

Employment Advisory: IRS Issues Proposed Regulations on Employer Shared Responsibility Under the Affordable Care Act

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Practices: Employment, Labor & Benefits

IRS Issues Proposed Regulations on Employer Shared Responsibility Under the Affordable Care Act: What Employers Need to Know

The IRS has issued proposed regulations providing guidance on Code Section 4980H which was added to the Code under the Affordable Care Act ("ACA"). The proposed regulations implement the "*employer shared responsibility*" provisions of ACA. Accompanying the regulations is a series of Q&As. The proposed regulations incorporate previous guidance found in a series of IRS Notices, with some modifications, and provide additional guidance. Although the regulations are only in proposed form, employers may rely on them pending issuance of the final regulations and, to the extent that future regulations and guidance are more restrictive, the future regulations and guidance will be applied without retroactive effect to allow employers sufficient time to come into compliance.

BRIEF SUMMARY

The employer shared responsibility provisions generally go into effect on January 1, 2014. Employers will use 2013 employment information to determine whether they employ a sufficient number of employees to be subject to Code Section 4980H in 2014. Specifically, commencing December 31, 2013, an applicable large employer will be liable for an annual "*assessable payment*" if the employer either (a) fails to offer to its full-time employees and their dependents the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan and the employer receives a certification from the Department of Health and Human Services ("HHS") that any full-time employee has received subsidized health insurance coverage through a premium tax credit or cost-sharing reduction (Code Section 4980H(a)), or (b) an employer offers all of its full-time employees and their dependents minimum essential coverage, but the coverage is either "unaffordable" or does not provide "minimum value" and the employer receives a certification from HHS that any full-time employee has received subsidized health insurance coverage through a premium tax credit or cost-sharing reduction (Code Section 4980H(b)).

The payment under Code Section 4980H(a) for failure to offer all full-time employees and their dependents (as explained in greater detail below) the opportunity to enroll in minimum essential coverage is calculated based on all full-time employees employed by the employer (excluding the first 30 employees), regardless of whether the employees of the employer are otherwise covered under the employer's health plan. In contrast, the payment under Code Section 4980H(b) for providing minimum essential coverage that is either unaffordable or does not provide minimum value is calculated based on the number of full-time employees who actually receive the applicable premium tax credit or cost-sharing reduction. A full-time employee for any month is an employee who is employed on average at least 30 hours of service per week. The assessable payment is calculated on a monthly basis.

In general, an "*applicable large employer*" is an employer that employed, on average, 50 full-time employees during the preceding calendar year. The regulations provide detailed rules for determining if an employer employs 50 full-time employees. In determining whether an employer is an applicable large employer, the controlled group rules apply and, thus, all employers in a controlled group will be considered a single employer. For employers that clearly exceed the threshold, no calculation will be required to determine if the employer may be subject to Code Section 4980H. For those employers that are uncertain, the calculation will need to be performed following the rules set forth in the proposed regulations. The determination will be based upon monthly employment data and will require the application of series of rules to determine full-time employee equivalencies or "FTEs".

For purposes of Code Section 4980H(a), the proposed regulations provide that an applicable large employer will be deemed to have "*offered*" minimum essential coverage to all of its full-time employees and their dependents if the employer offers the coverage to 95% of its full-time employees and their dependents. The proposed regulations provide a method for employers to determine in advance whether or not an employee is to be treated as a full-time employee based upon hours of service credited during a previous period. If an employer intends to offer minimum essential coverage to all of its full-time employees thereby avoiding the application of 4980H(a), it will be important to understand the application of these rules to ensure that it has met the 95% requirement.

As previously stated, liability under Code Section 4980H(b) may arise if the employer offers minimum essential coverage but it is either unaffordable or does not provide minimum value. Under the proposed regulations, for premium tax credit purposes, coverage is affordable if the employee's required contribution for self-only coverage does not exceed 9.5% of the employee's household income for the tax year. Because it is not likely that an employer will know an employee's household income, there are three optional safe harbors that an employer can use to ensure that the coverage is affordable. A plan provides minimum value if the plan's share of the cost of benefits is at least 60% of the total cost of plan benefits. Further guidance will be provided by the IRS as to how to determine minimum value.

This is only a brief summary of the more important aspects of the proposed regulations. There are other important provisions that have not been covered in this summary including guidance for foreign employers and how to handle foreign employees. The regulations also address how to handle fiscal year plans, mid-year changes in employment status. Finally, the proposed regulations also include a number of transition rules.

EMPLOYER ACTION PLAN

All employers with at least 50 employees should begin analyzing the regulations to understand implications on their plan design and cost share. Most employers offer some form of group health plan coverage to their full-time employees. However, it will be important to review the plan's eligibility requirements (minimum hours and service requirement to qualify and excluded classes of employees), to confirm that the coverage threshold is met. While employers may believe that their employees will not qualify for a premium subsidy due to their income and thus will not be subject to assessable payment, it is important to note that the subsidy is available to those employees with household incomes up to 400% of the federal poverty line. In 2013, that is \$92,200 for a family of four and \$123,880 for a family of six. Assuming there is a possibility that one or more employees could qualify for a premium subsidy, employers should consider whether they will continue to offer coverage and, if so, whether they will offer coverage to all of their full-time employees and whether to make the coverage affordable. Some of the factors that employers will need to consider are:

- For very large employers that offer coverage to most, but not all of its employees, the structure of the penalty appears to favor offering some form of employer-sponsored coverage to all full-time employees because the assessable payment is calculated based upon the total number of full-time employees regardless of whether most of the employer's employees are otherwise covered by the employer's plan. Smaller employers (those at or near 50) may not have the same concern because the first 30 employees are excluded in calculating the assessable payment.
- Employers will not be able to take a deduction for the assessable payment.
- In determining premium shares, the employer-paid portion of health care premiums is tax-free, whereas amounts included in an employee's income are subject to FICA and FUTA.
- There are new nondiscrimination rules that are applicable to insured plans. The enforcement of these rules has been delayed but will impact available plan design and premium shares.
- Other business considerations including company culture, recruiting, retention, productivity and employee morale.

The IRS has requested comments on the proposed regulations and public hearings will be held on April 23, 2013. We will keep you advised on developments and would be pleased to respond to any questions.