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American Benefits Council
P4P "Preparing for PPACA" Webinar

Applying Pay or Play to Special Employees

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Overview

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- Brief refresher on the employer “pay or play” requirement
- What is “full-time”?
- Who is an “employee”?
- What constitutes an “hour of service”?
- How to count hours of service?
- Treatment of certain types of employees:
  - Variable hour
  - Seasonal
  - Short-term
  - Temporary
  - Leased

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- Two separate penalties:
  - **4980H(a) or “A-Penalty”**
  - 4980H(b) or “B-Penalty”

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- **A-Penalty** (4980H(a))
  - Sometimes referred to as the "offering requirement"
  - **General rule** = An employer must offer "minimum essential coverage" (MEC) to 95% of its 4980H-defined full-time employees and their children up to age 26 or risk a penalty equal to (i) $2,000, multiplied by (ii) the number of full-time employees minus 30
  - ** Certain transition relief through close of 2015 plan year was provided **

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- **A-Penalty** (4980H(a))
  - **Things to keep in mind**:
    - The A-Penalty can only be triggered if a full-time employee goes to a public exchange, enrolls in individual coverage and receives a premium tax credit from the federal government (i.e., he or she generally must have MAGHI < 400% of the FPL)
    - There is no requirement that the coverage be affordable or provide "minimum value"
    - No requirement to offer spousal coverage

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- **4980H “Dependents”**

Yes

**** Note: Special 2015 Transition Relief**

NO

- Step-children
- Foster Children
- All Children age 26+
- Spouse

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- **B-Penalty** (4980H(a))
  - **General rule** = Even if an employer satisfies the offering requirement (i.e., avoids the A-Penalty), if the employer fails to offer affordable and minimum value coverage to a full-time employee, it can risk a B-Penalty generally equal to $3,000 per year for that employee

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- **B-Penalty** (4980H(b))
  - **Things to keep in mind**:
    - As with the A-Penalty, the B-Penalty can only be triggered if a full-time employee goes to a public exchange, enrolls in individual coverage and receives a premium tax credit from the federal government (i.e., he or she generally must have MAGHI < 400% of the FPL)
      - HOWEVER, if the employer offered the employee affordable, minimum value coverage (or the employee is otherwise enrolled in "minimum essential coverage"), then the employee is not eligible for a premium tax credit – and thus cannot trigger a "B Penalty" for the employer
    - Affordability is measured against the lowest-cost self-only coverage option that is minimum essential coverage and provides minimum value
    - Final regulations provide affordability safe harbors

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- **** A-Penalty Transition Relief for 2015 ****
  - **What does the relief provide?**
    1. So long as the employer offers minimum essential coverage (MEC) to at least 70% of its full-time employees (and children, as required under the transition relief), then no A-Penalty will apply –
       - Through 12/31/15 for calendar year plans
       - Through the close of the 2015 plan year for non-calendar year plans
    2. ALSO, the A-Penalty is reduced by the employer's allocable share of 80 full-time employees rather than just 30
  - **HOWEVER, It is important to note that there is no corresponding 4980H(b) relief!!!**
    - Thus, the employer could be on the hook for penalties equal to $3,000 per employee for any employee that goes to the exchange and gets subsidized individual coverage
  - Most likely helpful on issue of worker misclassification, but remember it is only through the close of the employer's 2015 plan year

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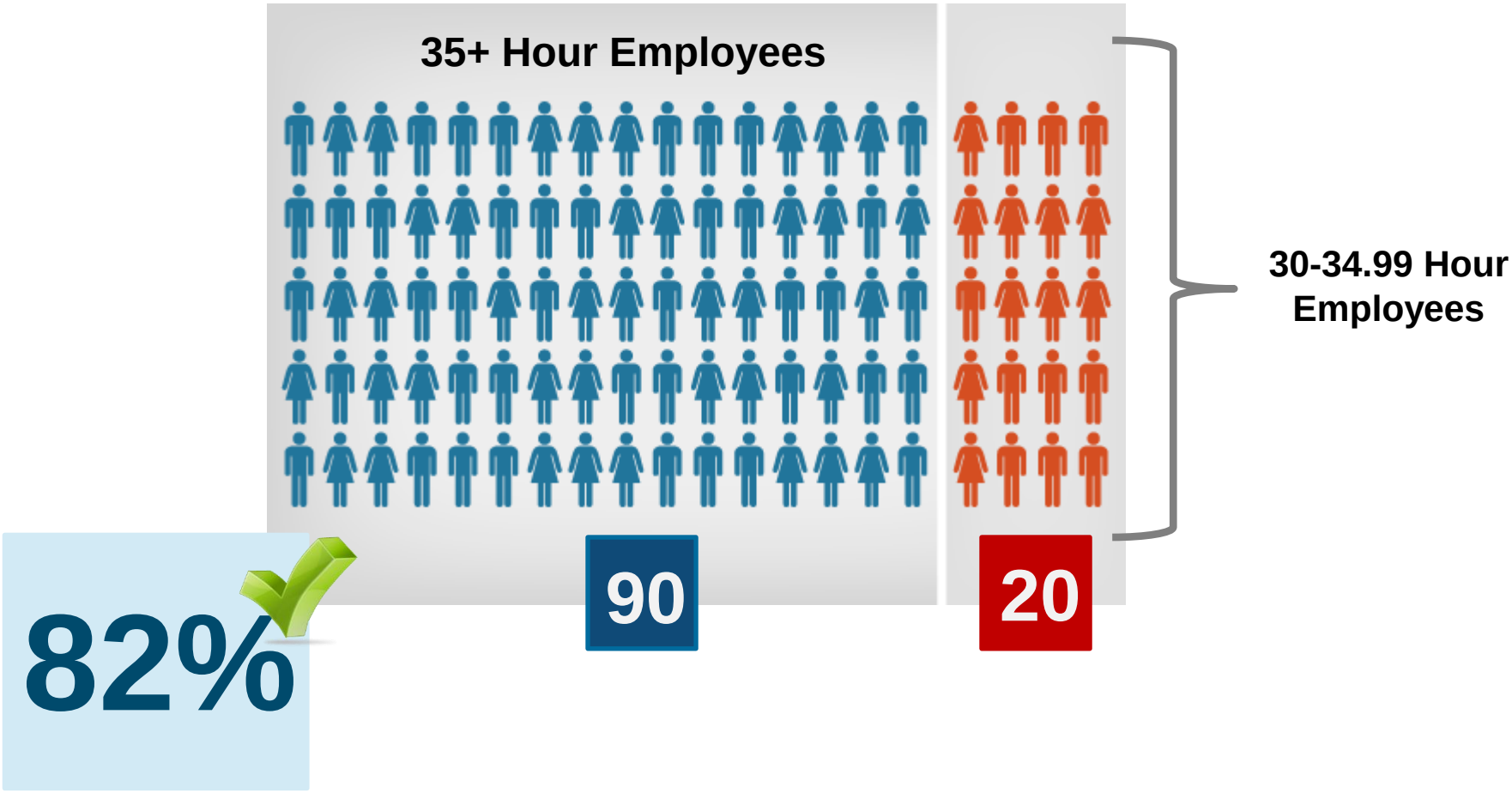
- ** A-Penalty Transition Relief for 2015 **



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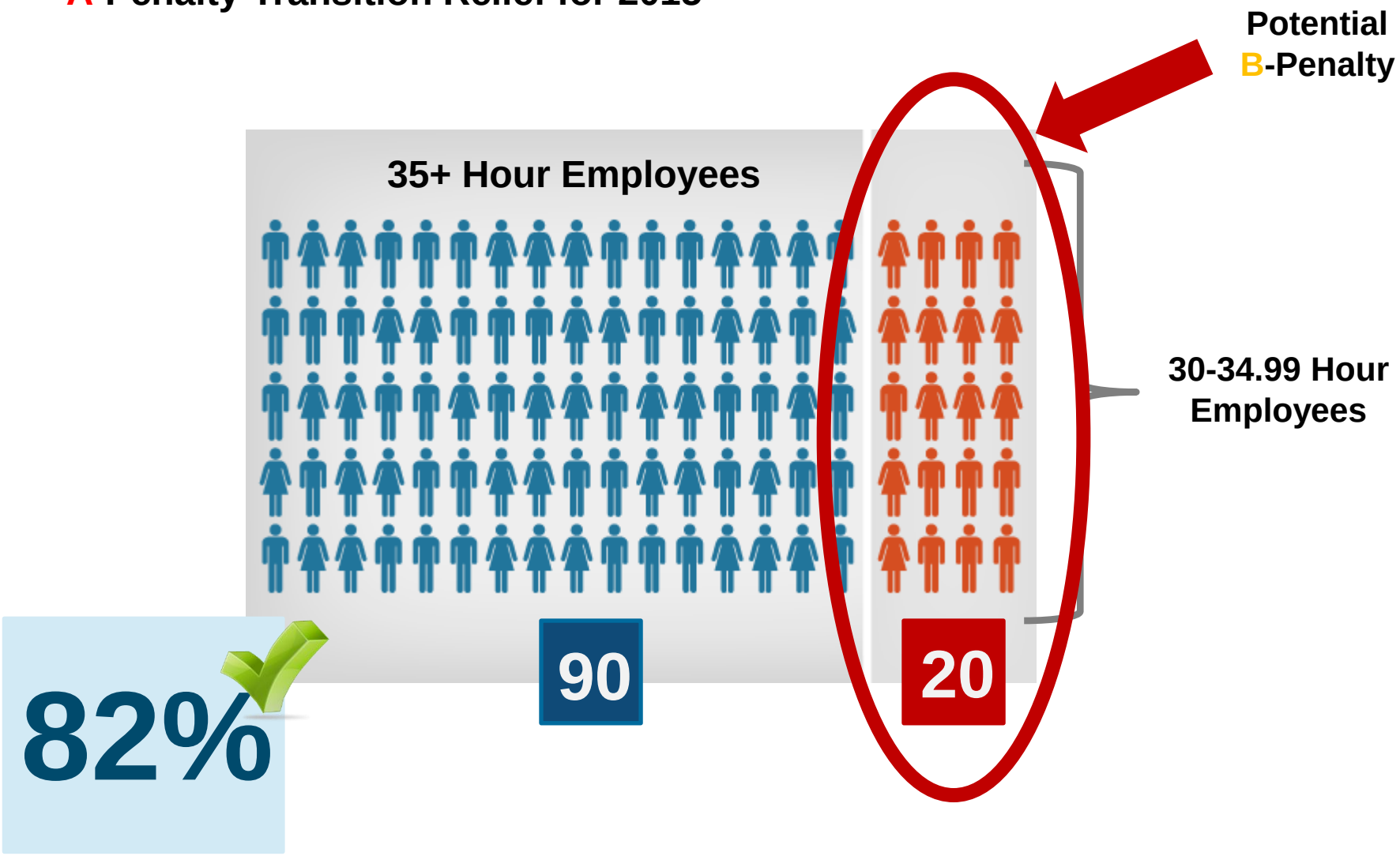
- ** A-Penalty Transition Relief for 2015 **



Employee & Employer

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- **Who is an employee for purposes of 4980H?**
  - A common law employee using the factor test
- **Who is "on the hook" for 4980H purposes with respect to the common law employee?**
  - Perhaps not surprisingly, the common law employer
    - So then, what about the following?
      - Temporary employees
      - Leased employees
      - Statutory employees
      - Multiemployer plan participants

Full-Time

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- **What is "full-time" for purposes of 4980H?**
  - 30 or more "hours of service" per week **OR** 130 "hours of service" per month
    - Note: This NOT the same definition of "full-time" that applies when determining whether an employer is an "applicable large employer" subject to 4980H in the first place. That definition uses 120 hours per month.

Hour of Service

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- **What is an "hour of service"?**
  - An hour of service includes:
    - **Hours Worked.** Each hour for which the employee is paid, or entitled to payment, "for the performance of duties"; **AND**
    - **Paid-Time Off.** Each hour for which the employee is paid, or entitled to payment "by the employer," for the period of time due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty, or leave of absence
  - Notes:
    - Appears that ALL unpaid leave gets counted
    - Do not count hours if attributable to foreign-sourced income
    - What about employer-paid or employer-sponsored workers' comp or STD/LTD?

Service Worked

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- **How to calculate hours of service?**
  - An employer can use one of the following three methods:
    1. ***Actual Hours*** - Count actual hours of service worked "from records", as well as other non-worked hours for which he or she is paid, or entitled to payment
    2. ***Days-Worked Equivalency*** – Credit 8 hours of service per day for each day for which the employee would be credited with at least one hour of service
    3. ***Weeks-Worked Equivalency*** – Credit 40 hours of service per week for each week for which the employee would be credited with at least one hour of service
- Notes:
  - Employers can use different methods for different classes of employees so long as reasonable and applied consistently; may change method annually
  - Includes anti-abuse rule

How Does 4980H Apply?

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- **Application varies depending on whether:**
  - Full-time
  - Variable hour
  - Seasonal
  - Non-seasonal short-term
  - Staffing firm
  - Professional employer organization (PEO)

How Does 4980H Apply?

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- **Full-Time Employee**
  - Definition = An employee reasonably expected to work a full-time schedule (using 30 hr/wk – 130 hr/month definition)
  - Generally, must offer coverage to a full-time employee by the first day of the fourth full month following hire
    - Exceptions IF using the "look-back" measurement period and there is a change in status:
      - For new employees who have a change in status and are now expected to work a full-time schedule, need to offer qualifying coverage by the earlier of (i) the first day of the fourth month after change in status, or (ii) the first day of the next proceeding stability period (if they worked a full-time schedule on average during the measurement period)
      - For new or existing employees that go from full-time to part-time status, the employer generally will need to continue to treat the employee as a full-time employee through the close of the stability period in which the change of status occurs, as well as possibly the next full stability period, UNLESS employer can avail itself of new rule in final regulations
        - The new final rule allows an employer to "turn off" 4980H liability as of the first day of the fourth month after a change to part-time status so long as the employee works non-full-time hours for all three full months after the change in status AND the employer consistently treated the employee as full-time from date of hire

How Does 4980H Apply?

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- **Part-Time Employee**
  - New definition included in the final regulations
  - Part-time = A new employee who is reasonably expected at the employee's start date not to be a full-time employee
  - Generally treated just like a variable hour employee (or seasonal employee)

How Does 4980H Apply?

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- **Variable Hour Employee**
  - Definition = An employee not reasonably expected to work a full-time schedule (using 30 hr/wk–130 hr/month definition)
  - What constitutes a reasonable expectation?
    - Final regs: Facts and circumstances test, but factors to consider include:
      - Whether the employee is replacing an employee who was or was not a full-time employee
      - The extent to which employees in the same or comparable positions are or are not full-time employees
      - Whether job was advertised, or otherwise communicated to the new hire or otherwise documented, as requiring employee to work an average of 30 or more hours of service per week or less than 30 hours of service per week
        - » **Consider creating written job descriptions for variable hour employees explicitly laying out hours expectation**

How Does 4980H Apply?

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- **Variable Hour Employee**
  - How 4980H applies to these employees depends on whether the employer plans to use the "look-back" measurement method or the new monthly measurement method
    - If using the "look-back" measurement method: Can apply-up to a 12 month measurement period for determining full-time status
    - If using new monthly measurement method: Must have offered coverage in advance for any calendar month in which the variable hour employee works a full-time schedule (subject to once per-employment-term 3-month non-assessment period)
    - BUT, remember, with respect to a new employee, if an employer's expectations change and it now reasonably expects the employee to work a full-time schedule, then the employee must be treated as full-time by the earlier of (i) the first day of the fourth full calendar month thereafter, or (ii) the first day of the next stability period (if the employee worked a full-time schedule during the applicable measurement period)

How Does 4980H Apply?

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- **Seasonal Employee**
  - How 4980H applies depends on whether the employer is using the "look-back" measurement method or the new monthly measurement method
    - If using the "look-back" measurement method: May apply a measurement period of up to 12 months even where the employee is expected to work a full-time schedule during their seasonal employment
      - The practical effect of this is that no 4980H penalties are likely to apply (since a seasonal employee should not be employed at the close of the 12-month period at which time the coverage requirement could take effect)
    - If using the new monthly measurement method: If expected to work a full-time schedule, then must be offered qualifying coverage by the first day of the fourth full month after hire
      - Thus, for employers with significant full-time seasonal workforce, the employer probably should consider using the "look-back" measurement method
      - But don't forget about the "slice and dice" rules

How Does 4980H Apply?

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- **Seasonal Employee**
  - But who qualifies as a "seasonal employee" for purposes of the special "look-back" measurement treatment?
    - The proposed regulations permitted employers to use a good faith interpretation
    - The final regulations include an express definition:
      - **Seasonal employee = an employee in a position that is performed at a recurring time each year and <u>customarily lasts no longer than 6 months</u>**
        - » Note: In limited instances, actual employment could in theory extend beyond six months without jeopardizing seasonal employee status

How Does 4980H Apply?

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- **Non-Seasonal Short-Term Employee**
  - Short-term hires are NOT necessarily seasonal employees
  - In fact, many short-term hires will NOT qualify as seasonal employees
    - Why? Because the position (i) customarily lasts in excess of 6 months, or (ii) is not recurring based on a specific time of the year
  - The proposed regulations included a limited transition rule for 2014 that permitted employers in certain instances to treat short-term hires like seasonal employees and apply a measurement period of up to 12 months
  - The final regulations do NOT include a similar transition rule
    - And specifically state that an employer CANNOT take turnover or expected short-term nature of employment into consideration in determining whether full-time
  - THEREFORE, an employer that employs a short-term employee that is expected to work a "full-time" schedule and is not a seasonal employee generally must be offered 4980H-compliant coverage by the first day of the fourth full calendar month after hire (or else the employer could be subject to penalties)

How Does 4980H Apply?

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- **Staffing Firms**
  - Staffing firms had asked for a presumption that temporary workers be treated as variable hour employees
    - The regulators declined to provide such a presumption. Thus, these firms need to consider expected hours of service just like all other common law employers
  - The final regulations include a special new rule that makes clear that an offer of coverage by a staffing firm will be treated as an offer of coverage by the service recipient for purposes of 4980H so long as there is evidence that the service recipient paid more to the staffing firm for the offered coverage
    - Good news: May help on work classification issues
    - Bad news: Need to show contractually that the service recipient specifically paid more for the coverage that is offered; all 4980H liability remains with the common law employer

How Does 4980H Apply?

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- **Professional Employer Organizations (PEOs)**
  - The special rule for staffing firms, also applies to PEOs where the PEO is not the common law employer
  - Therefore, an offer of coverage by a PEO will be treated as an offer of coverage by the common law employer for purposes of 4980H so long as there is evidence that the common law employer paid more to the PEO for the offered coverage

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