Employer Mandate Explanation

Revised to Include Changes from the Final Regulations

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On February 10, 2014, the Department of the Treasury and the Internal Revenue Service (the "IRS") released final regulations under Code Section 4980H (54.4980H-1, 2, 3, 4, 5 and 6) relating to the employer shared responsibility provisions (the "Employer Mandate") under Health Care Reform. These regulations follow prior guidance, make important changes, provide clarifications and include important new transition relief. The following has been written to include these new important provisions.

In general:

In Notice 2013-45, the IRS delayed the requirement that, certain large employers may be subject to a penalty tax for failing to offer health care coverage for all full-time employees (and their dependents), offering minimum essential coverage that is unaffordable, or offering minimum essential coverage under which the plan's share of the total allowed cost of benefits is not at least 60% (referred to as "minimum value") until 2015. The penalty tax is due if any full-time employee is certified to the employer as having purchased health insurance through an Exchange with respect to which a tax credit or cost-sharing reduction is allowed or paid to the employee, as provided in Code Section 4980H. In this notice, the IRS gave no indication of how the rules would apply for 2015. In these new final regulations, the IRS and Treasury provide such guidance.

What is a large employer for purposes of the employer mandate?

The penalty tax applies to "applicable large employers." An applicable large employer is an employer who employed an average of at least 50 "full-time employees" on business days during the preceding calendar year, as provided in Code Section 4980H(c)(2)(A).

For 2015, the final regulations provide an important new transition relief for employers with less than 100 employees. If the following conditions are met, no penalty tax will apply until 2016 for employers with 50 to 99 employees:

(1) Limited Workforce Size. The employer employs on average at least 50 full-time employees (including full-time equivalent employees) but fewer than 100 full-time employees (including full-time equivalent employees) on business days during 2014. For this purpose, the determination of the number of full-time employees (including full-time equivalent employee) is made in accordance with the otherwise applicable rules for determining status as an applicable large employer.

(2) Maintenance of Workforce and Aggregate Hours of Service. During the period beginning on February 9, 2014, and ending on December 31, 2014, the employer does not reduce the size of its workforce or the overall hours of service of its employees in order to satisfy the workforce size condition set forth above. A reduction in workforce size or overall hours of service for bona fide business reasons will not be considered to have been made in order to satisfy the workforce size condition.

(3) Maintenance of Previously Offered Health Coverage. Except as otherwise provided in this subsection, during the coverage maintenance period the employer does not eliminate or materially reduce the health coverage, if any, it offered as of February 9, 2014. For purposes of this section, in no event will an employer be treated as eliminating or materially reducing health coverage if:

i. it continues to offer each employee who is eligible for coverage during the coverage maintenance period an employer contribution toward the cost of employee-only coverage that either (A) is at least 95 percent of the dollar amount of the contribution toward such coverage that the employer was offering on February 9, 2014, or (B) is the same (or a higher) percentage of the cost of coverage that the employer was offering to contribute toward coverage on February 9, 2014;

ii. in the event there is a change in benefits under the employee-only coverage offered, that coverage provides minimum value after the change; and

iii. the employer 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. For purposes of this requirement, the term coverage maintenance period means (1) for an employer with a calendar year plan, the period beginning on February 9, 2014, and ending on December 31, 2015, and (2) for an employer with a non-calendar year plan, the period beginning on February 9, 2014, and ending on the last day of the plan year that begins in 2015.

(4) Certification of Eligibility for Transition Relief. The applicable large employer certifies on a prescribed form filed with the IRS that it meets the eligibility requirements set forth above.

The penalty tax actually consists of two separate taxes. The first applies when the employer fails to offer full-time employees (and their dependents) the opportunity to enroll in an eligible employer-sponsored plan, as provided in Code Section 4980H(a). The second applies when the employer offers eligible employer-sponsored health coverage to full-time employees, but the coverage is not affordable or does not provide minimum value, as provided in Code Section 4980H(b). Both taxes hinge on whether an employer offers eligible employer-sponsored health coverage to "full-time employees (and their dependents)." The amount of each tax is explained below.

The final regulations provide transition relief for purposes of the applicable large employer determination for the 2015 calendar year. This relief allows an employer the option to determine its status as an applicable large employer by reference to a period of at least six consecutive calendar months, as chosen by the employer, in the 2014 calendar year (rather than the entire 2014 calendar year). An employer may determine whether it is an applicable large employer for 2015 by determining whether it employed an average of at least 100 full-time employees on business days during any consecutive six month period in 2014. This will allow these employers to choose to use either, or both, a period to prepare to count their employees and a period afterward to ascertain and implement the results of the determination. For example, an employer could use the period from January to February, 2014 to establish its counting method, the period from March through August, 2014 to determine its applicable large employer status and, if it is an applicable large employer, the period from September through December, 2014 to make any needed adjustments to its plan (or to establish a plan) in order to comply with Code Section 4980H.

The final regulations also provide that an employer not in existence during an entire preceding calendar year is an applicable large employer for the current calendar year if it is reasonably expected to employ an average of at least 100 full-time employees for 2015 (taking into account full-time equivalent employees) on business days during the current calendar year.

The final regulations provide, with respect to an employee who was not offered coverage at any point in the prior calendar year, that if the applicable large employer offers coverage on or before April 1 of the first year in which the employer is an applicable large employer, the employer will not be subject to an assessable payment (for January through March of the first year the employer is an applicable large employer) by reason of its failure to offer coverage to the employee for January through March of that year, and the employer will not be subject to a penalty tax (for January through March of the first year the employer is an applicable large employer) if the coverage offered provides minimum value.

However, if the employer does not offer coverage to the employee by April 1, the employer may be subject to a penalty tax payment for those initial calendar months in addition to any subsequent calendar months for which coverage is not offered, and if the employer offers coverage by April 1 but the coverage does not provide minimum value, the employer may be subject to another penalty tax for those initial calendar months (in addition to any subsequent calendar months for which coverage does not provide minimum value or is not affordable). This rule applies only during the first year for which an employer is an applicable large employer (even if the employer falls below the level of being a large employer for a subsequent year and then expands and becomes an applicable large employer again).

When will the employer mandate apply to an applicable large employer who sponsors a health plan with a non-calendar plan or policy year?

The employer mandate is effective January 1, 2015, but the final regulations provide for transition relief for members of an applicable large employer with health plans with non-calendar plan or policy years. If any member of an applicable large employer maintains a non-calendar plan or policy year as of December 27, 2012, the relief applies with respect to employees of members of an applicable large employer (whenever hired) who would be eligible for coverage, as of the first day of the first non-calendar plan or policy year of that plan that begins in 2015 (the "2015 plan year") under the eligibility terms of the plan as in effect on February 9, 2014 and the plan year was not modified after December 27, 2012. If an employee described in the preceding sentence is offered affordable, minimum value coverage no later than the first day of the 2015 plan or policy year based on the eligibility terms of the plan as in effect on February 9, 2014, no penalty tax payment will be due with respect to that employee for the period prior to the first day of the 2015 plan or policy year.

Employers are provided further relief that have a significant percentage of their employees eligible for or covered under one or more non-calendar plans or policy year plans that have the same plan or policy year as of December 27, 2012 and want to offer certain other employees coverage under these plans. Specifically, if a member of an applicable large employer has either (1) had, as of any date in the twelve months ending on February 9, 2014, at least one-quarter of its employees (full-time and part-time) covered under one or more non-calendar plans or policy year plans that have the same plan or policy year as of December 27, 2012 or (2) offered coverage under those plans to one-third or more of its employees (full-time and part-time) during the most recent open enrollment period before February 9, 2014, no penalty tax payment will be due for any month prior to the first day of the 2015 plan or policy year of that non-calendar plan or policy year with respect to employees who:

(1) are offered affordable, minimum value coverage no later than the first day of the 2015 plan year of the non-calendar plan or policy year plan, and

(2) would not have been eligible for coverage under any group health plan maintained by the member of the applicable large employer as of February 9, 2014 that has a calendar plan or policy year.

The final regulations add another transition rule that provides the requirements indicated above, but base the one-quarter and one-third requirements only on just full-time employees. Because no liability will occur whether or not a full-time employee is offered coverage during the portion of the 2015 plan or policy year falling in 2016, the applicable large employer may determine the full-time employees for that period for purposes of reporting requirements after the period has ended, using actual service data rather than the look-back measurement method, and use those determinations for the reporting required at the beginning of 2016 to cover the entire 2015 calendar year.

In addition, the identification of whether the coverage offered provides minimum value and the employee portion of the applicable premium should be available to the employer in time to complete the required reporting. Therefore, because this reporting is essential to the administration of the premium tax credit, applicable large employers will be required to report this information for the entire 2015 calendar year, even if the requirements will not apply during some calendar months in 2015 due to application of the transition rules for non-calendar plans or policy years.

Who is considered an employee and an employer?

The final regulations provide that an employee is an individual who is an employee under the common law standard, and an employer is the person that is the employer of an employee under the common law standard.

Under the common law standard, an employment relationship exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. Under the common law standard, an employment relationship exists if an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so. In addition, for purposes of the employer mandate, a sole proprietor, a partner in a partnership, or a 2-percent S corporation shareholder is not considered an employee.

How are full-time and part-time employees counted to determine whether an employer is an "applicable large employer"?

For purposes of determining whether an employer is an applicable large employer, an employer must include not only its full-time employees but also full-time equivalents for employees who work part-time. To calculate full-time equivalents, the employer must add up all the hours of service in a month for employees who are not full-time and divide that aggregate number by 120. The result of that calculation is then added to the number of full-time employees during that month. Then, if the average number of employees for the year is 100 or more, the employer is an applicable large employer for 2015, as provided in Code Section 4980H(c)(2)(E).

The final regulations clarify that for determining the number of full-time employees for any month for this purpose, the number used is 120. The monthly figure of 130 is used to determine if an employee is full-time to offer coverage.

Code Section 4980H(c)(2)(C)(i) applies the controlled group test, meaning that all entities treated as a single employer under Code Section 414(b), (c), (m), or (o) are treated as a single employer for purposes of Code Section 4980H.

How are hours counted for all purposes?

The final regulations provide rules for hourly employees and non-hourly employees. For employees paid on an hourly basis, employers must calculate actual hours of service from records of hours worked and hours for which payment is made or due for vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence. For employees not paid on an hourly basis, employers are permitted to calculate the number of hours of service under any of the following three methods:

(1) counting actual hours of service (as in the case of employees paid on an hourly basis) from records of hours worked and hours for which payment is made or due for vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence;

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

(3) using a weeks-worked equivalency of 40 hours of service per week for each week for which the employee would be required to be credited with at least one hour of service under these service crediting rules.

These equivalents are based on DOL regulations (29 CFR 2530.200b-2(a)), modified as described in this preamble and in the final regulations.

An employer need not use the same method for all non-hourly employees. Rather, an employer may apply different methods for different classifications of non-hourly employees, so long as the classifications are reasonable and consistently applied. In addition, an employer may change the method of calculating non-hourly employees' hours of service for each calendar year.

Are there any special rules for counting hours?

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

Are seasonal employees counted in determining whether an employer is an "applicable large employer?

Under Code Section 4980H(c)(2)(B)(i), a special rule enables an employer that has more than 100 full-time employees solely as a result of seasonal employment to avoid being treated as an applicable employer. Under this rule, an employer will not be considered to employ more than 100 full-time employees if (a) the employer's workforce only exceeds 100 full-time employees

for 120 days, or fewer, during the calendar year; and (b) the employees in excess of 50 who were employed during that 120-day (or fewer) period were seasonal workers. "Seasonal worker" means a worker who performs labor or services on a seasonal basis as defined by the DOL, including agricultural workers covered by 29 CFR Section 500.20(s)(1) and retail workers employed exclusively during holiday seasons, as provided in Code Section 4980H(c)(2)(B)(ii).

The final regulations provide that, solely for purposes of the seasonal worker exception in determining whether an employer is an applicable large employer, an employer may apply either a period of four calendar months (whether or not consecutive) or a period of 120 days (whether or not consecutive).

Are the hours of certain employees not counted to determine whether an employer is a large employer?

Yes. The following individual's hours are not counted for the large employer determination:

Volunteers: 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 Code Section 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 Code section 4980H, however, bona fide volunteers are not limited to volunteer firefighters and emergency medical providers. Rather, bona fide volunteers include any volunteer who is an employee of a government entity or an organization described in Code Section 501(c) that is exempt from taxation under section 501(a) whose only compensation from that entity or organization is in the form of (i) reimbursement for (or reasonable allowance for) reasonable expenses incurred in the performance of services by volunteers, or (ii) reasonable benefits (including length of service awards), and nominal fees, customarily paid by similar entities in connection with the performance of services by volunteers.

Student Employees: The final regulations provide that hours of service do not include hours of service performed by students in positions subsidized through the federal work study program or a substantially similar program of a State or political subdivision thereof. However, the final regulations do not include a general exception for 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 a State or local government's equivalent) are required to be counted as hours of service.

With respect to internships and externships, services by an intern or extern would not count as hours of service under the general definition of hours of service contained in the final regulations to the extent that the student does not receive, and is not entitled to, payment in connection with those hours. However, excluding hours of service for which interns or externs receive, or are entitled to receive, compensation from the employer from the definition of hours of service would be subject to potential misuse through labeling positions as internships or externships to avoid application of the Employer Mandate. The final regulations do not adopt a special rule for student employees working as interns or externs for an outside employer, and, therefore, the general rules apply, including the option to use the look-back measurement method, as appropriate, or the monthly measurement method, as discussed below.

Members of Religious Orders: 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.

Which employees are considered "full-time" for an applicable large employer to be required to offer coverage under the employer mandate?

Under Code Section 4980H(c)(4)(A), a "full-time employee" for any month is an employee who is employed for an average of at least 30 hours of service per week. The final regulations would treat 130 hours of service in a calendar month as the monthly equivalent of 30 hours of service per week (52 x 30) ÷ 12 = 130). This monthly standard takes into account that the average month consists of more than four weeks.

When is a variable hour or seasonal employee considered a full-time employee requiring an applicable large employer to offer coverage?

In the final regulations, the IRS describes safe harbor methods that employers may use (but are not required to use) to determine which employees are treated as full-time employees for purposes of the employer mandate described above. These methods can be used to determine whether new, on-going employees or seasonal employees are considered full-time employees for the employer mandate and when an employer must provide coverage or be penalized.

Safe Harbors for new variable hour and seasonal employees: If an employer maintains a group health plan that would offer coverage to the employee only if the employee were determined to be a full-time employee, the employer may use either a look back measurement period of between three and 12 months and an administrative period of up to 90 days or a monthly measurement period for variable hour and seasonal employees. However, the look back measurement period and the administrative period combined may not extend beyond the last day of the first calendar month beginning on or after the one-year anniversary of the employee's start date (totaling, at most, 13 months and a fraction of a month).

Who is a variable hourly employee? A new employee is a variable hour employee if, based on the facts and circumstances at the start date, it cannot be determined that the employee is reasonably expected to work on average at least 30 hours per week. A new employee who is expected to work initially at least 30 hours per week must be offered coverage at the beginning of the month immediately following the end of the employee's initial three full calendar months of employment.

Who is a seasonal employee? A seasonal employee is an employee in a position for which the customary annual employment is six months or less.

What is the monthly measurement period? Under the monthly measurement method, employees will be identified as a full-time employee of initial eligibility using their hours of service of each calendar month and not based on averaging over a prior look back measurement period. These employees must be offered coverage at the beginning of the month after three full calendar months of employment.

What is an "initial look back measuring period"? For variable hour and seasonal employees, employers are permitted to determine whether the new employee is a full-time employee using an "initial look back measurement period" of between three and 12 months (as selected by the employer).

The final regulations clarify that an applicable large employer member may apply the payroll period rule for purposes of determining an initial measurement period, provided that an initial measurement period must begin on the start date or any date between the start date and the later of the first day of the first calendar month following the employee's start date and the first day of the first payroll period that starts after the employee's start date.

The final regulations clarify that the initial measurement period need not be based on calendar months but instead may be based on months, defined as either a calendar month or as the period that begins on any date following the first day of the calendar month and that ends on the immediately preceding date in the immediately following calendar month (for example, from March 15 to April 14). In contrast, a stability period must be based on calendar months. The final regulations also allow an employer to base measurement periods on one week, two week, or semi-monthly payroll periods.

The employer measures the hour of service completed by the new employee during the initial look back measurement period and determines whether the employee completed an average of 30 hours of service per week or more during this period. The stability period for such employees must be the same length as the stability period for ongoing employees (described below). If an employee is determined to be a full-time employee during the initial measurement period, the stability period must be a period of at least six consecutive calendar months that is no shorter in duration than the initial look back measurement period and that begins after the initial look back measurement period (and any associated administrative period). The stability period is the first period in which the employer is required to provide health coverage to the employee.

If a new variable hour or seasonal employee is determined not to be a full-time employee during the initial look back measurement period, the employer is permitted to treat the employee as not a full-time employee during the stability period that follows the initial look back measurement period. This stability period for such employees must not be more than one month longer than the initial look back measurement period and, as explained below, must not exceed the remainder of the standard look back measurement period as defined below (plus any associated administrative period) in which the initial look back measurement period ends.

Transition from New Employee Rules to Ongoing Employee Rules: Once a new employee, who has been employed for an initial measurement period, has been employed for an entire look back standard measurement period, the employee must be tested for full-time status, beginning with that standard look back measurement period, at the same time and under the same conditions as other ongoing employees.

A standard look back measurement period is a defined time period of not less than three but not more than 12 consecutive calendar months, as chosen by the employer and is used to determine whether ongoing employees are eligible for health coverage.

An employee determined to be a full-time employee during an initial look back measurement period or standard look back measurement period must be treated as a full-time employee for the entire associated stability period that follows the look back measurement periods. This is the case even if the employee is determined to be a full-time employee during the initial look back measurement period but determined not to be a full-time employee during the overlapping or immediately following standard look back measurement period. In that case, the employer may treat the employee as not a full-time employee only after the end of the stability period associated with the initial look back measurement period. Thereafter, the employee's full-time

status would be determined in the same manner as that of the employer's other ongoing employees (as described below).

In contrast, if the employee is determined not to be a full-time employee during the initial look back measurement period, but is determined to be a full-time employee during the overlapping or immediately following standard look back measurement period, the employee must be treated as a full-time employee for the entire stability period that corresponds to that standard look back measurement period (even if that stability period begins before the end of the stability period associated with the initial look back measurement period). Thereafter, the employee's full-time status would be determined in the same manner as that of the employer's other ongoing employees.

Use of an administrative period: In addition to the initial look back measurement period, the employer is permitted to apply an administrative period before the start of the stability period. This administrative period must not exceed 90 days in total. For this purpose, the administrative period includes all periods between the start date of a new variable hour or seasonal employee and the date the employee is first offered coverage under the employer's group health plan, other than the initial look back measurement period.

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

Example (12-Month Initial Measurement Period Followed by 1+ Partial Month Administrative Period): For new variable hour employees, Employer B uses a 12-month initial look back measurement period that begins on the start date and applies an administrative period from the end of the initial look back measurement period through the end of the first calendar month beginning on or after the end of the initial look back measurement period. Employer B hires Employee Y on May 10, 2014. Employee Y's initial look back measurement period runs from May 10, 2014, through May 9, 2015. Employee Y works an average of 30 hours per week during this initial look back measurement period. Employer B offers coverage to Employee Y for a stability period that runs from July 1, 2015 through June 30, 2016. Employee Y works an average of 30 hours per week during his initial look back measurement period and Employer B uses (1) an initial look back measurement period that does not exceed 12 months; (2) an administrative period totaling not more than 90 days; and (3) a combined initial measurement period and administrative period that does not last beyond the final day of the first calendar month beginning on or after the one-year anniversary of Employee Y's start date. Accordingly, from Employee Y's start date through June 30, 2016, Employer B is not subject to any payment with respect to Employee Y, because Employer B complies with the standards for the initial look back measurement period and stability periods for a new variable hour employee. Employer B also complies with the law. Employer B must test Employee Y again based on the

period from October 15, 2014 through October 14, 2015 (Employer B's first standard look back measurement period that begins after Employee Y's start date).

Safe harbor for ongoing employees: For this purpose, an "ongoing employee" is generally an employee who has been employed by the employer for at least one complete standard look back measurement period. An employer determines each ongoing employee's full-time status by looking back at the standard look back measurement period (a defined time period of not less than three but not more than 12 consecutive calendar months, as chosen by the employer). The employer has the flexibility to determine the months in which the standard look back measurement period starts and ends, provided that the determination must be made on a uniform and consistent basis for all employees in the same category.

For example, if an employer chooses a standard look back measurement period of 12 months, the employer could choose to make it the calendar year, a non-calendar plan year, or a different 12-month period, such as one that ends shortly before the start of the plan's annual open enrollment season. If the employer determines that an employee averaged at least 30 hours per week during the standard look back measurement period, then the employer treats the employee as a full-time employee during a subsequent "stability period", regardless of the employee's number of hours of service during the stability period, so long as he or she remained an employee. The stability period is the period in which the employer is required to offer the employee coverage to comply with the employer mandate.

For an employee whom the employer determines to be a full-time employee during the standard look back measurement period, the stability period would be a period of at least six consecutive calendar months that is no shorter in duration than the standard look back measurement period and that begins after the standard look back measurement period (and any applicable administrative period. If the employer determines that the employee did not work full-time during the standard look back measurement period, the employer would be permitted to treat the employee as not a full-time employee during the stability period that follows, but is not longer than, the standard look back measurement period. This means that the employer is not required to offer the employee coverage and would not be penalized.

Employers may use look back measurement periods and stability periods that differ either in length or in their starting and ending dates for the following categories of employees: (1) collectively bargained employees and non-collectively bargained employees; (2) each group of collectively bargained employee covered by separate collectively bargaining agreement; (3) salaried employees and hourly employees' and (4) employees located in different States.

Use of an administrative period: Because employers may need time between the standard look back measurement period and the associated stability period to determine which ongoing employees are eligible for coverage, and to notify and enroll employees, an employer may make time for these administrative steps by having its standard look back measurement period end before the associated stability period begins. However, any administrative period between the standard look back measurement period and the stability period may neither reduce nor lengthen the look back measurement period or the stability period. The administrative period following the standard look back measurement period may last up to 90 days. To prevent this administrative period from creating any potential gaps in coverage, it will overlap with the prior stability period, so that, during any such administrative period applicable to ongoing employees following a standard look back measurement period, ongoing employees who are eligible for coverage because of their status as full-time employees based on a prior look back measurement period would continue to be offered coverage.

Example: Employer W chooses to use a 12-month stability period that begins January 1 and a 12-month standard measurement period that begins October 15. Consistent with the terms of Employer W's group health plan, only an ongoing employee who works full-time (an average of at least 30 hours per week) during the standard look back measurement period is offered coverage during the stability period associated with that look back measurement period. Employer W chooses to use an administrative period between the end of the standard look back measurement period (October 14) and the beginning of the stability period (January 1) to determine which employees worked full-time during the look back measurement period, notify them of their eligibility for the plan for the calendar year beginning on January 1 and of the coverage available under the plan, answer questions and collect materials from employees, and enroll those employees who elect coverage in the plan. Previously-determined full-time employees already enrolled in coverage continue to be offered coverage through the administrative period.

Employee A and Employee B have been employed by Employer W for several years, continuously from their start date. Employee A worked full-time during the standard look back measurement period that begins October 15 of Year 1 and ends October 14 of Year 2 and for all prior standard look back measurement periods. Employee B also worked full-time for all prior standard measurement periods, but is not a full-time employee during the standard look back measurement period that begins October 15 of Year 1 and ends October 14 of Year 2.

Because Employee A was employed for the entire standard look back measurement period that begins October 15 of Year 1 and ends October 14 of Year 2, Employee A is an ongoing employee with respect to the stability period running from January 1 through December 31 of Year 3. Because Employee A worked full-time during that standard look back measurement period, Employee A must be offered coverage for the entire Year 3 stability period (including the administrative period from October 15 through December 31 of Year 3). Because Employee A worked full-time during the prior standard look back measurement period, Employee A would have been offered coverage for the entire Year 2 stability period, and if enrolled would continue such coverage during the administrative period from October 15 through December 31 of Year 2.

Because Employee B was employed for the entire standard look back measurement period that begins October 15 of Year 1 and ends October 14 of Year 2, Employee B is also an ongoing employee with respect to the stability period in Year 3. Because Employee B did not work full-time during this standard look back measurement period, Employee B is not required to be offered coverage for the stability period in Year 3 (including the administrative period from October 15 through December 31 of Year 3). However, because Employee B worked full-time during the prior standard look back measurement period, Employee B would be offered coverage through the end of the Year 2 stability period, and if enrolled would continue such coverage during the administrative period from October 15 through December 31 of Year 2.

Employer W complies with the requirements because the look back measurement and stability periods are no longer than 12 months, the stability period for ongoing employees who work full-time during the standard look back measurement period is not shorter than the standard look back measurement period, the stability period for ongoing employees who do not work full-time during the standard look back measurement period is no longer than the standard measurement period, and the administrative period is not longer than 90 days.

The final regulations indicate that the applicable large employer member may change its standard look back measurement period and stability period for subsequent years, but generally

may not change the standard look back measurement period or stability period once the standard measurement period has begun. There is a special transitional rule for 2015 indicated below.

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

The final regulations also provide a special rule that applies when an employee experiences a change in employment status from full-time employee status to part-time employee status. The employer is allowed to apply the monthly measurement method to such an employee within three months of the change if the employee actually averages less than 30 hours of service per week for each of the three months following the change in employment status and if the employer has offered the employee continuous coverage that provides minimum value from at least the fourth month of the employee's employment. Otherwise, under the look-back measurement method, full-time employee status in a stability period is based on hours of service in the prior applicable look back measurement period, regardless of whether the employee experiences a change in employment status either during the look back measurement period or during the stability period.

Employees Rehired After Termination of Employment or Resuming Service After Other Absence: Under the final regulations, if the period for which no hours of service is credited is at least 13 consecutive weeks, an employer may treat an employee who has an hour of service after that period, for purposes of determining the employee's status as a full-time employee, as having terminated employment and having been rehired as a new employee of the employer. For employees of educational institutions, the period is 26 weeks rather than 13 weeks.

The employer may also choose to apply a rule of parity for periods of less than 13 (26) weeks. Under the rule of parity, an employee may be treated as having terminated employment and having been rehired as a new employee if the period with no credited hours of service (of less than 13 (26) weeks) is at least four weeks long and is longer than the employee's period of employment immediately preceding that period with no credited hours of service (with the length of that previous period determined with application to that period of these rules governing employee rehires or other resumptions of service).

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

Unpaid leave: The final regulations provide a method for averaging hours when applying the look-back measurement method to measurement periods that include special unpaid leave. This method applies only to an employee treated as a continuing employee upon the resumption of services, and not to an employee treated as terminated and rehired. For this purpose, special unpaid leave refers to a period of unpaid leave subject to the Family and Medical Leave Act of 1993 (FMLA), Public Law 103-3, 20 U.S.C. 2601 et. seq., unpaid leaves subject to the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), Public Law 103-353, 38 U.S.C. 4301 et. seq., and unpaid leave on account of jury duty.

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

Additional requirements apply to employment break periods for employees of an educational organization. For this purpose, an employment break period is a period of at least four consecutive weeks (disregarding special unpaid leave) during which an employee is not credited with an hour of service. The final regulations provide that the educational organization must apply one of the methods in the preceding paragraph to employment break periods related to or arising out of non-working weeks or months under the academic calendar.

Accordingly, the educational organization must either determine the average hours of service per week for the employee during the measurement period excluding the employment break period and use that average as the average for the entire measurement period, or treat employees as credited with hours of service for the employment break period at a rate equal to the average weekly rate at which the employee was credited with hours of service during the weeks in the measurement period that are not part of an employment break period. However, the educational organization is not required to credit an employee in any calendar year with more than 501 hours of service for any employment break period (although this 501-hour limit does not apply to, or take into account, hours of service required to be credited for special unpaid leave). The rules governing employment break periods for educational organizations apply only to an employee treated as a continuing employee upon the resumption of services, and not to an employee treated as terminated and rehired.

Temporary Staffing Agencies: The final regulations set forth additional factors relevant to the determination of whether a new employee of a temporary staffing firm intended to be placed on temporary assignments at client organizations is a variable hour employee. These factors

generally relate to the typical experience of an employee in the position with the temporary staffing firm that hires the new employee (assuming the temporary staffing firm employer has no reason to anticipate that the new employee's experience will differ) and include whether employees in the same position with the temporary staffing firm retain as part of their continuing employment the right to reject temporary placements that the employer temporary staffing firm offers the employee, whether employees in the same position with the temporary staffing firm typically have periods during which no offer of temporary placement is made, whether employees in the same position with the temporary staffing firm typically are offered temporary placements for differing periods of time, and whether employees in the same position with the temporary staffing firm typically are offered temporary placements that do not extend beyond 13 weeks. No factor is determinative. In addition, the determination of whether an employee is a variable hour employee is made on the basis of the temporary staffing firm's reasonable expectations at the start date. An employee may accordingly be classified as a variable hour employee if this categorization was appropriate based on the employer's reasonable expectations at the start date, even if the employee in fact averages 30 or more hours of service per week over the initial measurement period.

Accordingly, until further guidance is issued, temporary staffing firms, like all employers generally, may determine when an employee has separated from service by considering all available facts and circumstances and by using a reasonable method that is consistent with the employer's general practices for other purposes, such as the qualified plan rules, COBRA, and applicable State law.

Adjunct Faculty: Until further guidance is issued, one (but not the only) method that is reasonable for this purpose would credit an adjunct faculty member of an institution of higher education with (a) 2 1/4 hours of service (representing a combination of teaching or classroom time and time performing related tasks such as class preparation and grading of examinations or papers) per week for each hour of teaching or classroom time (in other words, in addition to crediting an hour of service for each hour teaching in the classroom, this method would credit an additional 1 1/4 hours for activities such as class preparation and grading) and, separately, (b) an hour of service per week for each additional hour outside of the classroom the faculty member spends performing duties he or she is required to perform (such as required office hours or required attendance at faculty meetings).

On Call Hours: Until further guidance is issued, employers of employees who have on-call hours are required to use a reasonable method for crediting hours of service. It is not reasonable for an employer to fail to credit an employee with an hour of service for any on-call hour for which payment is made or due by the employer, for which the employee is required to remain on-call on the employer's premises, or for which 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.

Anti-Abuse Rules: Under an anticipated rule, if an individual performs services as an employee of an employer, and also performs the same or similar services for that employer in the individual's purported employment at a temporary staffing agency or other staffing agency of which the employer is a client, then all the hours of service are attributed to the employer for purposes of applying the employer mandate. Similarly, to the extent an individual performs the same or similar services for the same client of two or more temporary staffing agencies or other staffing agencies, it is anticipated that all hours of service for that client are attributed to the client, if the client is the common law employer, or, if not, one of the temporary staffing agencies

(or other staffing agencies) that purports to employ the individual with respect to services performed for that client.

Special Transition Rules for 2015: Solely for purposes of stability periods beginning in 2015, employers may adopt a transition measurement period that is shorter than 12 months but that is no less than 6 months long and that begins no later than July 1, 2014 and ends no earlier than 90-days before the first day of the plan year beginning on or after January 1, 2015 (90-days being the maximum permissible administrative period). For example, an employer with a calendar plan or policy year could use a measurement period from April 15, 2014 through October 14, 2014 (six months), followed by an administrative period ending on December 31, 2014. An employer with a plan with a non-calendar plan or policy year beginning April 1 that also elected to implement a 90-day administrative period could use a measurement period from July 1, 2014 through December 31, 2014 (six months), followed by an administrative period ending on March 31, 2015. However, an employer with a fiscal plan year beginning on July 1, 2015 must use a measurement period that is longer than 6 months in order to comply with the requirement that the measurement period begin no later than July 1, 2014 and end no earlier than 90 days before the stability period. For example, the employer could have a 10-month measurement period from June 15, 2014 through April 14, 2015, followed by an administrative period from April 15, 2015 through June 30, 2015. This transition relief is solely for the application of a stability period beginning in 2015 through the end of that stability period (including any portion of the stability period falling in 2016).

What is the penalty tax if an applicable large employer does not offer minimum essential coverage to its full-time employees (and their dependents)?

Beginning in 2015, Code Section 4980H(a) provides that an applicable large employer will pay a penalty tax for any month that:

(1) the employer fails to offer its full-time employees (and their dependents) the opportunity to enroll in “minimum essential coverage” under an “eligible employer-sponsored plan” for that month; and

(2) at least one full-time employee has been certified to the employer as having enrolled for that month in a QHP for which health coverage assistance is allowed or paid.

What is the amount of penalty tax?

Code Section 4980H(a) provides that the penalty tax is equal to the product of the “applicable payment amount” and the number of individuals employed by the employer (less the 80-employee reduction) as full-time employees during the month for 2015. The “applicable payment amount” for 2015 is $166.67 with respect to any month (that is, 1/12 of $2,000). The amount will be adjusted for inflation after 2015.

In calculating the liability the applicable large employer, as determined applying these same aggregation rules, is permitted one reduction of 80 full-time employees for 2015, and that the reduction must be allocated ratably among the members of the applicable large employer based on each member’s number of full-time employees.

The determination of whether an employer is subject to the penalty tax and the amount of any such payment is determined on a member-by-member basis. This liability for, and the amount of, any penalty tax 4980H is computed and assessed separately for each member of the

applicable large employer , taking into account that member's offer of coverage (or lack thereof) and based on that member's number of full-time employees. For example, if a parent corporation owns 100 percent of all classes of stock of 20 subsidiary corporations, and the controlled group is an applicable large employer, each of the 21 members of this controlled group (the parent corporation plus 20 subsidiary corporations) is considered separately in computing and assessing the penalty tax. In addition, each of the 21 group members is liable only for its separate penalty tax payment.

What is "minimum essential coverage"?

Under Code Section 5000A(f)(1), the term "minimum essential coverage" means coverage under any of the following: (a) a government-sponsored program, including coverage under Medicare Part A, Medicaid, the CHIP program, and TRICARE; (b) an "eligible employer-sponsored plan;" (c) a health plan offered in the individual market; (d) a grandfathered health plan; or (e) other health benefits coverage (such as a State health benefits risk pool) as the Department of Health and Human Services ("HHS") recognizes.

What is an "eligible employer-sponsored plan"?

Under Code Section 5000A(f)(2), it means a group health plan or group health insurance coverage offered by an employer to an employee that is (a) a governmental plan, or (b) any other plan or coverage offered in a state's small or large group market.

Under what circumstances will an applicable large employer be subject to the penalty tax if it offers its full-time employees (and their dependents) health coverage?

Beginning in 2015, Code Section 4980H(b)(1) provides that an applicable large employer will pay a penalty tax for any month that:

(1) the employer offers to its full-time employees (and their dependents) the opportunity to enroll in "minimum essential coverage" under an eligible employer-sponsored plan for that month; and

(2) at least one full-time employee of the employer has been certified to the employer as having enrolled for that month in a qualified health plan for which a premium tax credit or cost-sharing reduction is allowed or paid.

If an employee is offered affordable minimum essential coverage under an employer-sponsored plan, then the individual generally is ineligible for a premium tax credit and cost-sharing reductions for health insurance purchased through an Exchange.

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

The final regulations provide that, if an employee enrolls in coverage but fails to pay the employee's share of the premium on a timely basis, the employer is not required to provide

coverage for the period for which the premium is not timely paid, and that employer is treated as having offered that employee coverage for the remainder of the coverage period (typically the remainder of the plan year) for purposes of Code Section 4980H. The regulations generally adopt the provisions applicable for purposes of payment for COBRA coverage, which generally provides a 30-day grace period for payment and also provides rules with respect to timely payments that are not significantly less than the amount required to be paid and for responding to requests by health care providers for confirmation of coverage during the grace period.

Is an applicable large employer required to offer minimum essential coverage to an employee's dependents?

Yes. The final regulations provide that an applicable large employer is required to offer minimum essential coverage to an employee's dependents. An employee's dependents are defined for purposes of Code Section 4980H as an employee's child (as defined in Code Section 152(f)(1)) who is under 26 years of age. An offer of coverage to an employee's spouse is not required for purposes of Code Section 4980H because Code Section 4980H refers only to dependents (and not spouses).

The final regulations also provide transition relief with respect to dependent coverage for plan years that begin in 2015. Accordingly, any employer that takes steps during its plan year that begins in 2015 toward satisfying the requirements relating to the offering of coverage to full-time employees' dependents will not be liable for any penalty tax solely on account of a failure to offer coverage to the dependents for that plan year. The final regulations do not define what steps an employer needs to take.

What percentage of eligible full-time employees (and their dependents) must be offered coverage to avoid the penalty tax of $2,000 for 2015?

As further transition relief, for each calendar month during 2015 and any calendar months during the 2015 plan year that fall in 2016, an applicable large employer member that offers coverage to at least 70 percent (or that fails to offer to no more than 30 percent) of its full-time employees and their dependents) will not be subject to the $2,000 penalty tax. For any full-time employee not offered health coverage, an applicable large employer will be subject to the $3,000 penalty tax, explained below if the employee purchases coverage on the Exchange and is eligible for a credit or subsidy.

When would employees offered minimum essential coverage by an employer be eligible for a premium tax credit and cost-sharing reductions for health insurance purchased through the Exchange?

Under Code Section 36B(c)(2)(C), employees covered by an employer-sponsored plan will be eligible for the premium tax credit if the plan's share of the total allowed costs of benefits provided under the plan is less than 60% of those costs (that is, the plan does not provide "minimum value"), or the premium exceeds 9.5% of the employee's household income. The employee must seek an affordability waiver from the Exchange. The penalty tax applies for employees receiving an affordability waiver. In order to get the premium tax credit and cost-sharing reduction, however, an employee must decline to enroll in the coverage and purchase coverage through the Exchange instead, as provided under Code Section 36B(c)(2)(C).

The final regulations contain three affordability safe harbors, for purposes of determining whether an employer's coverage satisfies the 9.5 percent affordability for purposes of the

penalty tax. These safe harbors include the Form W-2 wages safe harbor, the rate of pay affordability safe harbor and the Federal poverty line safe harbor. These safe harbors do not apply for purposes of determining the penalty tax. The safe harbors also would not affect an employee's eligibility for a premium tax credit which would continue to be based on the cost of employer-sponsored coverage relative to an employee's household income. These safe harbors are all optional. An employer may choose to use one or more of these safe harbors for all its employees or for any reasonable category of employees, provided it does so on a uniform and consistent basis for all employees in a category. The final regulations clarify that reasonable categories generally include specified job categories, nature of compensation (for example, salaried or hourly), geographic location, and similar bona fide business criteria.

Form W-2 Wages Safe Harbor: The final regulations provide a safe harbor under which an employer could determine affordability for purposes of liability by reference to an employee's wages from that employer. Wages for this purpose would be the total amount of wages as defined in Code Section 3401(a), which is the amount required to be reported in Box 1 of Form W-2, Wage and Tax Statement for the current year.

For the Form W-2 wages safe harbor to apply, an employer must meet certain requirements, including:

(1) that the employer offers its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan; and

(2) that the required employee contribution toward the self-only premium for the employer's lowest cost coverage that provides minimum value (the employee contribution) not exceed 9.5 percent of the employee's Form W-2 wages for that calendar year.

Application of this safe harbor is determined after the end of the calendar year and on an employee-by-employee basis, taking into account the employee's Form W-2 wages from the employer and the employee contribution. So, for example, the employer determines whether it met the Form W-2 wages safe harbor for 2015 for an employee by looking at that employee's 2015 Form W-2 wages (meaning the wages reported on the 2015 Form W-2 that generally is furnished to the employee in January 2016) and comparing 9.5 percent of that amount to the employee's 2015 employee contribution.

An employer could also use this safe harbor prospectively, at the beginning of the year, to set the employee contribution at a level so that the employee contribution for each employee would not exceed 9.5 percent of that employee's Form W-2 wages for that year (for example, by automatically deducting 9.5 percent, or a lower percentage, from an employee's Form W-2 wages for each pay period).

If the employee only worked part of the year for the employer, this safe harbor can be applied. Affordability for a part-year period is determined by comparing annual income to an annualized premium. Using this test to determine liability could, in certain cases, result in penalizing employers that offer coverage that would be affordable based on the wages paid to, and premiums charged to, an employee for a given period. For example, if an employee was employed for six months of a calendar year by an employer, and offered coverage for those six months with an employee premium that did not exceed 9.5 percent of the employee's wages for those six months, and if the employee was not employed by the employer or any other employer for the other six months of the calendar year, the annualized premium may be higher than 9.5 percent of the employee's Form W-2 wages for the year. The final regulations address this

issue by providing that, for an employee who was not a full-time employee for the entire calendar year, the Form W-2 wages safe harbor is applied by adjusting the employee's Form W-2 wages to reflect the period when the employee was offered coverage, and then comparing those adjusted wages to the employee share of the premium during that period. Specifically, the amount of the employee's compensation for purposes of the safe harbor is determined by multiplying the wages for the calendar year by a fraction equal to the months for which coverage was offered to the employee over the months the employee was employed. That adjusted wage amount is then compared to the employee share of the premium for the months that coverage was offered to determine whether the Form W-2 wages safe harbor was satisfied for that employee. For example, if the employee worked eight months of a calendar year, during five months of which the employee was offered coverage, and received a Form W-2 reflecting Form W-2 wages of $24,000, the adjusted wages would be $24,000 multiplied by 5/8 or $15,000. That $15,000 is then treated as the adjusted Form W-2 wages for purposes of determining whether the employee share of the premium for each of the five months of coverage offered was affordable under the Code Section 4980H safe harbor (meaning the employee would be treated for this purpose as earning $3,000 per month during that five-month period).

Rate of Pay Safe Harbor: The final regulations provide a rate of pay safe harbor under which the employer would (1) take the hourly rate of pay for each hourly employee who is eligible to participate in the health plan as of the beginning of the plan year, (2) multiply that rate by 130 hours per month (the benchmark for full-time status for a month under Code Section 4980H), and (3) determine affordability based on the resulting monthly wage amount.

The final regulations permit an employer to use the rate of pay safe harbor even if an hourly employee's hourly rate of pay is reduced during the year. In this situation, the rate of pay is applied separately to each calendar month, rather than to the entire year and the employee's required contribution may be treated as affordable if it is affordable based on the lowest rate of pay for the calendar month multiplied by 130 hours. The final regulations adopt these changes because they result in lower employee required contributions in situations in which an employee's hourly rate of pay is reduced during the year.

Federal Poverty Line Safe Harbor: The final regulations provide that an employer may also rely on a design-based safe harbor using the Federal poverty line ("FPL") for a single individual. Specifically, for purposes of Code Section 4980H, employer provided coverage offered to an employee is affordable if the employee's cost for self only coverage under the plan does not exceed 9.5 percent of the FPL for a single individual. For households with families, the amount that is considered to be below the poverty line is higher, so using the amount for a single individual ensures that the employee contribution for affordable coverage is minimized.

When would the penalty tax be assessed?

To be considered minimum essential coverage, the coverage will need to meet an affordability requirement-which compares cost to income and provides minimum value (i.e., it will need to pay at least 60% of the total allowed cost of benefits). The penalty tax is due if any full-time employee is certified to the employer as having purchased health insurance through an Exchange with respect to which a premium tax credit or cost-sharing reduction is allowed or paid to the employee. Employers who provide coverage under an eligible employer-sponsored plan that does not meet the affordability and minimum value requirements may nevertheless avoid the tax to the extent employees actually participate in the plan, as provided under Code Section 36B(c)(2)(C)(iii).

What is the amount of the penalty tax if an applicable large employer does not offer coverage to its full-time employees (and their dependents)?

Code Section 4980H(b)(1) provides that the penalty tax is equal to $250 (1/12 of $3,000, adjusted for inflation after 2014) times the number of full-time employees for any month who receive premium tax credits or cost-sharing assistance (this number is not reduced by 30). This penalty tax (assessable payment) is capped at an overall limitation equal to the "applicable payment amount" (1/12 of $2,000, adjusted for inflation after 2014) times the employer's total number of full-time employees, reduced by 80 for 2015, as provided in Code Section 4980H(b)(2).

How will the minimum value for an employer-sponsored plan be determined?

The final regulations provide that minimum value is a determination of how generous the coverage provided is. Coverage is deemed to provide "minimum value" if it pays for at least 60% total costs for plan benefits, without regard to employee premium contributions. This is an actuarial standard that is based on the anticipated costs of a hypothetical or "standard" population. The calculation uses a population that reflects typical self-insured group health plans.

A plan that has no employee co-pays, deductibles, or co-insurance pays 100% of the total plan costs. A plan in which the employee pays 40% of the plan costs through co-pays, deductibles, and co-insurance, therefore, pays 60% of the total plan costs. Both plans would meet the minimum value test. Note that minimum value has nothing to do with who pays what portion of the premium: a plan with sufficiently high co-pays, deductibles, co-insurance and other cost-sharing features would pay less than 60% of the plan's costs, and therefore fail to provide minimum value, even if the employer pays 100% of the premium.

The Treasury Proposed Regulations Section 1.36B-6(d) through (f) provides four approaches for determining minimum value:

(1) Minimum value could be determined using the minimum value calculator made available by HHS and IRS, with actuarial adjustments to the extent of the value of the benefits that are outside the parameters of the minimum value calculator because they are not included in any EHB benchmark. Under an advance proposal that preceded the proposed regulations, non-grandfathered small group market insured plans would have used an actuarial value calculator and both self-insured plans and insured large group plans would have used a minimum value calculator. The calculators would permit an employer-sponsored plan to enter information about the plan's benefits, coverage of services, and cost-sharing terms to determine whether the plan provides minimum value.

(1) Minimum value could be determined using several design-based safe harbors, which would obviate the need to perform any calculations or obtain the assistance of an actuary. These safe harbors would be specified in additional agency guidance under Code Section 36B or 4980H.

(2) Minimum value could be determined through actuarial certification for plans with nonstandard features that would not be able to use the minimum value calculator or a safe harbor calculator. Certification must be by a member of the American Academy of Actuaries; the analysis must be performed in accordance with generally accepted actuarial principles and methodologies and specific standards that may be provided in published

guidance; and the MV calculator must be used in determining the plan's minimum value percentage for coverage that is measurable by the minimum value calculator, and the actuary may certify the plan's minimum value percentage based on the minimum value percentage that results from use of the minimum value calculator and an actuarial analysis of the plan's coverage that is not measured by the minimum value calculator.

(3) Minimum value could be established for the small group market by using a plan that satisfies any of the metal tiers (platinum, gold, silver, and bronze) specified for coverage under an Exchange.

Any there any special transitional rules for large employers participating in a multiemployer plan?

For 2015, the final regulation provides a transition rule which specifies that an applicable large employer member will not be treated as failing to offer the opportunity to enroll in minimum essential coverage to a full-time employee (and the employee's dependents) and will not be subject to a penalty tax with respect to a full-time employee if (i) the employer is required to make a contribution to a multiemployer plan with respect to the full-time employee pursuant to a collective bargaining agreement or an appropriate related participation agreement, (ii) coverage under the multiemployer plan is offered to the full-time employee (and the employee's dependents), and (iii) the coverage offered to the full-time employee is affordable and provides minimum value.