ERIC

The
ERISA
Industry
Committee

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Submitted through the Federal eRulemaking Portal

CC:PA:LPD:PR (REG-138006-12)
Internal Revenue Service
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

RE: REG-138006-12, RIN 1545-BL33 (Shared Responsibility for Employers)

Ladies and Gentlemen:

The ERISA Industry Committee ("ERIC") is pleased to respond to the request of the Internal Revenue Service and Treasury Department (collectively, the "Agencies") in REG-138006-12, RIN 1545-BL33 for comments regarding comprehensive proposed regulations ("proposed regulations") under section 4980H of the Internal Revenue Code. Section 4980H codifies the employer shared responsibility provisions under the Patient Protection and Affordable Care Act ("ACA").

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 millions of workers and their families.

The balance between providing high quality, affordable health care and the need to contain the costs for these programs is critical. While ERIC's members devote considerable time and resources to their programs, the amount they can spend on their plans is not unlimited. Thus, it is important that the Agencies recognize that imposing additional burdens on plans can result in a reduction in benefits and/or higher costs for employees as well as employers.

Further, ERIC encourages the Agencies to recognize the unique nature of large companies, which employ a diverse labor force that works on a variety of different schedules for different businesses around the globe. Large employers often employ workers on a temporary, seasonal, or part-time basis. They also frequently provide employees with flexible schedules, and accommodate workers who enter and leave the work force, take extended leaves of absence, change their working hours, move from one business unit to another, begin or return from foreign assignments, and change their

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status from independent contractors or leased employees to regular employees. An individual who has worked for a single company might have qualified for coverage under a wide variety of different employer-sponsored group health arrangements throughout his or her career, depending on the worker's position and employment status.

While ERIC appreciates the safe harbor approach of the proposed regulations and prior guidance[1] to measure compliance with the requirements of the ACA, ERIC strongly urges the adoption of the recommendations described below to ease the considerable administrative complexity and compliance burden generated by these new rules.

Summary of Comments

ERIC recommends that the Agencies adopt the following revisions to the proposed regulations:

- The proposed regulations' hour of service rules should be limited. In particular, we encourage the Agencies to:
  - reinstate the 160-hour rule limiting the counting of hours for periods during which no services are performed;
  - provide that companies need not offer health coverage retroactively for employees who are awarded back pay;
  - not mandate the counting of hours of service for employees after their employment has terminated; and
  - not require the aggregation of hours of service for an employee across all members of a controlled group.
- Liability under section 4980H should not apply to certain groups of employees.
  - Liability should not apply to workers whose employment is a section 530 safe harbor arrangement.
  - Companies should not be subject to liability for an employee for months when coverage is offered to the worker by a temporary staffing firm or a professional employer organization.
  - Companies should not be subject to a penalty before they are notified about the employee's eligibility for subsidized coverage in a state exchange and should be able to avoid the penalty by offering coverage once they are notified.

[1] Notice 2011-36, 2011-21 I.R.B. 792; Notice 2011-73, 2011-40 I.R.B. 474; Notice 2012-17, 2012-9 I.R.B. 430; and Notice 2012-58, 2012-41 I.R.B. 436.

- The coverage of dependents should be amended and clarified.
    - The penalty should not apply if the employer offers coverage to its employees, but not to their dependents. If this is not done, then:
        - The definition of dependent for purposes of liability under 4980H should be limited to biological, adopted, and step children who are eligible to be claimed on the employee's tax return.
        - The definition of dependents for these purposes should not include dependents who are non-U.S. citizens residing outside of the United States.
        - The transition rule for dependents should apply for plans that do not cover children, as well as those that cover some, but not all, categories of children.
        - An offer of appropriate coverage to an employee should satisfy the employer's obligation to offer coverage to the employee's dependents.
- The application and use of measurement, stability, and administrative periods should be clarified.
    - The hours of service of employees who are expected to work consistently on a full-time or part-time (less than 30 hours per week) basis need not be calculated in accordance with the rules applicable to the proposed regulations' measurement, stability and administrative periods.
    - Liability under 4980H does not apply to the former employer of any individual for periods after his or her employment has terminated or for hours worked after an employee commences an unpaid leave of absence or has been furloughed.
    - A variable hour employee's change in status to part-time employment should be recognized in the same fashion as are changes from variable-hour to full-time status.
    - The maximum administrative period should be extended to 3 months instead of 90 days.
    - Employers should be able to: (1) use different measurement and stability periods for acquired employees; and (2) change the measurement and stability periods during the plan year.
    - Companies should be given flexibility when variable-hour employees are transferred to another controlled group member.
    - The special rules for educational institutions should not apply to employees of non-educational institutions.

- Companies should be permitted the option to assume that all employees have earned any wellness incentives available to them under their group health plan when determining the plan's "affordability" for purposes of liability under 4980H(b).

- Additional information should be provided regarding the calculation of increases in the penalties due to inflation.

- The transition rules for fiscal year plans should be expanded.

Overview

The ACA provides that applicable large employers may face one of two penalties under section 4980H of the Internal Revenue Code of 1986.[2]

Under section 4980H(a), 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, provided that at least one full-time employee receives a premium tax credit or cost-sharing reduction through a state exchange.

Under section 4980H(b), if an applicable large employer offers minimum essential coverage, but the coverage is not affordable or does not meet the minimum value standard, 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 through a state exchange. 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.

Detailed Comments

I. Amend the rules on calculating "hours of service".

1. Limits should be placed on the hours of service that are credited for periods during which no services are performed.

The proposed regulations would count hours of service, for purposes of determining which employees are considered full-time, when the employee has more than 160 hours of service for periods during which no duties have been performed, for periods where back pay is awarded, and even after the worker's employment had been terminated. The proposed regulations provide that:

> "The term hour of service means each hour for which an employee is paid, or entitled to payment, for the performance of duties for the employer; and each hour for which an employee is paid, or entitled to payment, by the employer for a period of time during which no duties are performed due to *vacation, holiday, illness, incapacity*

[2] All references are to the Internal Revenue Code of 1986, as amended, unless otherwise noted.

(including disability), layoff, jury duty, military duty or leave of absence…."[3] (Emphasis added).

a. The proposed regulations should follow the Department of Labor's long-standing position that requires the counting of no more than 160 hours for periods for which no duties are performed.

With respect to the 160-hour limit, Department of Labor Regulations[4] reflect the government's long-standing approach that no more than 160 hours of service are to be counted as hours of service for any single continuous period during which the employee was paid, or entitled to payment, but performed no duties. The proposed regulations do not conform to this established rule.

The preamble states that some commenters "requested that the 160-hour limit be removed because they viewed it as restrictive, and expressed concern about the potential negative impact on employees who are on longer paid leaves, such as maternity or paternity leave."[5]

The preamble does not, however, appear to take into account the negative impact the elimination of the limit would have on companies that currently offer generous benefits, including long-term disability benefits.[6] In the case of a long-term disability benefit, it is not uncommon for the benefit to continue to age 65 or beyond. For example, an employee who qualifies for such a benefit at age 45 would be credited with hours of service for section 4980H purposes for 20 years.

Similarly, an employee could be on military duty for a protracted period of time. While such an employee would likely be covered under a military health program (and his family members would be covered under TRICARE), so that they would have minimum essential coverage, the employer would nevertheless still need to make an offer of coverage to avoid exposure under section 4980H(a). Without the limit, many employers may need to curtail long-term disability benefits and other benefits currently provided to employees.

ERIC thus urges that the 160-hour limit apply for purposes of limiting liability under the proposed regulations.

b. Companies should not be required to offer health coverage retroactively to employees who are awarded back pay.

The proposed regulations do not exclude the crediting of service for retroactive awards of back pay.[7] This approach creates an administratively unworkable rule.

While retirement plans may be able to increase an employee's vesting service or credited service, it is not feasible for an employer to offer minimum essential coverage retroactively to an

[3] Prop. Treas. Reg. § 54.4980H-1(a)(2).
[4] 29 C.F.R. § 2530.200b-2(a)(2).
[5] 78 Fed. Reg. 218, 223 (Jan. 2, 2103).
[6] *Id*.
[7] Prop. Treas. Reg. § 54.4980H-1(a)(2).

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.

c. Hours of service should not be counted for employees who no longer work for an employer.

The proposed regulations do not exclude hours of service after an employee terminates employment.[8] As a result, it appears that a former employee would have hours of service counted for payments of accrued vacation, disability pay, separation pay, or other employment based payments.

Shared responsibility liability 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 after the termination.

2. Hours of service for an employee should not be aggregated across all members of a controlled group.

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. [9] No statutory 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).

The proposed regulations, however, provide that "hours of service" are combined for all members of a controlled group. The proposed regulations state, "an hour of service for one applicable large employer member is treated as an hour of service for all other applicable large employer members for all periods during which the applicable large employer members are part of the same group of employers forming an applicable large employer."[10] As a consequence, an employee who works part-time for multiple members of a controlled group could be considered a full-time employee for purposes of assessing liability 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

[8] *Id.*
[9] I.R.C. §§ 4980H(c)(2)(D)(ii), 4980H(c)(2)(C)(i).
[10] *Id*. Prop. Treas. Reg. § 54.4890H-1(a)(21)(ii).

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.[11]

Although employers often must aggregate this information for retirement plan purposes, they can structure their plans so that they need to share data only once per year when they perform testing. The proposed regulations, on the other hand, would require companies to create a highly complex – and costly – systems interface to extract, compile, assimilate, and then communicate information on a monthly basis across multitudes of different entities. When the possibility of needing to coordinate many different measurement and stability periods is entered into the equation, counting hours across applicable large employer members can become a proposition of nightmarish proportion.

To avoid the resulting complexity and administrative challenges, ERIC urges the Agencies to revise the regulations to clearly provide that an employee's hours of service are computed separately for each employer in the controlled group, and that 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.

The vast majority of employers are compliance focused. However, if the Agencies are concerned about potential abuses, they could include anti-abuse provisions to address any employers that were deliberately dividing workers across members of a controlled group to avoid compliance with the rules. At a minimum, ERIC urges the Agencies to clarify that:

- If one applicable large employer member of a controlled group offers minimum essential coverage to an employee, no other applicable large employer member of the same controlled group will be subject to liability under 4980H(a) with respect to that same employee;

- If one applicable large employer member of a controlled group offers minimum essential coverage to an employee, and the minimum essential coverage meets the standards of the proposed regulations with respect to affordability and minimum value, no other applicable large employer member of the same controlled group will be subject to liability under 4980H(b) with respect to that same employee; and

- No more than one applicable large employer member of a controlled group will be liable under section 4980H(a) or (b) with respect to the same employee.

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

II. Liability under section 4980H should be limited for certain groups of employees.

1. The definition of "employee" should be revised to exclude workers whose employment is under a section 530 safe harbor arrangement.

The proposed regulations state that an "employee" means "an individual who is an employee under the common-law standard."[12] According to the preamble:

> "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."[13]

ERIC supports the Agencies' selection of the common law standard for section 4980H purposes. 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"),[14] 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 Agencies have identified twenty factors that serve as a guide for determining whether a worker is a common-law employee,[15] many of the factors are subjective, and the Agencies weigh 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 Agencies 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.[16] 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

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[12] Prop. Treas. Reg. § 54.4980H–1(a)(13).
[13] 78 Fed. Reg. at 221.
[14] Pub. L. No. 95-600, § 530 (1978), *amended by* Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1122 (1996).
[15] Rev. Rul. 87-41, 1987-1 C.B. 296. The Service has 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."
[16] *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.

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 for workers whom it reasonably classifies as independent contractors.

ERIC thus urges the Agencies to revise the definition of "employee" for purposes of section 4980H to exclude workers whose employment qualifies under a section 530 safe harbor arrangement.

2. Companies should be given credit for offers of coverage by leasing organizations.

Because of the proposed regulations' adoption of the common law employee standard, liability under section 4980H can apply unexpectedly to an employer who leases workers through a leasing firm, only to have these workers later adjudged to be common law employees of the client company and not of the leasing organization. Although the preamble raises this issue, it provides only that the final regulations will "contain an anti-abuse rule" in instances where an employer attempts to use a temporary staffing firm to evade section 4980H liability.[17] The preamble cites two abusive practices that involve the hiring of the same employee by one or more staffing firms or by an employer and one or more staffing firms in order to limit hours of service for one employer.

There are, however, many instances in which a client employer - in good faith and for valid business purposes - retains a staffing firm to provide workers, assuming that these are employees of the staffing firm, only to later have them reclassified as employees of the client company. This problem is particularly vexing for large employers that routinely engage hundreds or even thousands of employees to supplement the employer's workforce, to manage periods of peak demand for the company's products or services, or to navigate particularly complex areas with which the staffing firm has developed a particular expertise. Reclassification of workers under these circumstances could result in significant and unanticipated exposure under section 4980H for the client company, even in instances where the staffing company makes an offer of minimum essential coverage.

In addition, most professional employer organizations ("PEO") are structured as co-employment arrangements in which the worker is considered to be an employee simultaneously of the PEO and the client company for most employment and labor law purposes. For tax and benefits purposes, however, co-employment (or more accurately "concurrent employment") is uncommon.[18] In some cases, the PEO will provide group health plan coverage to some or all of the workers placed with a client company. Whether the PEO or the client is the common law employer is not always clear in these instances.[19]

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[17] 78 Fed. Reg. at 230.
[18] *See* Rev. Rul. 66-162, 1966-1 C.B. 234 (citing Rest. 2d Agency, § 226).
[19] *See, e.g.*, Blue Lake Rancheria v. U.S., 653 F. 3d 1112 (9th Cir. 2011) (holding that the PEO owned by a federally-recognized Indian tribe with substantial oversight of workers placed with client companies was the common law employer). *See also*, DOL Adv. Op. 2012-04A and IRS Rev. Proc. 2002-21.

ERIC urges the Agencies to adopt a rule whereby no 4980H(a) liability will be imposed on an employer for months during which minimum essential coverage is offered by a temporary staffing firm or PEO to workers placed with the employer by the temporary staffing firm or PEO employer, and no 4980H(b) liability will be imposed on any such employer for months during which the coverage offered to these workers by the temporary staffing firm or PEO meets the statute's affordability and minimum value standards.

3. The rules should include a failsafe provision that will allow an employer to avoid 4980H liability by offering coverage to employees who would otherwise receive subsidized coverage in a state exchange.

An employer that fails to offer minimum essential coverage to more than 5% of full-time employees potentially faces a substantial penalty with respect to its entire full-time workforce.[20] Although we appreciate that employers are not required to cover an impossible 100% of their full-time employees, we urge the Agencies to adopt two rules that would help to mitigate employer liability in this regard, maximize affordable health plan coverage for employees, and potentially reduce the amount of federal subsidies paid through the exchanges.

First, 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. Second, the regulation should include a failsafe provision that will permit employers to avoid the section 4980H penalty by extending affordable health coverage to an employee within a reasonable period of time after the employer receives notice that the employee is eligible for a premium tax credit or cost-sharing reduction.

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.[21] 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.[22]

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.

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 4980H by reimbursing the employee (or the state exchange, as applicable) for the cost of the coverage that the employee received through

[20] Prop. Treas. Reg. §§ 54.4980H-4, 54.4980H-5.
[21] ACA § 1411(e)(4)(B)(iii).
[22] ACA § 1411(f)(2).

the state exchange during the appeal period, and by offering affordable coverage to the employee prospectively.

ERIC urges the Agencies to amend the proposed regulations to include provisions to clarify that employers will not be assessed a penalty with respect to periods before the employer is notified of the employee's eligibility for subsidized coverage in the exchange and by permitting the employer to avoid 4980H liability by offering coverage to the employee after the employer is notified that the employee is eligible for a premium tax credit or cost-sharing reduction.

III. The rules governing coverage of dependents should be amended and clarified.

1. The shared responsibility penalty should not apply if the employer offers minimum essential coverage to 95% of its full-time employees, but not to their dependents.

Section 4980H liability applies to a company that fails to offer appropriate coverage to full-time employees (and their dependents). However, the penalty is calculated based only on the number of full-time employees. Additionally, the proposed regulations provide that an applicable large employer member will be treated as offering coverage to its full-time employees and their dependents if it offers coverage to all but five percent or, if greater, five, of its full-time employees (the "95% rule"). The proposed regulations also indicate that coverage will not be considered to have been provided to an employee unless coverage is also offered to that employee's dependents.[23]

As a practical matter, however, it is very difficult for a large employer to ensure that it covers every full-time employee, even if the employer provides comprehensive, affordable health coverage to a very high percentage of its full-time work force. For example, a large manufacturing business might own a few small retail outlets that cannot afford to offer group health coverage to the few individuals they employ.

ERIC thus strongly encourages the Agencies to retain the 95% rule in the final regulation. We are concerned, however, that the 95% rule also applies to dependents, so that an employer that satisfies the 95% rule with respect to its full-time employees might still be subject to the section 4980H(a) penalty if the employer fails to offer dependent coverage.

If section 4980H(a) is interpreted in this way, it will increase the administrative burden and expense that large employers must bear without necessarily increasing the number of dependents who have access to affordable health coverage, especially if employers offer coverage to dependents on an employee-pay-all basis.

A rule requiring employers to offer dependent coverage thus not only imposes an unnecessary administrative and cost burden on employers, it can actually harm the low-income employees whom the shared responsibility provisions were designed to help. The reason is that the "affordability" of family coverage under the ACA is measured with respect to the cost of self-

[23] 78 Fed. Reg. at 232.

only coverage in the employer's plan. Thus, many dependents will be ineligible for a premium tax credit or other financial assistance for coverage purchased through an Exchange if they are offered "affordable" coverage by an employer, even though in a real-life sense the cost of this dependent coverage will be financially out of reach for many families. Thus, many families will be priced out of buying health insurance.

ERIC encourages the Agencies to maintain the 95% rule, but not to require coverage of dependents.

2. If coverage of dependents is nonetheless required, the definition of dependents should be narrowed.

Section 4980H generally provides for penalties in the event that an applicable large employer fails to offer to its full-time employees (and their dependents) affordable minimum essential coverage if at least one of its full-time employees receives a premium tax credit or cost-sharing reduction through a state exchange. Section 4980H does not define the term "dependent" for this purpose. The proposed regulations provide that the term dependent means "a child (as defined in section 152(f)(1)) of an employee who has not attained age 26."[24]

The ACA also requires group health plans that provide dependent coverage of children to continue to make such coverage available for an adult child until the child turns 26 years of age.[25] The accompanying regulations jointly issued by the Treasury Department, Department of Health and Human Services and the Department of Labor ("DOL") provide that "a plan or issuer may not define dependent for purposes of eligibility for dependent coverage of children other than in terms of a relationship between the child and the participant."[26] FAQs issued by the DOL state "There is no federal requirement compelling a plan or issuer to offer dependent coverage at this time."[27]

The individual mandate generally requires individuals to pay a penalty if they do not have minimum essential coverage.[28] The individual mandate penalty also is imposed on individuals who are responsible for those dependents defined in section 152.[29]

Thus, the category of those considered to be dependents for purposes of the individual mandate is a much smaller category than those who are considered to be dependents for purposes of the proposed regulations on shared responsibility. While section 152 requires a child to meet financial support and residency criteria, section 152(f)(1) does not. For example, section 152(a) provides that the term "dependent" means a qualifying child or a qualifying relative. In order to be a qualifying child, section 152(c) provides, among other requirements, that the taxpayer must have the same principal place of abode as the child for more than half of the taxable year and

[24] Prop. Treas. Reg. § 54.4980H-1(a)(11).
[25] Pub. L. No. 111–148, § 1251(a)(4) (2010).
[26] Treas. Reg. § 54.9815-2714T(b).
[27] Dep't of Labor, *Young Adults and the Affordable Care Act: Protecting Young Adults and Eliminating Burdens on Businesses and Families Frequently Asked Questions,* Q&A 15, at http://www.dol.gov/ebsa/faqs/faq-dependentcoverage.html.
[28] Pub. L. No. 111–148, at § 5000A(a).
[29] *Id*. at § 5000A(b)(3). *See also*, 78 Fed. Reg. 7314 (Feb. 1, 2013).

have provided more than half of the child's support for the year. The broad definition in the proposed regulations, on the other hand, would apply even if the child is married, lives in another state from the employee, and is not the employee's dependent for tax purposes.

Coverage of dependents can have a significant impact on the cost and administrative burden of a plan. As a result, many plans currently provide coverage to a significantly narrower group of dependents than would be required by the proposed regulations.

The coverage of stepchildren, in particular, is problematic as the employee may have little or no relationship with any stepchildren and little or no knowledge of their place of residence or the availability of other health coverage.

The coverage of foster children is challenging as well, especially for those children who may be under the care of the individual for only a limited amount of time. This could lead to an unwelcome "churning" of health coverage for the child between the employer's plan and public coverage such as Medicaid or CHIP.

ERIC urges the Agencies to narrow the definition of "dependent" to exclude an employee's foster child and any other individual that is not eligible to be claimed as a dependent on the employee's federal tax return. If the Agencies insist on including foster children, ERIC recommends that the offer of coverage be limited to children who are considered foster children for purposes of state law.[30]

3. The proposed regulation should not apply to dependents of non-U.S. citizens residing outside of the United States.

As noted above, the proposed regulations provide that the term dependent means "a child (as defined in section 152(f)(1)) of an employee who has not attained age 26."[31] Such a definition does not exclude dependents who are not citizens or nationals of the United States, even if they do not reside in the United States.

If an employee of a foreign affiliate of an applicable large employer is assigned to work for an applicable large employer member in the United States, the employee's family may or may not accompany the employee to the United States. If the employee's family becomes U.S. residents, the family members may be offered coverage in the U.S. group health plan. However, if the employee's family remains in the employee's home country, it would be logistically difficult and extraordinarily expensive to offer coverage in a U.S. group health plan to individuals who are neither U.S. citizens nor U.S. residents.

[30] As noted above, the ACA also requires group health plans that provide dependent coverage of children to continue to make such coverage available for an adult child until the child turns 26 years of age. We recommend that the interim final regulations related to this "age 26" rule be revised to accommodate the concerns expressed above with respect to the coverage of dependents. We note that the definition of "dependent" under these two provisions need not be identical; separate ACA penalties apply to each.

[31] Prop. Treas. Reg. § 54.4980H-1(a)(11).

ERIC recommends that the Agencies narrow the definition of "dependent" for purposes of liability under 4980H to only those children described in section 152, which would exclude children who are neither citizens nor U.S. residents.

4. The transition rule for dependents should apply to plans that cover some, but not all, children as well as those that do not cover children at all.

The preamble provides transition relief for coverage of dependents. It recognizes that a number of employers currently offer coverage only to their employees and not to dependents. The preamble also notes extending plan coverage to dependents will require substantial revisions to their plans and to their procedures for administration of the plans.[32] As a result, the preamble provides that employers that take steps during the 2014 plan year toward satisfying the dependent coverage requirement will not be liable for any penalty solely due to a failure to offer coverage to the dependents for that plan year.[33]

The proposed regulations define "dependent" as including "a child (as defined in section 152(f)(1)) of an employee who has not attained age 26."[34] This definition includes biological, adopted, step, and foster children.[35]

Many plans currently cover some, but not all of the categories of dependents identified in the regulation. For example, many plans do not cover foster children.

ERIC encourages the Agencies to expand the transition rule for covering dependents to apply to plans that cover some, but not all, children as well as those that do not cover children at all.

5. An offer of appropriate coverage to an employee should satisfy the employer's obligation to offer coverage to the employee's dependents.

Section 4980H liability may apply if a company fails to offer appropriate coverage to full-time employees (and their dependents). The proposed regulations state that the penalties may apply "If an applicable large employer member fails to offer its full-time employees (and their dependents) the opportunity to enroll…"[36]

In employer-sponsored group health plans, companies offer coverage to their employees. Employees may be given the option to elect the type of coverage they wish (such as a choice between an HMO or a PPO and a consumer-directed plan) and whether or not they wish to cover certain family members in addition to themselves.

ERIC requests that the Agencies clarify that an employer that offers appropriate coverage to employees has satisfied the requirement to offer coverage to "full-time employees (and their

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[32] 78 Fed. Reg. at 238.
[33] *Id.*
[34] Prop. Treas. Reg. § 54.4980H-1(a)(11).
[35] I.R.C. § 152(f)(1).
[36] Prop. Treas. Reg. § 54.4980H-4(a); Prop. Treas. Reg. § 54.4980H-5(a).

dependents)" even if an employee declines such coverage for the employee's dependent(s). Additionally, we request that the Agencies clarify that an employee's dependents do not have any independent right to elect coverage, including that they do not have the right to elect a different type of coverage (e.g., HMO or PPO) from the type elected by the employee.

IV. The application and use of measurement, stability, and administrative periods should be clarified.

1. **The Agencies should clarify that the measurement, stability, and administrative period safe harbors are intended for use in calculating the hours worked by variable hour employees.**

The proposed regulations provide rules for determining the full-time status of employees. The proposed regulations state "This section sets forth the rules for determining hours of service and status as a full-time employee for all purposes of section 4980H…"[37] These regulations provide a safe harbor methodology that employers may use to count hours of service over blocks of time up to one year, rather than counting hours on a monthly basis.

Many employers may choose to use this safe harbor methodology to count the hours of service worked by employees whose hours may fluctuate from week to week, so-called "variable hour" employees. In most cases, however, employers will not need to use these safe harbors for those employees who work for them on a regular and consistent basis, either full-time or part-time (fewer than 30 hours per week.)

ERIC requests that the Agencies clarify that companies may use the safe harbor methodology for variable hour workers but may choose not to use this measurement approach for workers whom they reasonably expect to continue as full-time or part-time employees.

2. **Employers should not be subject to 4980H liability for terminated employees and employees on an unpaid leave of absence.**

The proposed regulations provide that when determining whether an employee is a full-time employee for certain purposes, an employer looks back at the standard measurement period for "ongoing employees".[38] The preamble states "The proposed regulations define an ongoing employee as, generally, an employee who has been employed by an employer for at least one standard measurement period."[39] As a result, the term ongoing employee could include terminated employees or those who are no longer receiving payment from the employer because they have been furloughed or are on an unpaid leave of absence.

As similarly requested in Section I.1.c above, ERIC requests that the Agencies confirm that liability under 4980H does not apply to the former employer of any individual for periods after his or her employment has terminated, and an employer may terminate coverage for workers when their employment terminates (subject, of course, to the COBRA rules.)

[37] Prop. Treas. Reg. § 54.4980H-3(a).
[38] Prop. Treas. Reg. § 54.4980H-3(c).
[39] 78 Fed. Reg. at 226.

Likewise, liability under 4980H should not apply to any employer for hours worked by an employee after an employee commences an unpaid leave of absence or has been furloughed, regardless of the employee's status as a full-time employee, a variable-hour employee, or a part-time employee.

3. Changes from variable hour to part-time status for variable employees should be recognized in the same fashion as are changes from variable hour to full-time status.

The proposed regulations provide a special rule that applies when a new variable hour employee has a "change in employment status" during his or her initial measurement period.[40] A "change in employment status" is defined 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."[41]

The preamble offers an example of a new variable hour employee who is promoted during an initial measurement period to a position in which employees are reasonably expected to be employed on average 30 hours of service per week. Where a new variable hour employee has a change in employment status, the look-back measurement methods no longer apply. The employee is instead treated as a full-time employee as of the first day of the fourth month following the change in employment status or if earlier, the date on which he or she would have otherwise achieved full-time status.

ERIC agrees that where there is a material change in employment status for a variable hour employee during the initial measurement period, the look-back measurement period/stability period rules should no longer apply. If, however, an employer is required to treat a variable hour worker as a full-time employee when the worker's status changes from variable hour to full-time, a parallel rule should apply when a variable hour worker's status changes from variable hour to part-time. An employer should not be required to treat a variable hour 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.

4. Employers should be allowed to establish an administrative period of three months instead of just 90 days.

The proposed regulations provide for measurement periods, optional administrative periods, and stability periods.[42] Administrative periods under these rules are limited to a period of 90 days,[43] rather than three months.

Limiting administrative periods to <u>90 days</u> rather than <u>three months</u> will present a significant problem for many plans, and especially the large number of plans on a calendar year basis that also will use a calendar-year stability period. In conjunction with a 12-month stability

[40] Prop. Treas. Reg. § 54.4980H-3(d).
[41] 78 Fed. Reg. at 228.
[42] Prop. Treas. Reg. § 54.4980H-3.
[43] Prop. Treas. Reg. § 54.4980H–1(a)(1).

period, many plans will use a measurement period running from October 1 to September 30. If plans are precluded from establishing more than a 90-day administrative period, the administrative period under these circumstances would end on December 29, rather than December 31, and the plan might need to enroll newly eligible employees before the start of the next plan year.

Forcing a plan to limit an administrative period to 90 days will needlessly complicate recordkeeping for these plans and add to the resulting costs with no offsetting benefit to either plans or employees.

ERIC recommends that employers be permitted to use a three-month period instead of a 90-day period as the maximum length of the administrative period.

5. Employers should be able to use different measurement and stability periods for acquired employees.

The proposed regulations provide that companies need not use the same method for measurement and stability purposes for all non-hourly employees and are allowed to apply different methods for different classifications of non-hourly employees as long as the classifications are reasonable and consistently applied by the applicable large employer member.[44] The proposed regulations also provide that each member of a controlled group is a separate entity for purposes of the measurement and stability periods.[45]

The flexibility provided in the proposed regulations is critical for companies that engage in mergers and acquisitions. An employer that acquires a new business will need to establish special measurement and stability periods for the acquired employees. The rules in the proposed regulations should help preserve existing measurement and stability periods for employees acquired in a stock purchase.

ERIC encourages the Agencies to allow an employer to have the option to treat employees acquired in an asset purchase as newly hired employees, and to apply the employer's initial measurement and stability periods to variable hour and seasonal employees of the acquired business. Employees of the acquired business who were reasonably expected to work full-time could be covered after 90 days, as would be true of other new full-time employees. Because employees acquired in an asset purchase will be eligible for health care continuation coverage under COBRA,[46] they will not have a gap in coverage as a result of this approach.

6. Employers should have the flexibility to change measurement and stability periods.

The proposed regulations provide that employers may change the method of calculating non-hourly employees' hours of service for each calendar year. The preamble includes the following example: "for all non-hourly employees, an employer may use the actual hours worked method

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[44] Prop. Treas. Reg. § 54.4980H-3(c)(1)(v).
[45] 78 Fed. Reg. at 226; Prop. Treas. Reg. § 54.4980H-3(c)(1)(v).
[46] *See* Treas. Reg. § 54.4980B-9, Q&A-6 & Q&A-8(c).

for the calendar year 2014, but may use the days-worked equivalency method for counting hours of service for the calendar year 2015."[47]

ERIC's members are concerned that they will need to work with the concepts in the proposed regulations 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 into an arrangement that proves unworkable in practice.

ERIC urges the Agencies to give employers greater flexibility to change the measurement and stability periods during the first several years in which the employer relies on this method to identify its full-time employees, particularly in cases where: (1) a plan year changes (for example, as the result of the merger of two plans); (2) the employer establishes a new plan or acquires a new plan in a business transaction; and (3) 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).

7. Companies should be given flexibility when variable-hour employees are transferred to another controlled group member.

Under the proposed regulations, employers may use measurement periods, administrative periods, and stability periods to determine whether a variable-hour employee is a full-time employee.[48] The proposed regulations also provide that "[a]n employer is not required to use the same method for all non-hourly employees, and may apply different methods for different classifications of non-hourly employees, provided the classifications are reasonable and consistently applied."[49]

Additionally, the proposed regulations state that "an applicable large employer member is not required to apply the same methods as other applicable large employer members of the same applicable large employer for the same or different classifications of non-hourly employees, provided that in each case the classifications are reasonable and consistently applied by the applicable large employer member."[50] Additionally, different rules apply to new and ongoing employees.[51] The proposed regulations generally define an ongoing employee as an employee who has been employed by an employer for at least one complete standard measurement period.[52]

The proposed regulations do not address what happens when a variable-hour employee is transferred from one member of a controlled group to another member of that controlled group. For example, it is unclear whether the recipient member would be required to track the employee using the original member's measurement period or if these individuals could be designated as a separate class of employees.

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[47] 78 Fed. Reg. at 224.
[48] Prop. Treas. Reg. § 54.4980H-3.
[49] Prop. Treas. Reg. § 54.4980H-3(c)(1)(v).
[50] *Id.*
[51] *Id.*
[52] Prop. Treas. Reg. § 54.4980H-1(a)(27).

ERIC recommends that the Agencies provide members of a controlled group with a grace period after the transfer to compile and transmit any relevant information with respect to transferred employees and provide the members with the flexibility to transition an employee from the measurement period of the original member to the measurement period of the recipient member.

8. The special rules for educational institutions should not apply to employees of non-educational institutions.

The proposed regulations recognize the unique working schedules of employees of educational institutions by providing a special rule 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 purposes of section 4980H.

We urge that the scope of this special rule be limited to employees of educational institutions; employees of non-educational institutions providing services to schools, colleges, and universities, among others, should not fall within the parameters of this special rule. Bus drivers, for example, might be employed by a local bus company or public transit authority; although they may work for an educational institution throughout the school year, they may also work for non-educational institutions during school or academic holidays.

This special rule was designed to accommodate the unusual pattern of employees of educational institutions who do not work during summers or academic holidays, not those who work for non-educational institutions who are not subject to similar constraints. ERIC recommends that the proposed regulations be clarified to expressly exclude from the scope of the special rule those employees of organizations that provide services to educational organizations but are not themselves employees of educational organizations.

V. Miscellaneous

1. Companies should have the option to take into account incentives related to wellness programs when determining affordability.

The proposed regulations provide that an employee may go to a state exchange and potentially receive subsidized coverage if the cost of the self-only premium of the employer's lowest-cost plan is considered unaffordable because it exceeds 9.5% of the employee's household income.[53] The proposed regulations are silent on the impact of wellness program incentives when calculating whether a plan is considered affordable.

The Agencies have recognized the value of wellness programs to employees and—reflecting amendments to HIPAA made by the ACA—have recently increased the incentives that may be provided in conjunction with these programs.[54] Employer workplace wellness programs

[53] Prop. Treas. Reg. § 54.4980H–5(e).
[54] 77 Fed. Reg. 70620 (Nov. 26, 2012).

come in all shapes and sizes. Some cover the employer's entire workforce, while others may apply only to a small group of employees with a chronic health condition. Like the programs themselves, incentive payments also vary widely across companies, both in magnitude and whether they are structured as discounts or penalties.

Because of the considerable variation in programs and incentive payments, coupled with HIPAA privacy concerns and potential difficulty in accessing data on the payments, some employers will wish to take these incentive payments into account when determining affordability of a group health plan, and others will not.

Accordingly, ERIC urges the Agencies to permit employers the option (provided that it is reasonably and consistently applied) to assume that all employees have earned any wellness incentives that are available to them under the plan when determining affordability of the associated group health plan for purposes of liability under 4980H.

2. Additional information should be provided regarding the calculation of increases in the penalties due to inflation.

Section 4980H includes an inflation adjustment for the associated penalties for calendar years after 2014.[55] Section 4980H and the preamble to the proposed regulations indicate that the penalties will be adjusted based on the premium adjustment percentage defined in section 1302(c)(4) of the Act.[56] Section 1302(c)(4) of the Act provides that the premium adjustment percentage is:

> "[T]he percentage (if any) by which the average per capita premium for health insurance coverage in the United States for the preceding calendar year (as estimated by the Secretary no later than October 1 of such preceding calendar year) exceeds such average per capita premium for 2013 (as determined by the Secretary)."

ERIC encourages the Agencies to provide additional information regarding the method that the Secretary will use for determining the average per capita premium for health insurance coverage in the United States.

3. The transition rules for fiscal year plans should be expanded.

The proposed regulations recognize that employers with fiscal year plans should be able to delay their compliance with the requirements of section 4980H until the start of their 2014 fiscal year.[57] However, the proposed regulations unnecessarily restrict the application of this relief, requiring many of these employers to either comply with the requirements of section 4980H at the start of their 2013 fiscal year or to run an off-cycle enrollment as of January 1, 2014.

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[55] I.R.C. § 4980H(c)(5).
[56] *Id*. See also, 78 Fed. Reg. at 233, 235-36.
[57] 78 Fed. Reg. at 236

As these employers deliberately chose fiscal year plans (either because of their business demands at year-end, such as retailers—or operational cycles, such as academic years), this choice should be recognized by expanding the final rules to permit any employer with a fiscal year plan that was in place as of a specified date to delay compliance with the requirements of section 4980H until the start of the 2014 fiscal year.

This delay should apply with respect to any employee of an applicable large employer who is determined to be a full-time employee under the proposed regulations—whether or not covered under the plan or eligible to participate before the start of the plan's 2014 fiscal year.

Alternatively, ERIC urges the Agencies to modify the conditions for relief where an employer has at least one-quarter of its employees covered under one or more fiscal year plans or has offered coverage under those plans to one-third or more of its employees (the "Significant Percentage Relief"). This relief should take into account only those employees of an employer who are determined to be full-time employees under the proposed regulations. It should not take into account all employees when determining the one-quarter or one-third measures, as many employers have very large populations who will never be subject to the 4980H shared responsibility rule. These populations, when sufficient in size, can make it impossible to meet the requirements for the Significant Percentage Relief. As a result, it would force these employers to comply with the proposed regulations either at the start of their 2013 plan year or require them to run an off-cycle open enrollment.

4. Special rules are needed for service contract employees.

[Reserved.]

ERIC appreciates the opportunity to provide comments on the shared responsibility rule in the proposed regulations. If the Agencies have any questions concerning our comments, or if we can be of further assistance, please contact us at (202) 789-1400.

Sincerely,

Scott J. Macey
President & CEO

Gretchen K. Young
Senior Vice President, Health Policy