's full-time status for purposes of calculating an employer's assessable payment under § 4980H. Section VI contains a more general request for comments, including comments on the interaction of the rules under § 4980H with certain other provisions of the Affordable Care Act.

### III. DEFINITION OF EMPLOYER, EMPLOYEE, HOURS OF SERVICE

In the interests of simplicity and consistency, it is contemplated that the definitions of employer, employee and hours of service and the rules for calculating

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<sup>3</sup> Section 4980H is effective for months beginning after December 31, 2013. For 2014, the first calendar year in which an employer could be an applicable large employer, the preceding calendar year is 2013.

hours of service (as outlined below) would generally conform, to the extent consistent with the provisions and purposes of § 4980H, to well-established regulatory definitions and rules applicable to employer-provided health and pension benefits. Comments are invited on the following possible approaches to defining those terms.

A. How “Employer” Would Be Defined

For purposes of § 4980H, as under Code provisions generally, “employer” would mean the entity that is the employer of an employee under the common-law test. In addition, § 4980H provides that all entities treated as a single employer under § 414(b), (c), (m), or (o) are treated as a single employer for purposes of § 4980H. Section 4980H(c)(2)(C)(i). Thus, all employees of a controlled group under § 414(b) or (c), or an affiliated service group under § 414(m), are to be taken into account in determining whether any member of the controlled group or affiliated service group is an applicable large employer. Section 4980H also provides that an employer includes a predecessor employer (§ 4980H(c)(2)(C)(iii)) and that an employer not in existence during an entire preceding calendar year will be 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. Section 4980H(c)(2)(C)(ii). (Section IV.C describes how FTEs are calculated for purposes of determining whether an employer is an applicable large employer.)

B. How “Employee” Would Be Defined

For purposes of § 4980H, as under Code provisions generally, “employee” would mean a worker who is an employee under the common-law test. (See Section IV.D for a special rule regarding seasonal employees described in § 4980H(c)(2)(B).) Section

414(n), which treats “leased employees”, as defined in § 414(n)(2), as employees of the service recipient for various purposes, does not cross-reference § 4980H and accordingly would not apply to § 4980H.

#### C. Definition of “Hours of Service”

In general, § 4980H treats, with respect to a month, an employee who has an average of at least 30 hours of service per week as a full-time employee. It is contemplated that, for this purpose, proposed regulations would provide that 130 hours of service in a calendar month would be treated as the monthly equivalent of at least 30 hours of service per week.<sup>4</sup> As under existing Labor Regulations, an employee's hours of service would 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 C.F.R. § 2530.200b-2(a)) (except that it is contemplated that no more than 160 hours of service would be counted for an employee on account of any single continuous period during which the employee was paid or entitled to payment but performed no duties). The potential rules for determining hours of service in this Section III.C and section III.D, which are based on prior guidance under other provisions of the Affordable Care Act, would apply in determining an employee's status as full-time or not full-time and in calculating an employer's FTEs.

#### D. How Hours of Service Would Be Calculated

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<sup>4</sup> This possible proposed standard of 130 hours of service per calendar month would take into account that the average month consists of more than four weeks ( $52 \times 30 / 12 = 130$ ).

## 1. Calculation of hours for service for hourly employees

For employees paid on an hourly basis (hourly employees), the employer would be required to calculate actual hours of service from records of hours worked and hours for which payment is made or due (payment is made or due for vacation, holiday, illness, incapacity, etc., as described above).

## 2. Calculation of hours for service for non-hourly employees

For employees not paid on an hourly basis (non-hourly employees), the employer would be permitted to calculate the number of hours of service under any of the following three methods: (1) counting actual hours of service from records of hours worked and hours for which payment is made or due for vacation, holiday, illness, incapacity, etc., as described above; (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 the rule in Section III.C above; 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 the rule in Section III.C above. These equivalents are based on Labor regulations at 29 C.F.R. § 2530.200b-2(a), modified as under prior guidance under other provisions of the Affordable Care Act.

Although an employer would be required to use one of these three methods for counting hours of service for all non-hourly employees, an employer need not use the same method for all non-hourly employees, but may apply different methods for different classifications of non-hourly employees, if 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.

The number of hours of service calculated using the days-worked or weeks-worked equivalency method would be required to reflect generally the hours actually worked and the hours for which payment is made or due. An employer would not be permitted to use 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 full-time.

#### IV. DETERMINATION OF WHETHER AN EMPLOYER IS AN APPLICABLE LARGE EMPLOYER

This section of the notice describes the process for determining whether an employer is an applicable large employer in accordance with § 4980H. Comments are welcome.

##### A. Applicable Large Employer Status Determined Based upon Sum of Full-Time Employees and FTEs

Under § 4980H, an employer would not be subject to an assessable payment unless the employer is an applicable large employer. As noted above, § 4980H defines an applicable large employer, with respect to a calendar year, as an employer that employed an average of at least 50 FT employees on business days during the preceding calendar year. For purposes of this Section IV, the term "FT employees" means the sum of the employer's full-time employees and FTEs.



B. Full-Time Employees for Determining Applicable Large Employer Status

Section 4980H provides that full-time employee status is determined on a monthly basis. Under § 4980H, a full-time employee with respect to any month is an employee (including a seasonal employee) who is employed, on average, at least 30 hours of service per week (or, under the rules contemplated to be included in proposed regulations, at least 130 hours of service in the calendar month). An employee who is not a full-time employee under this standard (including a seasonal employee) for a given month is taken into account in the FTE calculation. Section 4980H(c)(2)(E).

C. Full-Time Equivalents for Determining Applicable Large Employer Status

In determining whether an employer is an applicable large employer for the current calendar year, § 4980H provides that the employer is required to calculate the number of FTEs it employed during the preceding calendar year and count each such FTE as one FT employee for that year. All employees (including seasonal employees) 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. The number of FTEs for each calendar month in the preceding calendar year would be determined using the following steps:

(1) Calculate the aggregate number of hours of service (but not more than 120 hours of service for any employee) for all employees who were not full-time employees for that month.

(2) Divide 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 would be taken into account. For example, if in a calendar month employees who are not full-time employees work 1,260 hours, there would be 10.5 FTEs for that month. However, after adding the 12 monthly full-time employee and FTE totals, and dividing by 12 (the amount in Section IV.E, step (4) below), all fractions would be disregarded. For example, 49.9 FT employees for the preceding calendar year would be rounded down to 49 FT employees (and thus the employer would not be an applicable large employer in the current calendar year).

#### D. Seasonal Employees

Section 4980H provides that seasonal employees are employees who perform labor or services on a seasonal basis as defined by the Secretary of Labor, including seasonal workers covered by 29 C.F.R. § 500.20(s)(1) and retail workers employed exclusively during holiday seasons. Section 4980H(c)(2)(B)(ii). If an employer's workforce exceeds 50 FT 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 employees, the employer would not be an applicable large employer. It is contemplated that, for this purpose only, four calendar months would be treated as the equivalent of 120 days.

#### E. Calculating the Number of FT Employees

The steps in calculating the number of FT employees in the preceding calendar year, and thus whether the employer is an applicable large employer for the current calendar year, would be as follows:

(1) Calculate the number of full-time employees (including seasonal employees) for each calendar month in the preceding calendar year.

(2) Calculate the number of FTEs (including seasonal employees) for each calendar month in the preceding calendar year (as described in Section IV.C above).

(3) Add the number of full-time employees and FTEs calculated in steps (1) and (2) for each of the 12 months in the preceding calendar year.

(4) Add up the 12 monthly numbers in step (3) and divide the sum by 12. This is the average number of the employer's FT employees for the preceding calendar year. See Section IV.C above for rule regarding fractions and rounding.

(5) If the number of FT employees in step (4) is less than 50, the employer is not an applicable large employer for the current calendar year.

(6) If the number of FT employees in step (4) is 50 or more, determine whether the seasonal employee exception, as described in Section IV.D above, applies. If the seasonal employee exception applies, the employer is not an applicable large employer for the current calendar year. If the seasonal exception does not apply, the employer is an applicable large employer for the current calendar year.

Examples. In all of the examples in this notice, employees are common law employees of the employer, and hours of service are computed following the rules in Section III.D above.

Example 1 - Hourly-paid employees. (i) Employer K's taxable year is the calendar year. Employer K's payroll records indicate that Employee A was an hourly employee who worked 173 hours per month for January through November of 2014, worked 93 hours in December of 2014 and was paid for 80 hours of annual leave in December of 2014 (for a total of 173 hours for December of 2014).

(ii) Employee A had more than 130 hours of service in each month in calendar year 2014.

(iii) Employee A was a full-time employee of Employer K for each month during calendar year 2014.

Example 2 - Non-hourly employee: days-worked equivalency. (i) Same facts as Example 1, except that in calendar year 2014, Employee B is a non-hourly employee who worked for Employer K five days per week for 50 weeks, and was paid 80 hours of vacation leave for two weeks (40 hours per week). Employer K applies the days-worked equivalency for Employee B.

(ii) Employee B is credited with 40 hours of service for each week in the 2014 calendar year (50 weeks worked and 2 weeks for which payment was made).

(iii) Employee B averaged at least 30 hours of service per week during each month in calendar year 2014.

(iv) Employee B is a full-time employee of Employer K in each month in calendar year 2014.

Example 3 - Applicable large employer. (i) In each month in calendar year 2014, Employer L has 20 full-time employees, 30 FTEs, and no seasonal employees.

(ii) Because Employer L has 50 FT employees (20 full-time employees + 30 FTEs) during each month of 2014 and the seasonal employee exception is not applicable, Employer L is an applicable large employer for calendar year 2015.

Example 4 – Seasonal employees. (i) In calendar year 2014, Employer N has 40 full-time employees for January through December none of whom are seasonal employees. In addition, Employer N also has 80 seasonal full-time employees that work for Employer N from September through December. Employer N has no FTEs.

(ii) Before applying the seasonal employee exemption, Employer N has 40 full-time employees during each of eight calendar months of 2014, and 120 full-time employees during each of four calendar months of 2014, resulting in an average of 66.5 employees for the year (rounded down to 66 full-time employees), an average greater than the average of at least 50 full-time employees required for applicable large employer status. However, in this example, Employer N's workforce exceeded 50 full-time employees (counting seasonal employees) for no more than four calendar months (treated as the equivalent of 120 days) in calendar year 2014, and the employees in excess of 50 during those months were seasonal workers.

(iii) Accordingly, because of the seasonal employee exemption, Employer N is not an applicable large employer for calendar year 2015.

Example 5 – Seasonal and other FTEs. (i) Same facts as in Example 4, except that Employer N has 20 FTEs in August, some of whom are seasonal employees.

(ii) The seasonal employee exemption is not available if the number of an employer's FT employees (including seasonal employees) exceeds 50 employees for more than 120 days during the calendar year. Employer N has at least 50 FT employees for a period greater than four calendar months (treated as the equivalent of 120 days) in calendar year 2014. Therefore, Employer N is not eligible for the seasonal employee exception. As a result, Employer N averages 68 FT employees in 2014:  $[(40 \times 7) + (60 \times 1) + (120 \times 4)] \div 12 = 68.33$ , rounded down to 68.

(iii) Accordingly, Employer N is an applicable large employer for calendar year 2015.

## V. POTENTIAL METHODS FOR DETERMINING FULL-TIME EMPLOYEES

### UNDER § 4980H

An applicable large employer's potential § 4980H(a) liability is determined by reference to the number of full-time employees employed for a given month, and an applicable large employer's potential § 4980H(b) liability is determined by reference to the number of full-time employees with respect to whom an applicable premium tax credit or cost-sharing reduction is allowed or paid for a given month. Under a month-to-month method for determining an applicable large employer's potential § 4980H liability, each employee's full-time status would be determined on a monthly basis (i.e., an employee would be considered full-time for a month if the employee averaged at least 30 hours of service per week for the month (or, under the rules contemplated to be included in proposed regulations, had at least 130 hours of service for the month)).

A determination of full-time employee status on a monthly basis for purposes of calculating an employer's potential § 4980H liability may cause practical difficulties for employers, employees, and the State Exchanges. These difficulties include uncertainty and inability to predictably identify which employees are considered full-time and, consequently, inability to forecast or avoid potential § 4980H liability. This issue is

particularly acute in circumstances in which employees have varying hours or employment schedules (e.g., employees whose hours vary from month to month or who are employed for a limited period). If employer-sponsored coverage were limited to employees who satisfied the definition of full-time employee during a month, employees might move in and out of employer coverage as frequently as monthly, which would be undesirable from both the employee's and the employer's perspective, and could also create administrative challenges for the State Exchanges.

In order to address these concerns for employees and employers, and to give plan sponsors flexible and workable options as well as greater predictability, Treasury and the IRS are considering proposing possible alternatives to a month-by-month determination of full-time employee status for purposes of calculating an applicable large employer's potential assessable payment. One possible alternative would permit applicable large employers, at their option, to use a look-back/stability period safe harbor that would provide certainty as to which employees would be considered full-time for a particular coverage period. Such an approach also would be designed to give effect to the statutory provisions while accommodating a wide variety of current eligibility and enrollment practices in group health plans. Accordingly, this notice requests comments on the look-back/stability period safe harbor method described below, which Treasury and the IRS believe represents a reasonable interpretation of the statute.

Under the possible look-back/stability period safe harbor method, an employer would determine each employee's full-time status by looking back at a defined period of not less than three but not more than twelve consecutive calendar months, as chosen by the employer (the measurement period), to determine whether the employee

averaged at least 30 hours of service per week (or, under the rules contemplated to be included in proposed regulations, at least 130 hours of service per calendar month) during the measurement period. If the employee were determined to be a full-time employee during the measurement period, then the employee would be treated as a full-time employee during a subsequent “stability period”, regardless of the number of the employee’s hours of service during the stability period, so long as he or she remained an employee. For an employee who was determined to be a full-time employee during the measurement period, the stability period would be a period of at least six consecutive calendar months that follows the measurement period and is no shorter in duration than the measurement period. If the employee was determined not to be a full-time employee 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 stability period could not exceed the measurement period.

Example 6 – Measurement period/stability period. (i) Employer M, an applicable large employer, did not hire any new employees in calendar year 2014. Employer M elects to use a 6-month measurement period and a 6-month stability period for purposes of determining its full-time employees. The first measurement period runs from January 1, 2014 through June 30, 2014 and the associated stability period runs from July 1, 2014 through December 31, 2014.

(ii) Employer M determines each employee’s full-time status by looking back to determine whether the employee averaged at least 30 hours of service per week from January 1, 2014 through June 30, 2014 by totaling each employee’s hours of service during that measurement period and dividing that total by the number of weeks in that measurement period.

(iii) The employees determined to be full-time based on their hours of service during the first measurement period are considered to be full-time for each month in the stability period from July 1, 2014 through December 31, 2014 for purposes of calculating Employer M’s potential assessable payment under § 4980H for those months.

Treasury and IRS also request comments on other possible alternative methods of determining full-time employee status for purposes of calculating an applicable large employer's potential assessable payment.

For new employees who might not have been employed by the employer during the entire measurement period, or employees who move into full-time status during the year, it is currently anticipated that this safe harbor may apply only in a limited form. Comments are requested on potential rules for determining the full-time status of such employees. See also Section VI, below, which requests comments regarding the 90-day waiting period and its application to newly eligible employees.

In addition, comments are invited on the following possible provisions:

- To allow reasonable administrative time to perform the look-back calculation, notify employees of their eligibility, and enroll them in coverage, the stability period might not be required to commence immediately following the end of the measurement period. Instead, plans might be given the option of taking an administrative interval (for example, up to one month) between the end of the measurement period and the beginning of the stability period.
- Employers who select a measurement period of less than a year but select a stability period that is designed to provide coverage to employees on a plan year basis might be permitted to provide different stability periods for different groups of employees depending on the point during the plan year in which the employee is determined to be full-time. For example, employers using a three-month measurement period might be



permitted to use a stability period of at least six consecutive months or, if greater, the number of calendar months remaining in the plan year.

- Employers might be given the option of starting the first measurement period for an employee on the employee's date of hire rather than on the first day of a calendar month, provided that the duration of the measurement period was uniform for all employees.
- To minimize opportunities for manipulation, employers might be limited in the frequency with which they could change their measurement and stability period.

If employers could use different measurement and stability periods for different portions of their work force, the potential for manipulation could be greater, and the resources required for the IRS to review and confirm employer compliance would be materially increased. The use of a single measurement period and a single stability period for all of an employer's employees would minimize these concerns. Accordingly, commenters are requested to take these issues into account in commenting on whether applicable large employers should generally be required to use the same measurement and stability periods for all employees. Comments are requested on whether there are circumstances (such as corporate transactions bringing new entities into the applicable large employer's controlled group or the use of different payroll systems for different groups of employees) in which it may be appropriate for the employer to apply different measurement and stability periods for different classifications of employees or for different entities within its controlled group.

## VI. REQUEST FOR COMMENTS

## A. General Request for Comments

As noted, the IRS and Treasury intend to issue proposed regulations on the employer shared responsibility provisions under § 4980H. To help inform those proposed regulations, comments are invited on the issues addressed in this notice. In addition, employers and other stakeholders have requested clarification of how the § 4980H(a) assessable payment provisions will be interpreted and applied, and how they should work together with the § 4980H(b) assessable payment provisions. As noted earlier, § 4980H(a) provides that the assessable payment under § 4980H(a) may apply to an employer that “fails to offer its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an employer-sponsored plan.” It is contemplated that the proposed regulations would make clear that an employer offering coverage to all, or substantially all, of its full-time employees would not be subject to the § 4980H(a) assessable payment provisions. Comments are requested on the challenges employers may face in being able to offer coverage to certain categories of employees even after implementation of the changes made by the Affordable Care Act to the group insurance market, and on other situations where application of the § 4980H(a) assessable payment may not be appropriate. Comments are requested on whether there are appropriate exceptions that should be provided for under the employer responsibility provisions (for example, an exception to permit employers not to offer coverage to nonresident alien employees, who not are required to have coverage under the Affordable Care Act, or not to offer coverage to certain seasonal employees) and how any proposed exceptions would be consistent with the structure and purpose of the § 4980H(a) assessable payment provisions.

## B. Request for Comments on the 90-Day Waiting Period Limitation

Section 1201 of the Affordable Care Act added a new § 2708 of the PHS Act, which provides that a group health plan and health insurance issuer offering group health insurance coverage shall not apply any waiting period that exceeds 90 days.<sup>5</sup> PHS Act § 2708 (29 U.S.C. § 300gg-7) is incorporated by reference into the Employee Retirement Income Security Act of 1974 (ERISA) under § 715 and into the Code under § 9815, enacted by § 1563 of the Affordable Care Act. Accordingly, the interpretation and application of § 2708 of the PHS Act is subject to the shared jurisdiction of the three Departments. Violations by group health plans are subject to the excise tax under § 4980D of the Code, as well as other civil enforcement remedies under ERISA and the PHS Act.

For purposes of § 2708 of the PHS Act, “waiting period” is defined under § 2704(b)(4) of the PHS Act to mean “with respect to a group health plan and an individual who is a potential participant or beneficiary in the plan, the period that must pass with respect to the individual before the individual is eligible to be covered for benefits under the terms of the plan.” Identical definitions of “waiting period” appear in the Code and ERISA. See Code § 9801(b)(4); ERISA § 701(b)(4).<sup>6</sup> Joint final regulations under these three identical statutory provisions (which were added by HIPAA) define the term “waiting period” as “the period that must pass before coverage

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<sup>5</sup> PHS Act § 2708 is effective for plan years beginning on or after January 1, 2014 and applies to both grandfathered and non-grandfathered plans.

<sup>6</sup> The Health Insurance Portability and Accountability Act of 1996 (HIPAA) added the definition of waiting period to the PHS Act, ERISA and the Code as part of the portability provisions. Under the HIPAA portability provisions, a waiting period is not taken into account in determining whether an individual has had a significant break in coverage (i.e., a break of 63 or more days) that would nullify prior creditable coverage that would otherwise reduce the length of an allowed preexisting condition exclusion period.

for an employee or dependent who is otherwise eligible to enroll under the terms of a group health plan can become effective [emphasis added].” See Treas. Reg. § 54.9801-3(a)(3)(iii); DOL Reg. 29 CFR 701-3(a)(3)(iii); HHS Reg. 45 CFR 146.111(a)(3)(iii).

The Departments request comments on the 90-day limitation on any waiting period under PHS Act § 2708, including comments on which employees are subject to the limitation, when a waiting period may apply consistent with the limitation, and how the 90-day limitation should be calculated. Comments are also requested on the application of the 90-day waiting period under PHS Act § 2708 to common employer eligibility and enrollment practices and the interaction between the interpretation of the Code § 4980H employer responsibility provisions and the calculation of the maximum permissible waiting period under PHS Act § 2708, including the following:

1. On April 8, 2011, the DOL held an open forum on issues relating to implementation of the automatic enrollment provisions of § 18A of the Fair Labor Standards Act. At that open forum and in other contexts, stakeholders have described arrangements or practices currently used by some group health plans to determine when an employee is eligible to enroll in the plan and when enrollment occurs. Comments are requested on how the 90-day waiting period under PHS Act § 2708 should be applied in the following situations (including appropriate modifications, if any, that should be made to an employer group health plan’s eligibility and enrollment practices):
  - a. Employees become eligible to enroll in the employer’s group health plan when they are determined to have worked an average of a specified number of hours (e.g., 30 hours per week) during a look-back measurement period (e.g., a quarterly look-back measurement period) and are therefore considered to satisfy the plan’s eligibility requirements. Once an employee is determined to be eligible to enroll in the group health plan, he or she is enrolled at the end of a 90-day waiting period during which the employer and the plan or issuer, as applicable, complete the enrollment process.
  - b. Employees who are hired to work a full-time schedule become eligible to enroll in the employer’s group health plan, subject to a 90-day service

requirement, calculated from the date of hire. The plan or issuer does not permit mid-month enrollment but permits employees to enroll on the first day of the month (or the first day of a quarter) after completing 90 days of service.

- c. Employees covered by a collective bargaining agreement become eligible for coverage under a multiemployer health plan for a period (such as a calendar quarter) if they completed a specified number of hours during an earlier period (such as the previous calendar quarter, or the calendar quarter that began six months before the coverage quarter). The multiemployer health plan collects such an employee's hours worked from different employers that contribute to the plan. Under the terms of the multiemployer plan, excess hours may or may not be "banked" and available to maintain coverage for future quarters in which the employee does not meet the hours requirement.
  - d. Employees become eligible to enroll in the employer's group health plan after completing a service-based "probationary" period of, for example, three to six months. The plan enrolls employees 90 days after the completion of the probationary period.
  - e. Employees hired as seasonal workers or into certain other temporary or variable-hour categories of employment are not eligible to enroll in the employer's group health plan, even if such an employee works a sufficient number of hours to satisfy the plan's eligibility requirement for non-seasonal employees. To the extent that the status of this employee changes to one that is eligible to enroll in the plan, the employee is permitted to enroll 90 days after the change in status. In some instances, the same seasonal or temporary employees may be rehired annually.
  - f. Part-time employees are offered coverage, but only after having worked for longer than a 90-day period.
2. What, if any, other service-based eligibility conditions do employers, plans, or issuers currently impose that could raise compliance issues under PHS Act § 2708? Are there any clarifications or interpretations that would be helpful to facilitate compliance? Should the 90-day waiting period provision be interpreted to require aggregation of discrete periods of service or should plans be permitted to require continuous service to satisfy the waiting period?
3. How should § 4980H be coordinated with the 90-day waiting period provision?

Comments must be submitted by June 17, 2011. Comments should include a reference to Notice 2011-36. Send submissions to CC:PA:LPD:PR (Notice 2011-36),

Room 5203, Internal Revenue Service, P.O. Box 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 (Notice 2011-36), Courier's  
Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC  
20044, or sent electronically, via the following e-mail address:

*Notice.comments@irs.counsel.treas.gov*. Please include "Notice 2011-36" in the subject  
line of any electronic communication. All material submitted will be available for public  
inspection and copying.

#### NO INFERENCE

No inference should be drawn from any provision of this notice concerning any  
other provision of § 4980H or any other section of the Affordable Care Act.

#### DRAFTING INFORMATION

The principal author of this notice is Mireille Khoury of the Office of Division  
Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). For further  
information regarding this notice contact Ms. Khoury at (202) 622-6080 (not a toll-free  
call).