ERIC

The ERISA Industry Committee

June 17, 2011

Submitted by e-mail:
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CC:PA:LPD:PR
Room 5203
Internal Revenue Service
P.O. Box 7604
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Attention: Notice 2011-36 (Shared Responsibility Requirements)

Ladies and Gentlemen:

The ERISA Industry Committee ("ERIC") is pleased to respond to the request of the Internal Revenue Service (the "Service") and Treasury Department (collectively, the "Agencies") for comments regarding the implementation of the employer shared responsibility provisions under the Patient Protection and Affordable Care Act ("ACA"). ERIC has filed a separate letter responding to the request for comments on the 90-day waiting period.

ERIC's Interest in the Shared Responsibility Requirements

ERIC is a nonprofit association committed to the advancement of the employee retirement, health, and other welfare benefits of America's largest employers. ERIC's members sponsor some of the largest private group health plans in the country. These plans provide health care to tens of millions of workers and their families.

ERIC's members are committed to, and known for, providing high quality, affordable health care. Employers do not have unlimited resources to spend on health care, however. ACA has imposed a number of expensive new mandates on employer health plans that were already struggling to cope with ever-increasing medical costs. Many of ERIC's members are approaching, and many have already reached, the tipping point: they cannot spend more money on health care, so that every additional dollar needed to satisfy a new administrative requirement or pay a new excise tax is a dollar that must be recovered by reducing employees' health benefits. Accordingly, ERIC's members have a vital interest in ensuring that the shared responsibility provisions do not impose unnecessary administrative burdens on large employers and do not limit employers' flexibility to design cost-effective health benefits

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that meet the needs of their work forces. ERIC's members also wish to ensure that the shared responsibility provisions do not unfairly penalize employers that provide comprehensive, affordable health care to the majority of workers and their families. ERIC offers a number of recommendations below to help achieve these objectives.

Summary of Comments

ACA added section 4980H to the Internal Revenue Code of 1986, as amended (the "Code"). Under section 4980H, applicable large employers are subject to one of two penalties if any full-time employee is certified to receive a premium tax credit or cost-sharing reduction through a state exchange:

- Section 4980H(a) Liability: If an applicable large employer fails to offer its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage, the employer must pay an excise tax equal to 1/12 of $2,000 per month times the number of its full-time employees in excess of 30, regardless of whether the employees receive a premium tax credit or cost-sharing reduction through a state exchange.

- Section 4980H(b) Liability: If an applicable large employer offers minimum essential coverage, but the coverage is not affordable or not sufficiently valuable, the employer must pay an excise tax equal to 1/12 of $3,000 per month times the number of its full-time employees who receive a premium tax credit or cost-sharing reduction. This excise tax is capped so that it does not exceed the section 4980H(a) liability that would have applied if the employer did not offer coverage.

The most compelling concern for ERIC's members is the provision imposing section 4980H(a) liability. If this provision is interpreted broadly, it could require an employer to pay a penalty for hundreds of thousands of employees merely because one full-time employee is not offered minimum essential coverage. ERIC believes that this harsh result is not required by the statute and is contrary to the purpose of the shared responsibility provisions.

ERIC strongly endorses the proposal in Notice 2011-36 that section 4980H(a) liability should not apply to an employer that offers minimum essential coverage to substantially all of its employees. ERIC proposes the following additional limitations, so that liability under section 4980H(a):

(1) should not apply with respect to employees who are offered minimum essential coverage;

(2) should apply on an employer-by-employer basis rather than on a controlled-group basis;

(3) should not apply with respect to nonresident aliens and other employees who are exempt from the individual mandate;

(4) should not apply to U.S. citizens whose primary work location is outside the United States; and

(5) should not apply to resident aliens whose health coverage is provided outside the United States.

We discuss each of these proposals below.

ERIC is also concerned that large employers will incur liability under section 4980H in circumstances where the employer is not aware that the worker is subject to the employer shared responsibility provisions. This situation might arise, for example, if the Service reclassifies a worker whom the employer had classified as an independent contractor, or if the employer believed that a worker was a part-time employee but the worker proves to be a full-time employee. In order to address these situations, ERIC makes the following recommendations:

(1) an individual who is classified as an independent contractor under the section 530 safe harbor should be classified as an independent contractor for purposes of section 4980H;

(2) an employer should not incur section 4980H liability with respect to any period before the employer is notified that its full-time employee is eligible for a premium tax credit or cost-sharing reduction; and

(3) the Agencies should provide a failsafe provision that will permit employers to avoid penalties by offering coverage after the employer is notified that the employee is eligible for a premium tax credit or cost-sharing reduction.

ERIC is further concerned that the requirement to count hours of service in order to identify full-time employees will impose a substantial administrative burden on employers with tens of thousands of workers employed by diverse businesses around the world. ERIC appreciates the efforts that the Agencies have made to build on existing Labor Department rules for crediting service, and to propose that employers could use a measurement period and stability period to determine an employee's status. ERIC believes that these proposals will be helpful in reducing the administrative burden on large employers. ERIC offers several recommendations concerning the service-crediting rules proposed in Notice 2011-36.

Limiting Section 4980H(a) Liability

1. Section 4980H(a) liability should not apply to employers that offer coverage to substantially all employees.

Notice 2011-36 states that the Agencies intend to make clear that an employer will not be subject to section 4980H(a) liability if the employer offers minimum essential coverage "to all, or substantially all, of its full-time employees." ERIC strongly endorses the suggestion that the section 4980H(a) penalty will not apply if an employer fails to offer minimum essential coverage to a small portion of its work force, as long as the employer offers minimum essential coverage to substantially all of its employees.

If an employer mistakenly, but in good faith, determines that a small number of workers are outside the scope of the shared responsibility rules, the "substantially all" rule should prevent the employer from incurring the section 4980H(a) penalty. For example, an employer might conclude that certain individuals are independent contractors rather than employees, or are part-time employees rather than full-time employees, and might fail to offer these individuals minimum essential coverage. The employer should not be subject to the section 4980H(a) penalty if the Service subsequently reclassifies these workers as full-time employees.

ERIC urges the Agencies not to limit the "substantially all" rule to instances where an employer excludes individual employees from minimum essential coverage by mistake. As explained in comment 3, a large employer might provide minimum essential coverage to the great majority of its workforce, but might be unable to offer minimum essential coverage to a small group of workers employed in a low-margin business that cannot support expensive benefits. The employer should not be subject to section 4980H(a) liability for tens of thousands of employees merely because the employer fails to offer minimum essential coverage to a few hundred employees. Accordingly, the Agencies should recognize that the "substantially all" rule applies when an employer intentionally excludes a small group of full-time employees from coverage, as well as when the employer excludes a small number of full-time employees from coverage by mistake.

ERIC notes that even if an employer is relieved from section 4980H(a) liability under these circumstances, the employer would still incur liability under section 4980H(b) for the small group of employees to whom it did not offer minimum essential coverage if any of these excluded employees were certified to receive a premium tax credit or cost-sharing reduction through a state exchange.

2. Section 4980H(a) liability should not apply with respect to employees who are offered minimum essential coverage.

If an employer is subject to section 4980H(a) liability, the penalty should apply only with respect to those full-time employees who are not offered minimum essential coverage. The purpose of the penalty is to encourage large employers to offer minimum essential coverage to their full-time employees. If an employer must pay a penalty under section 4980H(a) with respect to employees to whom it offers minimum essential coverage, the penalty will have the opposite effect. The employer will have no incentive to continue to offer minimum essential coverage to these employees, since it must pay the same penalty for them that it pays for employees who have no minimum essential coverage. In addition, after paying an annual nondeductible penalty of $2,000 per employee, the employer might no longer be able to afford to offer minimum essential coverage to these employees. We urge the Agencies to interpret section 4980H(a) so that it encourages employers to offer minimum essential coverage by allowing them to avoid section 4980H(a) liability for employees who are offered minimum essential coverage.

3. Related employers should not be aggregated for purposes of determining section 4980H(a) liability.

Section 4980H(a) liability should be determined on an employer-by-employer basis, without aggregating employers that are members of the same controlled group. This rule is consistent with the statutory language and with the purpose of the shared responsibility provisions.

Employers that belong to the same controlled group, within the meaning of sections 414(b), (c), (m), and (o) of the Code, are aggregated for two specific purposes under section 4980H. First, related employers are aggregated for the purpose of determining whether an employer employs at least 50 full-time employees and thus is subject to the shared responsibility rules.[1] Second, related employers are aggregated for the purpose of applying the rule that excludes the first 30 full-time employees from certain penalty computations: the exclusion is allocated ratably among the controlled group members.[2]

We are concerned that Notice 2011-36 proposes to treat all controlled group members as a single employer "for purposes of section 4980H," without recognizing that the employer aggregation rule has only limited application under that section. The statute is quite clear that the employer aggregation rule applies only for purposes of paragraph (2) under subsection (c) of section 4980H–that is, in determining whether an employer is an "applicable large employer" and in applying the 30-employee exclusion.

Section 4980H(a) liability potentially applies to an "applicable large employer" that fails to offer minimum essential coverage to its full-time employees. When the statute describes how the liability is calculated, however, it says, "[T]here is hereby imposed *on the employer* an assessable payment equal to the product of the applicable payment amount and the number of individuals employed *by the employer* as full-time employees during such month" (emphasis added). Unlike the phrase "applicable large employer," the term "employer" is not subject to an aggregation rule: it has its ordinary meaning, which refers to a single business entity such as a corporation. Accordingly, although related employers are aggregated for purposes of determining whether they are subject to the shared responsibility provisions, section 4980H(a) liability is calculated on an employer-by-employer basis, taking into account only the full-time employees of the employer that fails to offer minimum essential coverage. We urge the Agencies to make clear that section 4980H(a) liability does not extend to other members of the same controlled group unless they also fail to offer minimum essential coverage to their employees.

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[1] I.R.C. § 4980H(c)(2)(C)(i).

[2] I.R.C. § 4980H(c)(2)(D)(ii).

An employer-by-employer calculation of section 4980H(a) liability not only reflects the correct reading of the statute, it also produces a better result from a policy perspective. Large employers often have diverse businesses that operate in a variety of different industries and geographic regions. In order to remain competitive, each business must offer a level of health benefits appropriate to its cost structure. For example, a large manufacturing company might offer affordable, comprehensive health care to the great majority of its employees, but it might own a small subsidiary in a retail business that cannot afford to offer employee health care.

Suppose, for purposes of illustration, that the controlled group employs 100,000 employees, and that only 40 employees work for the retail subsidiary. Under the employer aggregation rules in section 4980H(c), the controlled group (including the retail subsidiary) would be deemed to be a single employer with more than 50 full-time employees, and the 30-employee exclusion would be inapplicable to the retail subsidiary (because the subsidiary's allocable share of the exclusion would be less than one employee). For purposes of calculating 4980H(a) liability, however, only the 40 full-time employees of the subsidiary would be taken into account: the penalty would not include the 99,960 employees of the other controlled group members, who receive comprehensive health coverage from their employers.

It would be both inequitable and counterproductive to apply section 4980H(a) liability across a company with tens of thousands of employees in dozens of different businesses merely because one business was unable to provide minimum essential health benefits to its employees. Section 4980H(a) does not impose "guilt by association" on related employers. We urge the Agencies to limit the employer aggregation rule to the provisions identified in the statute, and to make clear that employer aggregation does not apply in calculating section 4980H(a) liability.

4. Section 4980H(a) liability should not apply with respect to workers who are excluded from ACA's individual mandate.

Notice 2011-36 asks whether nonresident alien employees should be excluded from the shared responsibility provisions. ERIC strongly believes that the shared responsibility provisions should exclude all employees (including, but not limited to, nonresident aliens) who are excluded from the individual mandate under ACA.

ACA added section 5000A to the Code. Section 5000A imposes a penalty on individual taxpayers who fail to obtain minimum essential coverage for themselves and their dependents. ACA specifically excludes certain groups from the individual mandate under section 5000A(d): (1) those who are neither U.S. citizens nor aliens lawfully present in the U.S., (2) those who meet certain religious exemptions, and (3) incarcerated individuals. In addition, individuals who reside outside of the United States for an extended period of time as described in section 911(d)(1) of the Code, or who are residents of U.S. possessions under section 937(a) of the Code, are deemed under section 5000A(f)(4) to have obtained minimum essential coverage.

ACA recognizes that the employer and the individual have a "shared responsibility" to provide and to obtain minimum essential health coverage. The shared responsibility provisions are intended, and should be interpreted, to operate in a coordinated way. Section 4980H encourages employers to offer minimum essential coverage to their full-time employees, and to ensure that the coverage is affordable and sufficiently valuable for lower-income employees. Section 5000A encourages individuals to obtain minimum essential coverage from an available source, including an employer-sponsored plan. If an employee does not have a responsibility to obtain minimum essential coverage, however, the employer should not have an obligation to provide the coverage. The Agencies should make clear that any employee who is excluded from the individual mandate under section 5000A(d) of the Code, or who is deemed to have minimum essential coverage under section 5000A(f)(4), is not treated as a full-time employee for purposes of section 4980H.

5. Section 4980H(a) liability should not apply to U.S. expatriates.

Many large employers have an increasingly international and mobile work force. Employers often hire citizens of the United States to work outside the U.S. or transfer U.S. citizens on a temporary or permanent basis to operations in other countries. It is not practicable (and, in some cases, not possible) for an employer to provide minimum essential coverage for U.S. citizens working outside the United States. These employees will not seek financial assistance through a state exchange, and thus will not present a "free rider" problem for the government programs that provide this assistance. Accordingly, U.S. citizens should not be treated as full-time employees for purposes of section 4980H during any period in which their primary work location is outside the United States.

Workers employed outside the U.S. generally receive health care in accordance with the standards and practices of the country where they are employed. If an expatriate receives health coverage through an employer-sponsored plan, the plan is designed to reflect the insurance regulations and health services in the local jurisdiction, not the standards that prevail in the U.S. In many cases, all or part of the health care for overseas workers is provided through a government-sponsored program. These programs might provide a level of coverage that is equal to, or greater than, "minimum essential coverage" in the United States, but the definition of "minimum essential coverage" in section 5000A(f) does not include foreign government-sponsored health programs. Accordingly, a U.S. citizen working abroad might be deemed not to have minimum essential coverage even though the employee has affordable, comprehensive health care coverage.

Section 4980H(a) liability potentially applies to all of an employer's full-time employees, regardless of whether they have affordable health coverage or apply for financial assistance through a state exchange. It is not practicable for a U.S. company to track the employees of its foreign operations for purposes of determining whether they should be included in calculating section 4980H(a) liability. If an overseas subsidiary or branch of a U.S. company interviews and hires a U.S. citizen, the U.S. company probably will not know that the employee has been hired, what his citizenship is, or on what schedule he will work. Even if a U.S. company coordinates the transfer of a U.S. citizen to a foreign location, it is unlikely that the U.S. company will have systems in place that will permit it to track the employee's service in the foreign country. As a result, the U.S. company will have no way of confirming the worker's status as a full-time employee or the worker's health care coverage, and will not be able to include the worker in the calculation of section 4980H(a) liability.

As explained in ERIC's previous comment, expatriates described in section 911(d)(1) of the Code are deemed to have minimum essential coverage and should be excluded from consideration under section 4980H for that reason. Section 911(d)(1) applies, however, only to individuals whose tax home is in a foreign country and who have resided in the foreign country for a full taxable year or for at least 330 full days in a twelve-month period. Some expatriates will not satisfy these conditions; even if an expatriate does satisfy the conditions, it will be difficult for a U.S. employer to determine whether and when the conditions are satisfied with respect to an employee of a foreign operation. The Agencies should make clear that no U.S. citizen working abroad is considered a "full-time employee" under section 4980H(a), regardless of whether the employee is described in section 911(d)(1).

6. Section 4980H(a) liability should not apply to employees with health coverage outside the United States.

Large multinational employers often transfer employees from foreign subsidiaries to work or train in the United States on a permanent or temporary basis. These employees might remain on their home country payroll and retain health coverage in their home country. This is often the case if the employee's family stays behind in the home country and the employee intends to return to that country after a relatively short assignment. The employer might provide the employee minimal accident and health coverage in the U.S. because the employee retains coverage in the home country and is likely to return home in the event of a serious illness. If these employees remain in the United States long enough to become U.S. residents, however, the exclusion for nonresident aliens (discussed above in comment 4) will no longer apply to them.

As explained in the preceding comment, health coverage that is designed to comply with the laws and conditions of a foreign jurisdiction will not necessarily constitute "minimum essential coverage" under the U.S. rules, even if the coverage is affordable and comprehensive. The Agencies should provide that individuals who are not U.S. citizens and who have health care coverage outside the United States (including coverage under a plan sponsored by a foreign government) are not considered full-time employees for purposes of 4980H(a), regardless of where the individuals work and reside.

Identifying Employees

7. The rules should incorporate the section 530 safe harbor for the classification of workers.

The Agencies have suggested that they will use a common-law test to determine who is an "employee" for purposes of the shared responsibility rules. ERIC agrees that an employer should not incur a penalty for failing to offer affordable health coverage to leased employees, statutory employees, independent contractors, and other workers who are not its common-law employees. The Agencies should recognize, however, that the common-law test is subjective and produces uncertain results when it is applied to many work relationships. The shared responsibility rules should incorporate the safe harbor under section 530 of the Revenue Act of 1978, as amended ("section 530"),[3] to protect employers from section 4980H liability for workers who are inadvertently misclassified.

Employers have struggled for decades to classify their workers correctly under the federal employment tax provisions. Although the Service has identified twenty factors that serve as a guide for determining whether a worker is a common-law employee,[4] many of the factors are subjective, and the Service weighs them differently in different circumstances. Applying the common-law test to its own work force, an employer acting in good faith might come to a different conclusion about a worker's status than the Service would reach. Congress enacted the section 530 safe harbor because it recognized that employers need greater clarity and certainty when they define their relationship with their workers.[5] Section 530 allows a company to treat a worker as an independent contractor for employment tax purposes (regardless of the worker's status under the common-law test) as long as the company has a reasonable basis for this treatment and applies it consistently.

The shared responsibility provisions significantly increase the financial stakes associated with the worker classification problem. If an employer mistakenly, but in good faith, classifies a common-law employee as an independent contractor and fails to offer the employee minimum essential coverage, the employer is potentially liable for an annual excise tax of $2,000 for each of its full-time workers. The same policy considerations that prompted Congress to enact the section 530 safe harbor apply here: an employer should not be exposed to substantial and potentially retroactive financial liability

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[3] Pub. L. No. 95-600, § 530 (1978), *amended by* Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1122 (1996).

[4] Rev. Rul. 87-41, 1987-1 C.B. 296. The Service has recently consolidated the twenty factors under three main headings (behavioral control, financial control, and type of work relationship), without any noticeable increase in clarity or objectivity. *See* IRS Publication 1779, "Independent Contractor or Employee."

[5] *See* S. Rep. No. 281, 104th Cong., 2d Sess., at 20–28 (1996). The legislative history of the 1996 amendments noted that section 530 "should be construed liberally in favor of taxpayers." *Id.* at 26.

for workers whom it reasonably classifies as independent contractors. ERIC urges the Agencies to make clear that a worker will not be treated as a common-law employee for purposes of the shared responsibility provisions during any period in which the worker is classified as an independent contractor under the section 530 safe harbor.

8. The penalties should apply only after an employer receives notice that an employee is eligible for financial assistance.

If an employer chooses not to offer minimum essential coverage to some of its employees, the penalty under section 4980H(a) should apply only for months beginning after the month in which the employer receives notice that at least one full-time employee has been certified to be eligible for a premium tax credit or cost-sharing reduction. Similarly, if an employer offers coverage that does not meet the affordability or actuarial value test, the penalty under section 4980H(b) should apply with respect to any full-time employee only after the employer receives notice that the employee has been certified to be eligible for a premium tax credit or cost-sharing reduction.

The penalties under section 4980H are substantial. Employers are not able to determine which full-time employees might trigger these penalties: an employee's eligibility for a premium tax credit or cost-sharing reduction depends on household income, and employers do not have access to this information. Although the Department of Health and Human Services has not yet established the procedures it will use to identify employees who are eligible for financial assistance, it seems likely that an individual will often be enrolled in a state exchange for several months before the determination is made that the individual is eligible for financial assistance.[6] An employer should not be subject to penalties for failing to offer coverage to an employee in any month before the employer is notified that the employee is eligible for a premium tax credit or cost-sharing reduction.

9. The rules should include a failsafe provision that will allow an employer to avoid a penalty by offering coverage.

An employer that fails to offer minimum essential coverage to one full-time employee potentially faces a substantial penalty with respect to all of its full-time employees. This concern will be particularly acute if the Agencies do not limit section 4980H(a) liability in the ways ERIC has recommended. Accordingly, the Agencies should provide a failsafe mechanism that will allow an employer to avoid penalties under section 4980H by extending affordable health coverage to an individual within a reasonable period of time after the employer receives notice that the individual is eligible for financial assistance.

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[6] ACA § 1412 permits a state exchange to request an advance determination of an individual's eligibility for financial assistance, but does not require that the state exchange obtain an advance determination.

When the Department of Health and Human Services determines that an individual does not receive affordable health coverage from an employer and certifies that the individual is eligible for a premium tax credit or cost-sharing reduction, the state exchange must notify the employer of the individual's eligibility for financial assistance.[7] If the employer disagrees with the determination, the employer may appeal the decision, present information for review, and obtain information (other than taxpayer return information) concerning the basis for the determination.[8]

When an employer receives notice that an employee has been certified as being eligible for a premium tax credit or cost-sharing reduction, the employer should have at least 60 days to offer the employee minimum essential coverage, or to adjust the employee's coverage (for example, by reducing the employee's contribution or cost-sharing requirements) so that it is affordable. The employer should be able to provide the employee with minimum essential coverage either by paying the premium for the employee's coverage through the state exchange or by enrolling the employee in a group health plan maintained by the employer.

If the employer chooses to appeal the determination that the employee is eligible for a premium tax credit or cost-sharing reduction, the employer should have at least 60 days after an adverse decision on appeal to avoid the penalties under section 4980H by reimbursing the employee (or the state exchange, as applicable) for the cost of the coverage that the employee received through the state exchange during the appeal period, and by offering affordable coverage to the employee prospectively.

<u>Counting Hours of Service</u>

10. The Labor Department's rules for crediting hours of service should be modified in some respects.

The shared responsibility penalties apply to an employer's full-time employees, defined as employees who are employed for an average of at least 30 hours of service a week during a given month. In Notice 2011-36, the Agencies propose to define "hours of service" using the existing rules in the Labor Department's regulation at 29 C.F.R. § 2530.200b-2(a). Although ERIC generally supports this proposal, we request that the Agencies clarify or modify the Labor Department's service-crediting rules in the following respects:

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[7] ACA § 1411(e)(4)(B)(iii).

[8] ACA § 1411(f)(2).

A. No hours of service should be credited after termination of employment.

The Labor Department's regulation at 29 C.F.R. § 2530.200b-2(a)(2) states that an "hour of service" includes hours for which an employee is paid or entitled to payment by the employer "irrespective of whether the employment relationship has terminated." Accordingly, for example, a terminated employee might be credited with hours of service for periods extending beyond the termination date for which the employee receives payments of accrued vacation, disability pay, separation pay, or other employment-based payments.[9]

Shared responsibility under section 4980H applies only to an employer's full-time employees: it does not extend to former employees. Accordingly, the Agencies should make clear that an individual will not in any circumstance be treated as a full-time employee with respect to any period after the individual's employment relationship has terminated, even if the individual continues to receive employment-based payments from the employer for that period.

B. No hours of service should be credited for back pay awards.

Under 29 C.F.R. § 2530.200b-2(a)(3), an employer must credit hours of service with respect to any period for which an employee receives a back pay award. Accordingly, for example, if a court or arbitrator concludes that an employee should have been paid for time spent donning and doffing protective clothing, the employer must credit the employee with the additional hours of service associated with the back pay award.

This rule works well enough in a retirement plan context, where an employer can simply increase an employee's vesting service or credited service and recalculate the employee's retirement benefit. Under section 4980H, however, it will be impracticable for the employer to offer minimum essential health coverage retroactively to an individual who had been classified as a part-time employee, but who is reclassified as a full-time employee on the basis of a back pay award. An employer should not be penalized for failing to provide minimum essential coverage (or failing to make the coverage affordable and sufficiently valuable) when the employer reasonably believed, based on the conditions prevailing at the time, that the employee was not subject to the shared responsibility requirements. Accordingly, a back pay award should not increase an employee's "hours of service" for purposes of section 4980H.

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[9] *See, e.g.,* LTR 8031091 (May 9, 1980) (employees credited with hours of service while receiving a post-termination separation pay allowance).

C. Hours of service with different controlled group members should not be aggregated.

Under the Labor Department's regulation, employers that are members of the same controlled group are treated as a single employer, and an employee's hours of service with all related employers are aggregated. This employer aggregation rule should not apply in determining an employee's status as a full-time employee under section 4980H.

Large employers often transfer employees between two subsidiaries, or between the parent company and a subsidiary, during the year. In addition, employees sometimes work part-time simultaneously for two different employers within the same controlled group. Each entity often maintains its own payroll system and employment records. Accordingly, it is very difficult for an employer to identify which employees work for a related employer, let alone to determine how many hours of service the employee has recorded with the related employer.[10]

As ERIC explained above in comment 3, section 49890H requires related employers to be aggregated only for two specific purposes: to determine whether an employer is an "applicable large employer," and to apply the 30-employee exclusion. No employer aggregation rule applies for purposes of determining whether an individual is a full-time employee (except to the extent necessary to determine whether the employer has more than 50 full-time employees). Accordingly, the Agencies should make clear that an employee's hours of service are computed separately for each employer in the controlled group, and the employee's status as a full-time employee of a given employer is based solely on the employee's hours of service with that employer.

D. Existing exclusions for worker's compensation and similar laws should apply.

The Labor Department's regulation at 29 C.F.R. § 2530.200b-2(a)(2)(ii) provides that an employer is not required to credit hours for which an employee is paid or entitled to payment solely for the purposes of complying with workmen's compensation, unemployment compensation, or disability insurance laws. The Agencies should make clear that these exclusions also apply for purposes of tracking hours of service under section 4980H.

11. A "single continuous period" of absence should not be interrupted by short periods of employment.

Notice 2011-36 proposes that employers will be required to count no more than 160 hours of service for an employee on account of any single continuous period during

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[10] In the retirement plan context, large employers often deal with this problem by using the elapsed time method of crediting service for salaried employees; but this solution is not workable under section 4980H.

which the employee is paid or entitled to payment but performs no duties. ERIC supports this rule, which reduces employers' administrative burden and limits the extent to which employers must provide health care or pay penalties for individuals on long-term leaves of absence. The rule will have its intended effect, however, only if the Agencies make clear that a "single continuous period" of absence does not end when an employee returns to work for a short period during an extended leave.

Employees who are on a long-term leave often return to work for a brief period. For example, an employee on maternity leave might return to the office for a few days to finish a project started before the leave commenced. An employee on sick leave or disability leave might return for a short trial work period to determine whether the employee is able to withstand the physical demands of the job. If an employee's leave continues after these brief interruptions, the absence should be considered "a single continuous period of absence" for purposes of the service-crediting rules in section 4980H.

12. The "measurement period" and "stability period" should provide maximum flexibility to employers.

ERIC's members employ thousands of employees around the world. Their work force requirements and employment relationships change constantly to meet their changing business needs. In addition, employees increasingly demand flexible work schedules so that they can balance work requirements with family or other obligations. The Agencies recognize the difficulties that will arise if employees with flexible work schedules move in and out of full-time employment status for purposes of the shared responsibility rules. Accordingly, Notice 2011-36 proposes that employers will be able to use a "measurement period" of three to twelve calendar months to determine which employees will be treated as full-time employees, followed by a "stability period" during which the employee's status as full-time or part-time will be deemed to continue.

Notice 2011-36 observes that if an employer is permitted to use different measurement and stability periods for different portions of its work force, the potential for manipulation and the burden on the Service's enforcement resources might be increased. ERIC believes that these concerns are outweighed by employers' need to apply the service-counting rules in a way that accurately reflects their employment relationships. ERIC believes that the proposal for measurement and stability periods is valuable and should be adopted, but only if an employer has maximum flexibility in applying these concepts. We have outlined briefly below some of the areas in which flexibility will be essential.

A. Employers should be able to use a measurement period and stability period for some groups and not others.

The concept of a "measurement period" followed by a "stability period" will be useful mainly in the case of employees whose work schedule changes month-by-month, so that they might work substantially full-time in some months and perform little or no service in other months. Employers will be reluctant to apply this concept to employees whose employment status is relatively stable. For example, if an employee who is clearly a full-time employee determines that she wishes to change her work schedule to ten hours per week, the employer will not wish to continue to treat the employee as a full-time employee for a stability period lasting up to twelve months. For this reason, an employer might wish to make a month-by-month determination of employment status for workers whose work schedule changes only occasionally, and might wish to use a measurement period and stability period for workers who have flexible or seasonal work schedules.

The Agencies should permit employers to use a measurement period and stability period for some workers and not others, as long as the employer designates in advance the applicable measurement and stability periods and the classification of workers to which the periods apply. The advance designation will prevent employers from manipulating these periods to match changes in workers' schedules.

B. If the Agencies limit the use of measurement and stability periods for workers whose hours increase, the Agencies should apply a parallel rule to workers whose hours decrease.

Notice 2011-36 suggests that the measurement and stability period concept might apply only in a limited form with respect to employees who move into full-time status during the year. If an employer is required to treat a worker as a full-time employee immediately when the worker's status changes from part-time to full-time in the middle of a measurement or stability period, a parallel rule should apply when a worker's status changes from full-time to part-time. An employer should not be required to treat an employee as a full-time employee for an entire stability period if the employee's status changes so that he or she clearly is working a part-time schedule that calls for less than 30 hours of service per week.

C. Employers should have the option to apply a month-to-month determination following a worker's change in status.

If a worker has a distinct change in status in the middle of a stability period, an employer that otherwise uses measurement and stability periods should have the option to use a month-to-month method to determine whether the worker is a full-time employee for the remainder of the stability period. In order to prevent manipulation, the rule could require that an employer who elects to switch to a month-to-month determination must do so consistently for employees whose work schedule increases as well as for employees whose work schedule decreases.

For example, an employee working part-time might be promoted to a full-time position in the middle of the stability period. Similarly, a seasonal employee who worked enough hours during the previous measurement period to achieve full-time status might transfer to a regular part-time position working 20 hours per week in the middle of the stability period. Under ERIC's proposed rule, the employer would be able either to switch to a month-to-month determination for both employees, or to continue to treat the first employee as part-time and the second employee as full-time for the remainder of the stability period.

ERIC believes that this rule will give employers flexibility to address changes in employees' status during the year. ERIC emphasizes that the rule should be optional rather than mandatory, however. One advantage of the Agencies' proposal to allow measurement and stability periods is that it permits employers to determine a worker's status relatively infrequently, without continually monitoring the worker's schedule to address changed circumstances. Employers that wish to take full advantage of this administrative convenience should be permitted to do so.

D. Employers should be able to use different measurement periods and stability periods for different groups.

Large employers will wish to use different measurement periods and stability periods for different groups. For example, an employer that offers a variety of group health plans with different plan years might wish to establish measurement and stability periods on a plan-by-plan basis, to coordinate with each plan's open enrollment period. Similarly, as Notice 2011-36 suggests, an employer might wish to use a measurement period that starts on an employee's hire date, so that each employee has his or her own measurement period. An employer that acquires a new business will need to establish special measurement and stability periods for the acquired employees. Accordingly, employers should have flexibility to use different measurement and stability periods for different groups of employees.

E. Employers should be able to specify an administrative interval of up to four months between the end of a measurement period and the beginning of a stability period.

Notice 2011-36 suggests that employers might be given the option of including an administrative interval between the end of a measurement period and the beginning of a stability period, so that they will have time to identify and enroll employees in their group health coverage. The notice suggests an interval lasting up to one month. ERIC believes that an administrative interval is crucial to make the measurement and stability period concept workable. ERIC urges the Agencies to recognize that large employers will need an administrative interval lasting at least four months.

ERIC's members anticipate that they generally will use a twelve-month measurement period, and that they will wish to coordinate the measurement period with the plan's open enrollment period. For example, if a group health plan operates on a calendar-year basis, the open enrollment period often commences in early October. The employer would use a twelve-month measurement period lasting from September 1 through August 31 to identify its full-time employees. In the September following the end of the measurement period, the employer would look back at its employment records for the trailing twelve months and would identify the employees who had been employed for an average of at least 30 hours of service per week. If the employer in this example wished to avoid the shared responsibility penalties, the employer would notify the employees of their eligibility for the group health plan and would provide them with enrollment materials. The employees would then enroll during the open enrollment period, and would remain covered by the plan for the next calendar year, which would be the stability period. As this example illustrates, an administrative interval of four months is the minimum interval an employer will need to coordinate the measurement and stability periods with its regular enrollment process.

F. Employers should have flexibility to change measurement and stability periods.

Notice 2011-36 suggests that employers might be limited in the frequency with which they can change measurement and stability periods. ERIC's members are concerned that they will need to work with this concept for several years before they are able to determine which combination of measurement and stability periods is easiest to administer and best reflects the dynamics of their work force. Large employers will not be willing to adopt a measurement and stability period if they are in danger of being locked in to an arrangement that proves unworkable in practice. Accordingly, ERIC urges the Agencies to give employers unlimited flexibility to change measurement and stability periods during the first several years in which the employer relies on this method to identify its full-time employees.

If the Agencies limit employers' flexibility to change measurement and stability periods after the employer has used these periods for several years, the Agencies should still allow employers to change these periods to reflect material changes in their circumstances. For example, employers should be permitted to change measurement and stability periods (1) when a plan year changes (for example, as the result of the merger of two plans); (2) when the employer establishes a new plan or acquires a new plan in a business transaction; and (3) when there is a material change in the employer's work force (for example, when the employer acquires a new business and must integrate a number of new workers into its existing health coverage).

G. Employers should have flexibility in applying the initial measurement and stability periods.

The shared responsibility provisions become effective in 2014. Accordingly, an employer that maintains a calendar-year health plan might be required to commence the first measurement period as early as September 1, 2012, in order to identify full-time employees in time for open enrollment in the fall of 2013. Even assuming that the Agencies are able to develop rules governing measurement and stability periods and to publish them for comment relatively soon, the rules will not be finalized in time for employers to develop the administrative systems and procedures necessary to track hours accurately. The Agencies should recognize this difficulty by making clear that employers will not be penalized for mistakes in assessing their section 4980H liability for the stability period beginning in 2014 as long as they make a good-faith effort to comply.

The Agencies should also make clear that an employer will not be subject to section 4980H liability for any period beginning before the first stability period in 2014, regardless of whether the employer offers affordable coverage to full-time employees during that period. For example, if a group health plan operates on a plan year beginning October 1, the employer might designate the plan year as the stability period for that plan. The Agencies should make clear that the employer is not subject to section 4980H liability for failing to offer affordable coverage to full-time employees before the stability period that begins in 2014.

ERIC appreciates the opportunity to provide comments on the shared responsibility proposals in Notice 2011-36. If the Agencies have any questions concerning our comments, or if we can be of further assistance, please let us know.

Sincerely,

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