KEY BENEFIT ADMINISTRATORS

Understanding and Applying the Employer Shared Responsibility Requirements

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Key Benefit Administrators

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ABOUT THIS MANUAL

Caution: Nothing contained in this instruction manual is or should be construed as legal advice for specific cases, and readers are responsible for obtaining such advice from their own legal counsel. This manual is intended for educational and informational purposes only.

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NOTE: CERTAIN TERMS ARE CAPITLIZED THROUGHOUT THIS MANUAL. THOSE CAPITALIZED TERMS REFLECT KEY TERMS UNDER THE 4980H RULES AND YOU SHOULD PAY SPECIAL ATTENTION TO THEM. EACH CAPITALIZED TERM IS SPECIFICALLY DEFINED IN THIS MANUAL.

Introduction

Effective January 1, 2015, each employer who is an "applicable large employer" ("ALE") with 100 or more Full-time Equivalents becomes subject to the employer shared responsibility requirements prescribed in Internal Revenue Code Section 4980H ("4980H Rules"). Under the 4980H Rules, ALEs who fail to offer a Qualifying Full-Time Employee "Qualifying Coverage" for a month will be subject to one of two excise taxes if that Qualifying Full-time Employee also receives a premium subsidy or tax credit with respect to coverage purchased in the Marketplace ("Premium Subsidy"). Qualifying Coverage is the level of coverage required to be offered to avoid the specific excise tax. See Step #3 for a more detailed description of the type of coverage that qualifies as Qualifying Coverage for each excise tax.

Key Point: The 4980H Rules delay the effective date of the excise taxes for ALEs with at least 50 but less than 100 Full-time Equivalents *so long as* the employer satisfies certain other requirements, such as not reducing the workforce after February 9, 2014 solely to avoid the 4980H Rules. See Appendix L for a more detailed discussion of this transition relief for small ALEs. **BUT EVEN IF THIS DELAY UNTIL 2016 APPLIES TO YOU, YOU MUST STILL SATISFY THE REPORTING REQUIREMENTS UNDER CODE SECTION 6056 FOR 2015.**

Applying the 4980H Rules to each employer is a three step process—each of which is detailed in a separate, more detailed section of this manual.

Step #1: <u>Determine whether the employer is an ALE</u>.

The 4980H rules only apply to ALEs. Generally, an ALE is any employer or any combination of employers who are members of the same controlled group who, in the aggregate, employed on average 50 or more Full-time Equivalents during the *preceding calendar year* (although transition relief is available for the 2015 year that allows employers to use 6 months during 2014 to determine ALE status). Full-Time Equivalents include both Full-Time Employees (i.e. employees who average 30 Hours of Service per week in a month) and Full-Time Equivalencies (See Step #2 of this manual for a more detailed definition of "Full-time Equivalencies").

Step #2: <u>If the employer is an ALE, then each ALE Member (i.e. each employer who is a member of the controlled group of employers) must identify Qualifying Full-time Employees</u>.

The 4980H Rules impose one of two excise taxes on ALE Members who fail to offer Qualifying Coverage to Qualifying Full-time Employees for a month if the Qualifying Full-time Employee receives a Premium Subsidy. The 4980H rules identify two different methods from which an ALE Member can choose to identify Qualifying Full-time Employees for a month: the Look Back Measurement Method and the Monthly Measurement Period Method.

Since compliance with 4980H is determined *for each month of the calendar year*, ALE Members who wish to avoid excise taxes must ensure that Qualifying Coverage is offered each month to employees who are Qualifying Full-time Employees for ***<u>that month</u>***. The IRS has provided two different methods for identifying employees who are Qualifying Full-time Employees for a month: the "Look Back

Measurement Period" and the "Monthly Measurement Periods". These are discussed in more detail in the Step #2 Section of this manual.

Step #3: <u>Determine if ALE Member will owe excise taxes based on existing offers of coverage</u>.

An ALE Member can control its excise tax destiny and avoid excise taxes under 4980H for a month only if the employer *offers* coverage through an Eligible Employer Sponsored Plan that is Affordable and provides Minimum Value to 100% of the employer's employees who are Qualifying Full-Time Employees (and their dependent children) *each month.*

If, however, the ALE Member does not satisfy this 100% threshold in a month, the ALE Member could be subject to an excise tax under the 4980H Rules for that month if a Qualifying Full-Time Employee receives a Premium Subsidy in the Marketplace that month. If you do not satisfy the 100% threshold in a month, and a Qualifying Full-time Employee receives a Premium Subsidy for that month, the only question then is which of the two excise taxes imposed under the 4980H Rules will apply. More detail regarding the excise tax determination under the 4980H Rules is provided in Step #3 of this manual.

Moving Forward

Before we move headlong into each Step of the analysis, we want to identify the Key terms you must understand in order to properly apply the Employer Shared Responsibility Rules. Each of the following terms is a Key Term and each is defined in this Manual.

- Applicable large employer or ALE
- ALE Member
- Full-Time Employee
- Qualifying Full-time Employee
- Hours of Service
- Seasonal Employee
- Seasonal Worker
- Variable Hour Employee
- Part-time Employee
- Non-Variable Employee
- Initial Measurement Period
- Standard Measurement Period
- Minimum essential coverage
- Eligible Employer Sponsored Plan
- Affordability or Affordable Coverage
- Minimum value (not the same concept as "minimum essential coverage")
- Qualifying Coverage
- Sledgehammer Tax (also referred to as 4980H(a) Penalty)
- Tackhammer Tax (also referred to as the 4980H(b) penalty)
- Premium Subsidy

Step #1: The Applicable Large Employer Determination

Overview

- Only applicable large employers ("ALEs") are subject to 4980H
- The ALE determination is based on IRS' controlled group rules.
- The ALE determination is based on Full-time Equivalents, which is the sum of both Full-Time Employees and Full-Time Equivalencies, determined in accordance with 4980H.
- Employers who exceed 50 Full-time Equivalents for no more than 4 months/120 days during the year solely because of Seasonal Workers do not qualify as ALEs.
- Employers may use any six consecutive month period in 2014 to determine ALE status for 2015.
- If there is no question that employer is an ALE, then skip this step and proceed immediately to Step #2.

A. Who is an ALE?

An ALE is defined generally in Section 4980H(c) as *any* employer (private, governmental and tax exempt entity) who employed, on average, at least 50 Full-time Equivalents (the sum of Full-Time Employees and Full-time Equivalencies) on business days during the prior calendar year (without regard to any plan year of a plan sponsored by the employer).

Key Point: For 2015, employers may use ANY 6 consecutive period in 2014 to determine ALE status.

B. How do you determine whether an employer is an ALE?

Employers should apply the following principles and rules when making an ALE determination:

- ALE determination is based on controlled group rules. The controlled group rules in the Code are complex and the employer should analyze these rules only with assistance of qualified legal counsel. Nevertheless, it is important to understand the fundamentals. There are three main types of controlled groups: parent/subsidiary, brother/sister, and affiliated service group.

    - A "Parent/Subsidiary controlled group" consists of a parent corporation and one or more subsidiary corporations. A Parent/Subsidiary controlled group exists if the members of the group (other than the common parent) are at least 80 percent owned by other members of the group, and if the common parent owns at least 80 percent of at least one of the member corporations.

    - "Brother/Sister controlled groups" of employers exist where five or fewer shareholders *control* the corporations. For this purpose, control is defined as: (i) ownership of at least 80 percent of the entity, in the aggregate and (ii) ownership of more than 50 percent of the entity, taking into account the stock ownership of each such person only to the extent that such stock ownership is identical with respect to each such corporation.

- An "affiliated service group" is defined generally as a service organization that regularly performs services in certain professional fields, such as health, law, engineering, for the "first service organization" and is generally a shareholder or partner in the first service organization (although there is a limited situation in which the service organization does not have to be a shareholder-see Code Section 414(m)(5)).

Key Point: The 4980H Rules provide virtually no guidance regarding application of the controlled group rules to governmental employers. Until subsequent guidance is issued, governmental employers may apply a reasonable good faith interpretation of the controlled group rules to determine ALE status.

- Identify Full-Time Employees during each month of the *prior calendar year*. A Full-Time Employee is any common law employee of the employer who is employed 30 Hours of Service or more on average each week during a month *in the prior calendar year*. This determination is made consistent with the following fundamental rules:

  - Full-time status for purposes of the ALE Determination is based on the actual *Hours of Service* in the preceding calendar year.

Key Point: Although not clear, IRS officials have informally clarified recently that the monthly equivalency test used to identify "full-time employees" for purposes of compliance with the 4980H rules does NOT apply to the ALE determination. The IRS official informally indicated that you would use 120 hours of service to identify full-time employees for purposes of the ALE determination (despite the fact that some months might have more than 4 weeks).

  - Employers do *not* use the Look Back Measurement Period to determine ALE status.

  - The IRS has prescribed specific *Hours of Service* rules. See appendix A for a summary of the specific Hours of Service rules prescribed by the IRS.

  - Only *common law employees* are considered for purposes of determining which employees qualify as Full-time Equivalents. The IRS utilizes a 20-factor common law employee test to determine whether an individual is a common law employee of an employer. See Appendix B for an overview of the IRS' 20 factor common law employee test.

    - Partners in a partnership and more than 2% shareholders in a subchapter S are not considered common law employees.

    - "Leased employees" as defined in Code Section 414(n) are not considered common law employees of the recipient organization for purposes of the 4980H rules even though such individuals are treated as employees of the recipient organization for other purposes in the Internal Revenue Code (e.g. benefit plan nondiscrimination testing).

Key Point: The final regulations address the application of the 4980H rules to special categories or types

of employees, such as bona fide volunteers, on-call employees, staffing agency employees, and others. See Appendix A for a more detailed discussion of these special categories of employees.

- Determine Full-Time Equivalencies each month in the prior calendar year. The employer must also count Full-Time Equivalencies of the controlled group employer in addition to Full-Time Employees. The number of Full-Time Equivalencies is equal to the total *Hours of Service* in a month for common law employees who are NOT Full-Time Employees (not to exceed 120 for each such employee) divided by 120. The number of Full-Time Equivalencies each month is added to the number of Full-Time Employees to determine applicable large employer status.

- Determine ALE status. The applicable large employer determination is based on the following formula:

a. Determine the total number of Full-Time Employees during each month of the prior calendar year
b. Determine the Full-Time Equivalency amount each month
c. Determine the sum of (a) and (b)
d. Divide c. by 12
If d. is $\geq$ 50, then the employer is an applicable large employer

You must also consider the following fundamental rules when making your determination:

- Fractions for a month are considered in the calculation; however, fractions are rounded down to the *nearest 100th*. For example, if the total number of Full-Time Equivalencies for a month is 30.544, you may round down to 30.54.
- Once the calculation is made for the year, fractions in the final number are rounded DOWN to the *nearest whole number*. For example, an employer with 49.8 Full-Time Employees/equivalencies is treated as having 49 Full-Time Employees.

- Special rule for Employers who exceed 50 Full-time Equivalents due to "Seasonal Workers." There is a special rule regarding employees who qualify as Seasonal Workers. Under the special rule, if the employer exceeds (or, if in the first year of existence, the employer reasonably expects that it will exceed) 50 employees for four calendar months (or 120 days) or less, not necessarily consecutive, and the excess over 50 for those four months (or 120 days) are Seasonal Workers, then the employer is not an ALE.

A Seasonal worker is generally defined as an employee who performs services on a seasonal basis, as defined by the Secretary of Labor, including but not limited to employees covered by 29 C.F.R. 500.20(s)(1) and retail workers employed exclusively during holiday seasons. The final regulations indicate that employers may apply a good faith reasonable interpretation of the term Seasonal Worker as well as 29 C.F.R. 500.20(s)(1), including as applied by analogy to workers and employment positions similar to those described in 29 C.F.R. 500.20(s)(1).

Key Point: Don't confuse Seasonal Worker with Seasonal Employee; these terms are different and have different applications. Seasonal Worker is a term related solely to the ALE determination and Seasonal

Employee is a term related to the look back Measurement Period used to identify Full-Time Employees for purpose of compliance with 4980H. The term Seasonal Worker appears to be narrower in scope than Seasonal Employee (as defined in the final regulations) with respect to the type of employee that could qualify as seasonal; however, a Seasonal Worker's seasonal employment could be longer than a Seasonal Employee's employment. For a more detailed discussion regarding Seasonal Employees, see Step 3 of this manual.

If, after performing the analysis above, you have determined that the employer is NOT an ALE,—**the 4980H Rules do not apply to the employer**.

If, however, the employer is an ALE, proceed to Step #2.

Step #2: Identifying Qualifying Full-Time Employees

Overview

- Each ALE Member is independently responsible for identifying its Qualifying Full-Time Employees (as defined by 4980H) for purposes of reporting and assessment of excise taxes (if any).
- The Full-Time Employee determination is based on specific Hours of Service rules, which includes certain paid leaves of absence defined in 29 C.F.R. 2530.200b-2(a). See Appendix A for a more detailed overview of the Hours of Service rules.
- ALE Members may be subject to an excise tax under 4980H for a month if Qualifying Coverage is not offered to a Qualifying Full-time Employee during a month in which the Qualifying Full-time Employee receives a Premium Subsidy in the Marketplace.
- The 4980H Rules identify two methods for identifying Qualifying Full-Time Employees: the Look Back Measurement Period Method and the Monthly Measurement Period Method (collectively, the Full-time Employee Determination Method).
- Generally, the ALE Member must apply the same Full-Time Employee Determination Method to *every* employee within one of the distinguishable classes (e.g. salaried or hourly).
- The application of the Look Back Measurement Period Method will vary depending on whether the employee is a new employee or an Ongoing Employee.

An ALE Member may be subject to excise taxes under 4980H for each month that the ALE Member fails to offer qualifying coverage to a Qualifying Full-Time Employee if that Qualifying Full-Time Employee also receives a Premium Subsidy in the Marketplace. Thus, each ALE Member must identify Qualifying Full-time Employees each month. The IRS has identified two methods for identifying Qualifying Full-Time Employees: the Look Back Measurement Period Method and the Monthly Measurement Period Method.

A. General Rules for Identifying Qualifying Full-time Employees

Both methods for identifying full-time employees are subject to the following fundamental principles:

1. Qualifying Full-Time Employee: Generally, a Qualifying Full-time Employee is an ALE Member's common law employee with respect to whom the failure to offer Qualifying Coverage in a month could trigger excise taxes for the ALE Member if that employee receives a Premium Subsidy. An employee will be a Qualifying Full-time Employee in the following situations (depending the on specific method adopted by the ALE Member):

   Look Back Measurement Period Method

   - If a new employee to whom the Initial Measurement Period applies (as described below) averages 130 Hours of Service or more each month during that Initial Measurement Period, then the employee will be a Qualifying Employee during each month of the Stability Period that follows, regardless of the employee's Hours of Service during that Stability Period.

Practice Pointer-Are ALE Members subject to excise taxes during the Initial Measurement Period? Generally, the answer is no. However, the Initial Measurement Period for an employee who becomes a Qualifying Full-time Employee is a Limited Non-Assessment Period. Consequently, excise taxes could apply for each month during the Initial Measurement Period that the Qualifying Full-time Employee had 130 Hours of Service or more IF coverage through an Eligible Employer Sponsored Plan that provides minimum value is NOT offered to the Qualifying Full-time Employee by the first day of the applicable Stability Period.

- For employees to whom the Initial Measurement Period does NOT apply (e.g. Non-Variable Employees), the employee is a Qualifying Full-time Employee every month that the employee has 130 Hours of Service; however, no excise taxes will apply in certain months that Qualifying Coverage is not offered to the extent that such months are part of a Limited Non-Assessment Period.

- All "Ongoing Employees" (as described below) who average 130 Hours of Service or more per month during the Standard Measurement Period will be a Qualifying Employee during each month of the following Stability Period. Unlike the Initial Measurement Period for new employees, the Standard Measurement Period is NOT a Limited Non-Assessment Period.

Monthly Measurement Period

- All employees who have 130 Hours of Service or more (unless the Weekly Method described below is used); however, no excise taxes will apply in certain months that Qualifying Coverage is not offered to the extent that such months are part of a Limited Non-Assessment Period.

2. Hours of Service: 4980H prescribes specific *Hours of Service* rules. Generally, an hour of service includes any periods for which the employee is paid or entitled to payment for services performed as well as certain periods during which the employee is paid or entitled to payment even though the employee is not performing services. For more details on the Hours of Service rules, see Appendix A.

3. Common Law Employee: All common law employees of the employer are considered when you identify Qualifying Full-Time Employees. The IRS has prescribed a 20-factor common law employee test. For more details on the common law employee test, see Appendix B. NOTE: The manner in which an ALE Member classifies an employee isnt relevant to the 4980H rules (except in the case of seasonal employees). The common law analysis focuses on who has the right to control the manner in which services are performed, regardless of whether that right is exercised or not—not the manner in which the employee is classified by the employer. In addition, Seasonal Employees must also be considered in the analysis if they are common law employees of the ALE Member; however, a special rule applies to Seasonal Employees.

Once the ALE Member understands these fundamental terms and concepts, the ALE Member must then decide which method is best under the circumstances.

Practice Pointer: The final regulations clarify the application of the 4980H Rules to a number of special

employees, such as:

- Bona fide volunteers
- Certain clergy
- Students
- Interns
- Adjunct professors
- On call employees

See Appendix A for a more detailed discussion regarding these special employees.

B. The Look Back Measurement Period Method-General Operating Principles

The Look Back Measurement Period Method generally operates according to the following, fundamental principles:

- ALE Members will establish an "Initial Measurement Period" for new employees during which the Hours of Service of a new Variable Hour, Seasonal Employee, or Part-Time Employee are measured over that Initial Measurement Period. Non-Variable Employees (as defined herein) will be subject to the Monthly Measurement Period Method until the Stability Period following the Standard Measurement Period.

- The employer will also establish a Standard Measurement Period for Ongoing Employees during which each Ongoing Employee's aggregate Hours of Service are collected.

Practice Pointer: ALE Members who adopt the Look Back Measurement Period Method must establish procedures for new employees and procedures for Ongoing Employees.

- During an Administrative Period that follows the applicable Measurement Period, the ALE Member will identify the employees that averaged 130 Hours of Service or more per month during the applicable Measurement Period.

- Each employee who averaged 130 Hours of Service or more per month during the applicable Measurement Period will be a Qualifying Full-time Employee during each month of the following Stability Period.

- The manner in which the Look Back Measurement Period Method is applied differs slightly depending on whether the employee is a *new employee* or an *Ongoing Employee*.

    - Ongoing Employees are defined as employees who have been employed for one entire *Standard Measurement Period and following Administrative Period*, which is the static Measurement Period chosen by the ALE Member to measure the Hours of Service for existing employees.

Practice Pointer: All employees in a distinguishable class to which the ALE Member applies the Look

Back Measurement Period are subject to a Standard Measurement Period. The Variable and Non-Variable distinction applicable to new employees does NOT apply to Ongoing Employees.

- There are four types of "new employees" (i.e. employees who are not Ongoing Employees): Non-Variable, Variable, Part-time and Seasonal Employees. The Look Back Measurement Period Method is applied differently to Variable/Part-time/Seasonal Employees than it is to Non-Variable Employees.

The following provides a roadmap for implementing the Look Back Measurement Period Method for both Ongoing Employees and new employees. We begin with Ongoing Employees.

C. Application of the Look Back Measurement Period Method to "Ongoing Employees

As noted above, an Ongoing Employee is an employee who is employed by the employer for an entire Standard Measurement Period. The following summarizes the application of the Look Back Measurement Period Method to Ongoing Employees:

- Establish the Standard Measurement Period. The Standard Measurement Period is subject to the following requirements:

  - *Duration of Standard Measurement Period*. The Standard Measurement Period must be no less than three months and generally no more than 12 months. See "Additional Considerations" below for a more detailed discussion regarding additional factors to consider when establishing the Standard Measurement Period.

    - *Payroll Period:* For payroll periods that are one week, two weeks or semi-monthly in duration, an employer is permitted to treat as a Standard Measurement Period a period that ends on the last of the payroll period preceding the payroll period that includes the date that would otherwise be the last day of the Standard Measurement Period so long as the first day of the Standard Measurement Period begins on the first day of the payroll period that includes the date that would otherwise be the first day of the Standard Measurement Period. Likewise, an ALE Member may treat as a Standard Measurement Period a period that begins on the first day of the payroll period that includes the date that would otherwise be the first day of the Standard Measurement Period so long as the Standard Measurement Period ends on the last of the payroll period that includes the date that would otherwise be the last day of the Measurement Period.

  - *Identify Breaks in Service*. An employee who has a period during which the employee has no Hours of Service for 13 full weeks (26 full weeks for employees of an "Educational Organization") or longer is treated as having a Break in Service. Thus, an employee who resumes Hours of Service after 13/26 full weeks is considered a new employee whereas an employee who resumes Hours of Service after less than 13/26 full weeks is considered a Continuous Employee for purposes of the 4980H Rules. There is also a rule of parity that

treats as a Break in Service as any period with no Hours of Service that is at least four weeks in duration and greater than the prior period of employment (determined after applying the special rule for Special Unpaid Leaves and Employment Breaks). See Appendix C for examples that illustrate the application of the Break in Service rules.

- *Averaging Rules for Special Unpaid Leaves and Employment Breaks*. There are special averaging rules for Continous Employees who take an unpaid leave of absence that is a Special Unpaid Leave or who experience an "Employment Break" (if the employer is an Educational Organization). See Appendix D for a more detailed overview of the special for Special Unpaid Leaves and Employment Breaks.

- *Different Standard Measurement Periods may apply to each distinguishable class of employees*. ALE Members may vary the Standard Measurement Period for each of the following distinguishable classes of employees:

    - Employees subject to a collectively bargained agreement and employees not subject to a collectively bargained agreement
    - Each group of collectively bargained employees covered by a different collectively bargained agreement
    - Salaried
    - Hourly employees
    - Employees located in different states

Practice Pointer: Can the ALE Member apply the Look Back Measurement Period Method to some but not all Ongoing Employees in the same distinguishable class? NO!!!!!

- *Impact of employment status change*. A change in positions during a Standard Measurement Period generally has no impact on the application of the Standard Measurement Period to that employee. See Appendix C for examples on applying the look back Measurement Period to employees.

- Establish a Stability Period for Qualifying Full-Time Employees. The employer must establish a Stability Period following the Standard Measurement Period (and any associated administrative period). The Stability Period for employees who averaged 30 Hours of Service or more per week over the Standard Measurement Period is subject to the following fundamental requirements:

    - *Status during Stability Period*. The employee is a Qualifying Full-time Employee for each month of the Stability Period (or until the employee's employment is terminated, whichever is earlier)—regardless of the actual Hours of Service during such month. If the employee takes an unpaid leave of absence, the Qualifying Full-time Employee must remain eligible for Qualifying Coverage during the unpaid leave of absence to the extent employed by the employer. If, however, the Qualifying Full-time Employee terminates employment, coverage may be terminated without risk of excise taxes under the 4980H Rules. If the Qualifying Full-time Employee resumes Hours of Services as a Continuous

Employee, the Qualifying Full-time Employee must be offered coverage (to the extent previously elected and then lost during the period with no Hours of Service) no later than the 1st day of the month following the date Hours of Service resume. If the Qualifying Full-time Employee resumes Hours of Service after experiencing a Break in Service (as defined above), then the ALE Member may treat the employee as a new employee upon resumption of Hours of Service. See Appendix C for examples that illustrate this rule.

- *Duration of Stability Period for Qualifying Full-Time Employees*. The Stability Period following the Standard Measurement Period for Qualifying Full-time Employees must be at least six months in duration, and no shorter in duration than the Standard Measurement Period and it must begin immediately following the Standard Measurement Period and any applicable Administrative Period. See "Additional Considerations" below for a more detailed discussion on the duration of the Stability Period.

- Establish a Stability Period for employees who do not have the requisite Hours of Service during the Standard Measurement Period to be a Qualifying Full-time Employee. The Stability Period for employees who do not have the requisite Hours of Service over the Standard Measurement Period is subject to the following requirement:

  - *Duration of Stability Period for employees who are NOT Qualifying Full-time Employees*. The Stability Period for such an employee cannot be longer than the Standard Measurement Period (even if the Standard Measurement Period is less than six months).

  - *Status during Stability Period*. If an employee does not average the requisite Hours of Service during the applicable Measurement Period, then he or she is not a Qualifying Full-time Employee during each month of the following Stability Period (i.e., there is no penalty for failing to offer coverage during that Stability Period)—regardless of the employee's actual Hours of Service during that Stability Period.

- Establish an Administrative Period. The Administrative Period is the period during which employees are identified as full-time or not based on their Hours of Service during the preceding Measurement Period and, if identified as full-time, offered the opportunity to enroll. The administrative period following the Standard Measurement Period may not exceed 90 calendar days.

- Additional Considerations. In light of the above mentioned fundamental rules, ALE Members should consider the following factors in establishing their safe harbor and Measurement Periods:

  - *Equal measurement and Stability Periods*. ALE Members should consider establishing a Standard Measurement Period that is the same duration as the Stability Period and that ends near the start of the annual enrollment period for the health plan. Since the Stability Period for employees who are NOT full-time must be no shorter in duration than the Standard Measurement Period, an employer who implements a Measurement Period that is shorter in duration than the Stability Period will have to implement two sets of rules—

one for employees who are considered to be full-time and another for employees who are not considered to be full-time.

- *Transition relief for 2015:* Notwithstanding the general rule above, ALE Members may establish a Standard Measurement Period in 2014 that is at least 6 months in duration and a 12 month Stability Period for all Ongoing Employees (including non-full-time) beginning in 2015 so long as the Standard Measurement Period begins no later than July 1, 2014.

See Appendix C for an illustration of look back measurement method for Ongoing Employees, including the impact of cafeteria plan rules on employee's elections for a Stability Period.

D. Application of the Look Back Measurement Period Method to "New Employees

The application of the Look Back Measurement Period Method to new employees differs slightly than the application of the Look Back Measurement Period rules to Ongoing Employees. The following describes the fundamental requirements of the Look Back Measurement Period method as applied to new employees:

- Determine which of the four "buckets" the employee fits based on the applicable facts and circumstances on the date of hire: The 4980H Rules identify four different types (or "buckets") of new employees, each of which is described below. The rules vary depending on which bucket the employee fits. Thus, each ALE Member must determine which bucket a new employee fits in order to know the specific rule to apply.

  - *Non-variable full-time.* A Non-Variable Hour new employee is an employee for whom it can be determined by the ALE Member on the start date that the employee is reasonably expected to average 30 Hours of Service or more per week during each month employed, *regardless of the duration of employment*. The determination whether an employee is a Non-Variable Employee (or not) is reasonable is based on the facts and circumstances that exist at the time of employment. The final regulations provide an inclusive list of factors, such as:

    - Whether the employee is replacing an employee who is or was full-time;
    - The extent to which Hours of Service for Ongoing Employees in comparable positions vary above or below the 30 Hours of Service threshold during recent Measurement Periods;
    - Whether the job was advertised as full-time or not.

  No single factor is determinative. The duration of employment is *not* a factor. Thus, if the ALE Member only expects the employee to be employed for 5 months, but the ALE Member reasonably expects the employee to average 30 Hours of Service per week during those 5 months, the employee is generally non-variable.

Practice Pointer: AN EMPLOYEE WHO QUALIFIES AS A SEASONAL EMPLOYEE IS NOT CONSIDERED A NON-VARIABLE EMPLOYEE, even if the ALE Member determines at the start date that the employee is reasonably expected to average 30 Hours of Service per week during each month the employee is employed. The 4980H Rules allow ALE Members who use the Look Back Measurement Period Method to treat employees who qualify as Seasonal Employees the same as a "Variable Employee. See below for more details on who qualifies as a Seasonal Employee.

- *Variable Employee*: An employee is a Variable Employee if, at the start date, the ALE Member cannot make a determination that the employee is reasonably expected to average 30 Hours of Service each month employed because the employee's hours will vary or are otherwise uncertain. The ALE Member would use the same factors described above with respect to non-variable to determine whether the employee was variable or non-variable.

- *Seasonal Employees*: Employees that qualify as "Seasonal Employees" are treated as Variable Employees for purpose of the look back Measurement Period, even if the ALE Member can make a determination on the hire date that the employee is reasonably expected to average 30 Hours of Service or more per week for each month employed during the Initial Measurement Period. An employee qualifies as a "Seasonal Employee" if the following requirements are satisfied: (i) the employee is hired into a position for which the customary employment is 6 months or less (although it can be longer under unusual circumstances) and (ii) the period of employment customarily begins during the same date each calendar year. See Appendix C for a more detailed application of the special Seasonal Employee rule.

- *Part-time employee*. A Part-Time Employee is an employee for whom the ALE Member can make a determination on the start date that the employee is not reasonably expected to average 30 Hours of Service for each month employed during the Standard Measurement Period. During an Initial Measurement Period, Part-Time Employees are subject to the same rules as variable employees.

- Apply the Monthly Measurement Period Method to Non-Variable Employees. Unlike variable/seasonal/Part-Time Employees, ALE Members will apply the Monthly Measurement Period Method approach to a Non-Variable Employee until the start of the Stability Period following the first Standard Measurement Period for that employee. Whether a non-variable employee is a Qualifying Full-time Employee each month depends on the employee's Hours of Service for those months and whether the month is part of a Limited Non-Assessment Period. The following Limited Non-Assessment Periods apply to a Non-Variable Employee: (i) the first partial month of employment; (ii) any of the first three full-calendar months following the date of hire provided that (A) the employee is otherwise eligible for coverage under a plan and is not offered coverage during any such month due solely to a waiting period (ii) coverage providing minimum value is offered to the Qualifying Full-time Employee (if still employed) by no later than the 1st day of the 4th full calendar month following the employee's start date.

- Establish an Initial Measurement Period for new Variable, Seasonal, and Part-Time Employees: If an employee is a Variable, Seasonal, or Part-time Employee (as defined above), the ALE Member may apply an Initial Measurement Period to determine if the employee is a Qualifying Full-time Employee for the following Stability Period.

  - *Duration of Initial Measurement Period*. The Initial Measurement Period must be no less than three months and generally no more than 12 months. It may begin on the date of hire or the first day of the month following the date of hire; however, any delay in the Initial Measurement Period must be factored into the duration of the Administrative Period (which cannot exceed 90 calendar days in the aggregate). Also, the duration of the Initial Measurement Period is impacted directly by the desired duration of the Administrative Period. See "Additional Considerations" below for a more detailed discussion on establishing the Initial Measurement Period.

    - *Payroll periods:* For payroll periods that are one week, two weeks or semi-monthly in duration, an employer is permitted to treat as an Initial Measurement Period a period that ends on the last of the payroll period preceding the payroll period that includes the date that would otherwise be the last day of the Initial Measurement Period so long as the first day of the Initial Measurement Period beings on the first day of the payroll period that includes the date that would otherwise be the first day of the Initial Measurement Period. Likewise, an ALE Member may treat as an Initial Measurement Period a period that begins on the first day of the payroll period that includes the date that would otherwise be the first day of the Initial Measurement Period so long as the Initial Measurement Period ends on the last of the payroll period that includes the date that would otherwise be the last day of the Initial Measurement Period.

  - *Identify Breaks in Service*. An employee who has a period during which the employee has no Hours of Service for at least 13 full weeks or longer (26 weeks or longer for employees of Educational Organization) is treated as having a Break in Service. An employee who resumes Hours of Service after a Break in Service is considered a new employee whereas an employee who does not experience a Break in Service is considered a Continuous Employee. There is also a rule of parity that treats as a Break in Service as any period with no Hours of Service that is at least four weeks in duration and greater than the prior period of employment (determined after applying the special rule for Special Unpaid Leaves and Employment Breaks). See Appendix C for examples that illustrate the Break in Service rules.

  - *Averaging Rules for Special Unpaid Leaves and Employment Breaks*. There are special averaging rules for Continuous Employees whose Break In Service during the Measurement Period was due in whole or part to a "special unpaid leave" or to "employment breaks" (if the employer is an Educational Organization). See Appendix D for a more detailed overview of the special averaging rules for special unpaid leaves.

- *Different* Measurement *Periods for different classes of distinguishable employees.* Employers may vary the Initial Measurement Period among the distinguishable class of employees in the same manner as the Standard Measurement Period.

- *Changes in employment status during Initial Measurement Period.* If a Variable/Seasonal/Part-time Employee experiences a change in employment status before the end of the Initial Measurement Period such that the employee, if hired into that new position, would reasonably be expected to be employed on average at least 30 Hours of Service per week, then a Limited Non-Assessment Period will apply with respect to (i) any full-calendar month that the employee is otherwise eligible for coverage providing minimum value but is not offered coverage due solely to a waiting period (not to exceed 3 full calendar months) and (ii) the employee is offered coverage providing minimum value by no later than the 1st day of the 4th full calendar month following the employment status change or, if earlier the 1st day of the Stability Period (if the employee averaged 30 Hours of Service or more per week during the Initial Measurement Period).

- Establish a Stability Period for employees who averaged the requisite Hours of Service during the Initial Measurement Period. The employer must establish a Stability Period following the Initial Measurement Period (and any associated administrative period). The Stability Period for employees who averaged the requisite Hours of Service during the Initial Measurement Period is subject to the following fundamental requirements:

  - *Qualifying Full-time Employees are in a Limited Non-Assessment Period during the Initial Measurement Period.* Consequently, Qualifying Full-time Employees who are not offered coverage by the first day of the Stability Period could trigger excise taxes for each month of the Qualifying Full-time Employee's Initial Measurement Period that the employee had 130 Hours of Service or more.

  - *Status during Stability Period. Status during Stability Period.* The employee is a Qualifying Full-time Employee for each month of the Stability Period (or until the employee's employment is terminated, whichever is earlier)—regardless of the actual Hours of Service during such month. If the employee takes an unpaid leave of absence, the Qualifying Full-time Employee must remain eligible for Qualifying Coverage during the unpaid leave of absence to the extent employed by the employer. If, however, the Qualifying Full-time Employee terminates employment, coverage may be terminated without risk of excise taxes under the 4980H Rules. If the Qualifying Full-time Employee resumes Hours of Services as a Continuous Employee, the Qualifying Full-time Employee must be offered coverage (to the extent previously elected and then lost during the period with no Hours of Service) no later than the 1st day of the month following the date Hours of Service resume. If the Qualifying Full-time Employee resumes Hours of Service after experiencing a Break in Service (as defined above), then the ALE Member may treat the employee as a new employee upon resumption of Hours of Service. See Appendix C for examples that illustrate this rule.

- *Duration of Stability Period for Qualifying Full-Time Employees*. The Stability Period following the Initial Measurement Period for such employees must be at least six months in duration, no shorter in duration than the Standard Measurement Period and it must begin immediately following the Standard Measurement Period and any applicable Administrative Period. See "Additional Considerations" below for a more detailed discussion on the duration of the Stability Period.

- Establish a Stability Period for employees determined to NOT be full-time during the Initial Measurement Period. The Stability Period for employees who are determined not to be full-time during the Initial Measurement Period is subject to the following fundamental requirements:

  - *Status during Stability Period*. If an employee does not have the requisite Hours of Service over the Initial Measurement Period, then he or she is not a Qualifying Full-Time Employee during any months of the Stability Period that follows the Initial Measurement Period (and Administrative Period).

  - *Duration of Stability Period for employees who are NOT Qualifying Full-time Employees*. The Stability Period for such an employee cannot be more than one month longer in duration than the Initial Measurement Period.

  - *Transition from variable/seasonal/part-time to ongoing employee*. If there is a gap between the end of the Stability Period following the Initial Measurement Period and the date the Stability Period following the Standard Measurement Period begins, the treatment afforded to the employee during the Stability Period following the Initial Measurement Period is continued until the start of the next Stability Period. See Appendix C for an example that illustrates this rule.

- Establish an administrative period. The Administrative Period is the period during which employees are identified as Qualifying Full-time Employees (or not) based on their Hours of Service during the Initial Measurement Period and, if identified as a Qualifying Full-time Employee, offered the opportunity to enroll for the Stability Period. The Administrative Period following the Initial Measurement Period may not exceed 90 calendar days. However the duration of the Initial Measurement Period and the following administrative period cannot extend beyond the last day of the month that begins on or after the employee's anniversary date.

- Additional Considerations: In light of the above mentioned fundamental rules, employers should consider the following factors in establishing their Initial Measurement and following Stability Periods:

  - *Preferred Measurement Period duration*. ALE Members should consider establishing an Initial Measurement Period that is no less than 11 months. Since the Stability Period for employees who are Qualifying Full-time Employees must be the same as the Stability Period for Ongoing Employees who are Qualifying Full-time Employees, and the Stability Period for employees who do not average the requisite Hours of Service during

the Initial Measurement Period must be no more than 1 month longer in duration than the Initial Measurement Period, an employer who implements an Initial Measurement Period that is shorter than 11 months will have to implement two sets of rules—one for employees who are considered to be full-time and another for employees who are not considered to be full-time.

See Appendix C for an illustration of the Look Back Measurement Period Method for new employees.

E. The Monthly Measurement Period Method

If the ALE Member does not use the Look Back Measurement Period Method, then the ALE Member may use the Monthly Measurement Period Method. The Monthly Measurement Period Method is subject to the following fundamental requirements:

- Identifying Qualifying Full-time Employees: All employees who have 130 Hours of Service (unless using the Weeks Approach defined below) in a month will be a Qualifying Full-time Employee for such month; however, the ALE Member may avoid excises taxes for months that Qualifying Coverage is not offered unless that month is part of a Limited Non-Assessment Period.

- Continuous employees are subject to a one-time Limited Non-Assessment Period. The following Limited Non-Assessment Periods apply to an employee under the Monthly Measurement Period Method: (i) the first partial month of employment; (ii) any of the first three full-calendar months beginning with the month that the employee first has the requisite Hours of Service provided that (A) the employee is otherwise eligible for coverage under a plan and is not offered coverage during any such month due solely to a waiting period (ii) coverage providing minimum value is offered to the Qualifying Full-time Employee (if still employed) by no later than the 1st day of the 4th full calendar month beginning with the first full-calendar month that the employee first had the requisite Hours of Service.

    - *The Limited Non-Assessment Period only applies once to any Continuous Employee*. If the employee has a period of less than 13 weeks with no Hours of Service (26 weeks if the entity is an Educational Organization), and then resumes service, the Limited Non-Assessment Period does not apply again and the ALE Member will be subject to excise taxes for any month that the Qualifying Full-time Employee is not offered qualifying coverage by the ALE Member and also receives a Premium Subsidy in the Marketplace.

See Appendix C for examples that illustrate the Monthly Measurement Period Method and the application of the Limited Non-Assessment Period.

- ALE Members may use a "weeks" approach. The ALE Member may determine full-time status for a calendar month based on Hours of Service over a period that (i) begins on the first day of the week that includes the first day of the calendar month so long as the period does not include the

week in which falls the last day of the calendar month (unless that week ends with the last day of the month) or (ii) begins on the first day of the week immediately subsequent to the week that includes the first day of the calendar month so long as it includes the week in which the last day of the month falls. Under this method, the Hours of Service limit for months with 4 weeks is 120 hours and 150 for months with 5 weeks.

- Special rules apply when an employee changes positions to which different methods apply. The following rules apply when an employee changes status from a position to which one method applies to a position to which another method applies.

  - From look back to monthly: If an employee changes positions during a Stability Period, the employer will continue to treat the employee according to the status (full-time or not) the employee maintained prior to the change in employment status for the remainder of that Stability Period even though the employee is now in a position to which the Monthly Measurement Period applies. For the Stability Period that follows the Measurement Period in which the change in status occurred, the employee must be treated as full-time throughout the Stability Period following that Measurement Period in which the change in status occurred if the employee averaged 30 Hours of Service or more per week during that Measurement Period both before and after the change. Otherwise, if the employee did not average the requisite Hours of Service during that Measurement Period that the change in status occurred, the employee would only qualify as a Full-time Employee for each calendar month that the employee averaged the requisite Hours of Service.

  - From monthly to look back: If an employee changes positions during the Stability Period for the new position, then the ALE Member would continue to apply the Monthly Measurement Period to that employee, even though the employee is now in a position to which the look back Measurement Period applies, unless the employee's Hours of Service prior to the change would have resulted in the employee being treated as a Full-Time Employee during that Stability Period in which the change occurred; in that case, the employee must be treated as a full-time for the remainder of that Stability Period. For the Stability Period that follows the Measurement Period in which the change in status occurred, the employee will continue to qualify as a Full-Time Employee throughout the Stability Period following that Measurement Period in which the change in status occurred if the employee averaged 30 Hours of Service or more per week during that Measurement Period both before and after the change. Otherwise, if the employee did not average the requisite Hours of Service during that Measurement Period that the change in status occurred, the employee would only be a Qualifying Full-time Employee for each calendar month that the employee had the requisite Hours of Service.

Step #3. Determine whether excise taxes will be owed

Step #3 Overview:

- Determine whether an ALE Member offers coverage during a month through an Eligible Employer Sponsored Plan to all but 5% (or if greater, 5) of its Qualifying Full-Time Employees for that month. In other words, the ALE Member must offer coverage through an Eligible Employer Sponsored Plan to 95% of its Full-Time Employees to whom qualifying coverage must be offered (for 2015, the applicable percentage is 70%). If it does, then the ALE Member is not liable for the Sledgehammer Tax (but may be liable for the Tackhammer Tax).
- Determine whether an "effective" offer of coverage is made to a Qualifying Full-time Employee. Generally, an offer is effective if the following conditions are satisfied:
  - The offer of coverage must include an offer of coverage for a dependent child. A dependent child is defined as a natural or adopted child or child placed with the employee for adoption. Interestingly the final regulations exclude step children and foster children from the definition of dependent child for purposes of the 4980H Rules.
  - Coverage offered must be effective for the entire month except in certain limited situations.
  - The employee has a reasonable opportunity to elect or decline coverage at least once every plan year, which is a defined as a 12 month period. No opportunity to decline is required if the ALE Member offers coverage to the employee (and the employee's dependent children) that is affordable and provides minimum value.
- Determine whether any coverage option through an Eligible Employer Sponsored Plan that also provides minimum value is "affordable". 4980H rules provide three different safe harbor methods for making the affordability determination. The final regulations made minor changes to the affordability safe harbors.
- Determine whether the coverage offered provides minimum value. A plan provides minimum value if it pays for 60% of the "allowed costs", which are based on essential health benefits.

A. Determining Excise Tax Liability-Fundamental Principles

Once Qualifying Full-Time Employees are identified, the ALE Member must assess its current offering to determine whether it would be subject to any excise taxes. ALE Members should remember the following fundamental rules when analyzing what, if any, excise taxes it may owe:

- As a threshold matter, ALE Members must "offer" coverage according to the 4980H Rules in order to avoid excise taxes. If the opportunity to elect coverage is provided but it does not qualify as an "offer" under the 4980H rules, it is as though the ALE Member did not offer coverage at all. This will play a significant role in whether the ALE Member satisfies the Substantially All Test or not.
- ALE Members control their own destiny and avoid all excise taxes under 4980H only to the extent coverage through an Eligible Employer Sponsored Plan that is affordable and

provides minimum value is *offered* (as defined by the 4980H Rules) to 100% of the ALE Member's Qualifying Full-Time Employees each month. ALE Members who do not offer affordable, minimum value coverage through an Eligible Employer Sponsored Plan to 100% of its Qualifying Full-time Employees (and dependent children) during a month (e.g. an ALE Member who only offers coverage through a "skinny" plan) will also avoid excise taxes in the following situations; however, the ALE Member has no control over the outcome in these situations:

  - The coverage offered qualifies as coverage through an Eligible Employer Sponsored Plan and every Full-time Employee who would otherwise qualify for a Premium Subsidy in the Marketplace <u>*voluntarily*</u> enrolls in the coverage;
  - No Qualifying Full-Time Employee who was not offered qualifying coverage for the month would otherwise qualify for a Premium Subsidy in the Marketplace.

- If the ALE Member does not satisfy this 100% threshold, the ALE Member may be liable for one of the two excise taxes under 4980H, depending on whether the ALE Member satisfies the "substantially all" test and whether a Qualifying Full-time Employee receives a Premium Subsidy.
- If the ALE Member does not satisfy the Substantially All Test in a month, and Qualifying Full-time Employee receives a Premium Subsidy in the Marketplace, the ALE Member will be liable for the Sledgehammer Tax under 4980H(a) for that month.
- If, however, the ALE Member satisfies the Substantially All Test, then the ALE Member will only be liable (if at all) for the Tackhammer Tax under 4980H(b) for each Qualifying Full-time Employee who received a Premium Subsidy in the Marketplace for that month.

B. The Sledgehammer Tax-fundamental Principles

To determine whether an ALE Member may be subject to a Sledgehammer Tax, each of the following questions must be answered. NOTE: The analysis relates only to the ALE Member's Full-Time Employees for that month.

The employer will avoid the sledgehammer for a month if each of the following questions is answered "Yes".

- <u>Does the employer satisfy the Substantially All Test? An ALE Member satisfies the Substantially All Test if offers coverage through an Eligible Employer Sponsored Plan to at least 95% of its Qualifying Full-time Employees?</u> The 4980H Rules allow an ALE Member to *intentionally* exclude up to 5% (or if greater, 5) of its Full-Time Employees from eligibility for the plan.

  - For 2015, the percentage threshold for the Substantially All Test is reduced to 70%.
  - See Appendix F for more details regarding the definition of an Eligible Employer Sponsored Plan.

Key Point: Employees who have the requisite Hours of Service to qualify as a Full-time Employee in a month are not counted in the Substantially All Test (i.e. it is though they don't exist) if the month is part of a Limited Non-Assessment Period.

- Does the offer of coverage include an offer of coverage for a dependent "child"? A child is defined as a natural or adopted child, or child placed for adoption with the employee. Interestingly the final regulations exclude step children and foster children from the definition of dependent child for purposes of the 4980H Rules.

- Does the employer provide an "effective opportunity" to enroll or decline no less than once during a plan year? Whether a Qualifying Full-Time Employee has been offered an effective opportunity to enroll during a month is based on the facts and circumstances, including but not limited to adequacy of notice, the period of time during which the election may be made and any other conditions of the offer. See 26 C.F.R. 1.401(k)-1(e)(2)(ii) for an analogous provision relating to the effective opportunity to participate. See also Appendix G for a summary of the electronic enrollment rules. The ALE Member does not have to offer an opportunity to decline coverage if the coverage is Affordable and provides Minimum Value.

Key Point: Some ALE Members only offer the opportunity to enroll when first eligible. If the employee does not enroll at that time, the employee can only enroll again if they experience a special enrollment event. Does this practice constitute a valid offer of coverage under the 4980H rules? NO!!!! Employees must be offered the opportunity to enroll annually (e.g. during annual enrollment).

- Is the coverage offered generally available for the entire month? In the case of a termination of employment, a Qualifying Full-Time Employee is treated as having been offered coverage during the entire month if the Full-Time Employee would have been offered coverage for the entire month had he/she remained employed.

Key Point: The offer of coverage for a dependent child must extend through the end of the month that the child turns age 26 (assuming the employee is also eligible). This rule is inconsistent with the rule in PHSA Section 2716 that requires employers to offer coverage to a dependent child until the date preceding the date that the child turns age 26.

- Does the employer apply the following premium payment rules from 26 C.F.R. 54.4980B-8, Q-5 with respect to its Qualifying Full-Time Employees? The 4980H Rules do not consider an employer to have offered coverage for an entire month unless the employer complies with the following, COBRA premium payment rules:

    - 30-day grace period rule (see Q-5(a))

    - Provider response rules regarding status of payment (See Q-5(c))

    - Insignificant shortfall rule (e.g., where payment is insufficient by the lesser of 10 percent of $50) (see Q-5(d))

- Deemed payment rule (payment deemed received when sent) (See Q-5(e))

NOTE: Even if the answer is yes to each of the above questions, but the ALE Member does not offer affordable, minimum value coverage through an Eligible Employer Sponsored Plan to 100% of it is Full-Time Employees, the employer could be liable for a Tackhammer Tax.

If the answer is "No" to *any* of those questions, the employer may be liable for the Sledgehammer Tax for each month that a Qualifying Full-Time Employee receives a Premium Subsidy in the Marketplace.

Key Point: If the ALE Member is liable for the Sledgehammer Tax, the ALE Member may reduce the number of Full-Time Employees during the month that it must include in the excise tax formula by its allocable share of 30 (the percentage that its Full-Time Employees represent of the entire controlled group's Full-Time Employee). And for 2015, that reduction number has been increased to 80. THIS INCREASE DOES NOT APPLY TO ALEs WITH LESS THAN 100 BUT AT LEAST 50 FULL-TIME EQUIVALENTS WHO FAILED TO QUALIFY FOR THE 1 YEAR DELAY.

See Appendix J for a sample Sledgehammer Tax calculation, including an overview of the rule for determining the employer's allocable share of 30.

C. The Taxhammer Tax-fundamental Principles

If the ALE Member does not offer affordable, minimum value coverage to 100% of its Qualifying Full-Time Employees (and their dependent children) each month, but the ALE Member satisfies the Substantially All Test described above (i.e. the ALE Member is not liable for the Sledgehammer Tax) then the ALE Member will only be liable for the Tackhammer tax with respect to any Qualifying Full-Time Employees who receive a Premium Subsidy in a month.

Key Point: In addition, ALE Members may be liable for the Tackhammer Tax with respect to any employee who qualifies as a Full-time Employee in a month but is otherwise in a Limited Non-Assessment Period if the ALE Member timely offers coverage through an Eligible Employer Sponsored Plan but such coverage does not provide minimum value.

See Appendix J for a sample Tackhammer Tax calculation.

- Limited Non-Assessment Periods: In some situations, a Full-Time Employee is not offered coverage during a month that the employee would otherwise be a Qualifying Full-time Employee based on his or her Hours of Service but is not liable for excise taxes, even if the employee otherwise receives a Premium Subsidy. Such months are referred to as "Limited Non-Assessment Periods". The following is a list of the applicable Limited Non-Assessment Periods:

    - For certain employees of ALE Members who are ALE Members for the first time. See Step 1 Section of this manual for more details.

- Variable hour and Part-Time Employees during an Initial Measurement Period (applicable only to ALE Members who use Look Back Measurement Period Method). See the Step #2 Section of this manual for more details.
- The three full calendar month period during which a Non-Variable Hour employee is otherwise eligible for coverage under the plan (applicable only to ALE Members who use Look Back Measurement Period Method). See the Step #2 section of this manual for more details.
- The three full calendar month period during which an employee is otherwise eligible for coverage under a Monthly Measurement Period Method. See the Step #2 section of this manual for more details.
- The three full-calendar month period following the date a change in positions occurs from part-time/variable to a non-variable position during the Initial Measurement Period (applicable to employers who use the Look Back Measurement Period Method). See the Step #2 section of this manual for more details.
- The month in which an employee's start date is other than the first day of the month.

Appendix A: Hours of Service Rules

Hours of Service Rules

The following is a summary of the fundamental concepts regarding Hours of Service calculations prescribed in the Proposed Rules:

- Hours of service means each hour for which the employee is paid or entitled to payment for performance of services AND hours for which the employee is paid or entitled to payment by the employer for a period of time, without limitation, during which no duties are performed due to any of the following (i.e., paid leave):
  - Vacation
  - Holiday
  - Illness or incapacity (i.e., disability)
  - Layoff
  - Jury duty
  - Military duty or leave of absence

The Hours of Service rules for periods during which no services are performed are based on the rules set forth in 29 C.F.R. 2530.200b-2(a)(i). These are the rules under ERISA that are generally applicable to retirement and pension plans.

Key Point: Are Hours of Service required to be credited during periods in which the employee is receiving payments made under a workers' compensation plan? This is not yet clear. The section of the 2530.200b-2 rules that excludes time spent on a workers' compensation leave, 2530.200b-2(a)(ii), but that section is not referenced in the 4980H rules.

- Employers must determine Hours of Service for hourly employees based on actual Hours of Service from records of hours worked and Hours of Service for which payment is due, even if no services were performed.

- Employers must determine Hours of Service for non-hourly employees based on one of the following three methods and only these three methods:

  - Actual Hours of Service worked or hours for which payment is due based on the records,
  - A day's equivalency test based on labor rules set forth in 29 C.F.R. 2530.200b-2(a) (an employee is credited with eight Hours of Service for each day that the employee would be required to be credited with one hour of service), or
  - A week's equivalency test based on labor rules set forth in 29 C.F.R. 2530.200b-2(a) (an employee is credited with 40 Hours of Service for each week in which the employee would be required to be credited with one hour of service).

Key Point: The equivalency methods do not require the employee to have actually worked an hour of

service in a day or a week in order to be credited with eight or 40 hours in a week under the equivalency methods; if they are paid for an hour (e.g. paid leave) then they would be credited with Hours of Service for that day or week as applicable.

- The equivalency tests are subject to an anti-abuse rule. According to the anti-abuse rule, the equivalency tests may not be used if use of the tests substantially understates an employee's Hours of Service in a manner that would cause that employee to not be treated as full-time. The anti-abuse rule also applies where equivalency test would understate the hours for a substantial number of employees. This could affect the full-time equivalency determination. For example, an employer who had 100 non-hourly employees who average 10 Hours of Service two days a week could not use the day's equivalency test because they would substantially understate the Hours of Service each week by 400 Hours of Service.

- The employer is NOT required to use the same Hours of Service calculation method for all categories of non-hourly employees as long as the categories are reasonable and consistently applied.

Key Point: The employer may change the Hours of Service method for one or more categories of non-hourly employees each calendar year.

- The 4980H Rules identify the following types of employees whose Hours of Service performed in the below mentioned positions are not considered "Hours of Service" for purposes of 4980H:

Category	*Description*
Bona fide volunteer NOTE: Although the definition of bona fide volunteer for 4980H purposes is based on the Code Section 457(e)(11)(B)(i) definition of bona fide volunteer for qualified plan purposes, the definition of bona fide volunteer for 4980H purposes is NOT limited to volunteer firefighters and emergency medical providers.	ANY volunteer who is an employee of a government entity or an organization described in Section 501(c) (i.e. non-profit organization) whose only compensation is in the form of the following: (i) Reimbursement for or reasonable allowance for reasonable expenses incurred in the performance of services by volunteers or (ii) Reasonable benefits (including length of service awards) and (iii) Nominal fees customarily paid by similar entities in connection with the performance of services by volunteers.
Student Employees in a Work Study Program NOTE: The regulations do NOT provide a general exemption for student employees or interns/externs who are otherwise compensated for Hours of Service they perform or are entitled to payment for periods during which they provide no services.	Students in positions subsidized through the federal work study program or a substantially similar program of a State or political subdivision thereof.

Members of a religious order	Individuals subject to a vow of poverty as a member of that order when the work is in the performance of tasks usually required of an active member of the order. See Example A-1 below for an illustration of this rule.

Example A.-1: Pat Brown and Chris Green are members of a religious order and have taken vows of poverty. They renounce all claims to their earnings. The earnings belong to the order. Pat is a licensed attorney. The superiors of the order instructed her to get a job with a law firm. Pat joined a law firm as an employee and, as she requested, the firm made the salary payments directly to the order. Pat's services are not tasks usually required of an active member of the order. Consequently, Hours of Service performed by Pat for the law firm would constitute Hours of Service for the law firm. Chris is a secretary. The superiors of the order instructed him to accept a job with the business office of the church that supervises the order. Chris took the job and gave all his earnings to the order. Chris' services are tasks usually required of an active member of the order.

- Until further guidance is issued, any reasonable method for calculating Hours of Service may be used for the following types of employees:

  - Commissioned employees
  - Adjunct faculty
  - Transportation employees (e.g., airline pilots)
  - On-call employees
  - Employees in similar positions for whom tracking Hours of Service will prove challenging

Key Point: A method of crediting hours is not reasonable if it takes into account only a portion of employee's Hours of Service with the effect of characterizing as non-full time an employee in a position that traditionally involves 30 or more Hours of Service per week.

The final regulations provide additional clarification regarding what is considered reasonable for the following categories of employees:

Category	*Clarification*
Adjunct Faculty	A reasonable method (but not the only method) would include crediting an adjunct professor with (i) 2.25 Hours of Service per week for each hour of teaching or classroom time PLUS (ii) an hour of service per week for each additional hour outside of the classroom the adjunct faculty member spends performing duties he or she is required to perform. NOTE: This method may be relied on at least through 2015.
Airline Industry employees subject to layovers	Employers must consider layover hours as Hours of Service if the employee is paid for layover

	hours beyond the compensation received without regard to the layover hours or if the layover hours are counted towards the employee's required hours for the week. If, however, the employee is not paid additional amounts for the layover hours and such hours are not counted towards the employee's required hours for the week, then it is reasonable to credit the employee for 8 hours for each day that a layover is required TO THE EXTENT THAT DOING SO WOULD NOT SUBSTANTIALLY UNDERSTATE THE EMPLOYEE'S HOURS OF SERVICE.
On Call Employees	Employers must credit Hours of Service for each hour that the employee is paid to remain on call on the employer's premises or which the employee's activities while remaining on call are subject to substantial restrictions that prevent the employee from using the time effectively for the employee's own purposes (the "Shoot your Weekend" rule).

- An employee's Hours of Service must be counted across all ALE Members of the same controlled group. If an employee performs Hours of Service for two or more ALE Members of the same controlled group during a month, then the ALE Member for whom the employee performed the most Hours of Service during the month is considered the employee's employer. If the employee performs the same number of Hours of Service each ALE Member, then ALE Members may choose which ALE Member will be considered the employer (and that ALE Member will report the employee on its Code Section 6056 return if the employee is full-time).

  Example A-2: Bob performs services for Company A and Company B, each of whom is in the same controlled group of corporations. In January 2015, Bob has 25 Hours of Service with Company A and 20 Hours of Service with Company B. In January 2015, Bob is considered a Full-Time Employee of Company A for purposes of the 4980H Rules.

Key Point: What happens if Company A and Company B are using a different Look Back Measurement method for identifying Full-Time Employees? The IRS recently addressed this in Notice 2014-49. See Appendix M for a summary of IRS Notice 2014-49.

- Hours of Service for which the compensation for such hours constitutes income from sources outside the United States in accordance with Internal Revenue Code Section 862(a)(3) are not counted. In essence, Hours of Service performed outside of the United States are not considered. Oddly enough, United States is defined to include only the 50 States and the District of Columbia. United States for this purpose does NOT include possessions or territories of the United States, such as Guam or Puerto Rico.

Key Point: Are plans in the territories subject to any of the ACA's provisions? Yes, plans maintained in the territories are subject to other aspects of the ACA, including but not limited to the health insurance reforms.

Appendix B: Common Law Employee Factors

The IRS has issued a 20 factor common law employee test that employers should use to determine if an employee is a common law employee. The following is an overview of those factors:

1. **Instructions:** If the person for whom the services are performed has the right to require compliance with instructions, this indicates employee status.

2. **Training:** Worker training (e.g., by requiring attendance at training sessions) indicates that the person for whom services are performed wants the services performed in a particular manner (which indicates employee status).

3. **Integration:** Integration of the worker's services into the business operations of the person for whom services are performed is an indication of employee status.

4. **Services rendered personally:** If the services are required to be performed personally, this is an indication that the person for whom services are performed is interested in the methods used to accomplish the work (which indicates employee status).

5. **Hiring, supervision, and paying assistants:** If the person for whom services are performed hires, supervises or pays assistants, this generally indicates employee status. However, if the worker hires and supervises others under a contract pursuant to which the worker agrees to provide material and labor and is only responsible for the result, this indicates independent contractor status.

6. **Continuing relationship:** A continuing relationship between the worker and the person for whom the services are performed indicates employee status.

7. **Set hours of work:** The establishment of set hours for the worker indicates employee status.

8. **Full time required:** If the worker must devote substantially full time to the business of the person for whom services are performed, this indicates employee status. An independent contractor is free to work when and for whom he or she chooses.

9. **Doing work on employer's premises:** If the work is performed on the premises of the person for whom the services are performed, this indicates employee status, especially if the work could be done elsewhere.

10. **Order or sequence test:** If a worker must perform services in the order or sequence set by the person for whom services are performed, that shows the worker is not free to follow his or her own pattern of work, and indicates employee status.

11. **Oral or written reports:** A requirement that the worker submit regular reports indicates employee status.

12. **Payment by the hour, week, or month:** Payment by the hour, week, or month generally points to employment status; payment by the job or a commission indicates independent contractor status.

13. **Payment of business and/or traveling expenses.** If the person for whom the services are performed pays expenses, this indicates employee status. An employer, to control expenses, generally retains the right to direct the worker.

14. **Furnishing tools and materials:** The provision of significant tools and materials to the worker indicates employee status.

15. **Significant investment:** Investment in facilities used by the worker indicates independent contractor status.

16. **Realization of profit or loss:** A worker who can realize a profit or suffer a loss as a result of the services (in addition to profit or loss ordinarily realized by employees) is generally an independent contractor.

17. **Working for more than one firm at a time:** If a worker performs more than de minimis services for multiple firms at the same time, that generally indicates independent contractor status.

18. **Making service available to the general public:** If a worker makes his or her services available to the public on a regular and consistent basis, that indicates independent contractor status.

19. **Right to discharge:** The right to discharge a worker is a factor indicating that the worker is an employee.

20. **Right to terminate:** If a worker has the right to terminate the relationship with the person for whom services are performed at any time he or she wishes without incurring liability, that indicates employee status.

Appendix C: Look Back Measurement Period and Monthly Measurement Period Methods

The following general assumptions apply to examples 1-8 below.

ABC becomes subject to the 4980H rules on January 1, 2015. ABC maintains the plan on a calendar year basis. The plan is offered through a Code Section 125 cafeteria plan. ABC has adopted the Look Back Measurement Period Method for identifying Full-Time Employees. ABC has adopted the following rules for the Initial Measurement Period and associated Stability Period:

- *Initial Measurement Periond-11 month Initial Measurement Period that begins on the first day of the month following the month in which the employee is hired.*
- *Administrative period-60 days*
- *Stability Period-12 months for both employees that qualify as Full-Time Employees and employees that do not qualify as Full-time employees.*

ABC has adopted the following rules for the Standard Measurement Period:

- *Standard Measurement Period that begins on October 4 each year and ends the following October 3.*
- *Administrative period—begins October 4 each year and ends the following December 31*
- *Stability Period-12 months for both employees that qualify as Full-Time Employees and employees that do not qualify as Full-time employees.*

Notwithstanding the above, the first Standard Measurement Period is a 6 month period that begins April 5, 2014 and ends October 4, 2014. The first administrative period ends December 31, 2014 and the first Stability Period is January 1, 2015 through December 31, 2015.

<u>Example #1; Bob is a non-variable employee:</u>

- Bob is hired on June 15, 2015. Bob is a Non-Variable Employee because ABC can make a determination on Bob's start date that Bob is reasonably expected to be employed 30 or more Hours of Service per week, on average, during his employment with ABC.
- Under the terms of the Plan, Bob is subject to a 60 day waiting period. Bob is offered coverage through an Eligible Employer Sponsored Plan that provides minimum value that becomes effective on August 15, 2015.
- Since Bob was eligible for coverage but not offered coverage due solely to a waiting period in July and August 2015, and Bob is offered coverage no later than the 1st day of the fourth full calendar month following his date of hire (Bob is actually offered coverage sooner than that), July and August are part of a Limited Non-Assessment Period. Since Bob is offered coverage that provides minimum value, ABC will *NOT* have to include Bob in the Substantially All test for July and August 2015 and ABC will not be liable for a Tackhammer tax with respect to Bob in July and August.
- Since Bob is a Non-Variable Employee, ABC will apply the Monthly Measurement Period approach to Bob until he completes ABC's Standard Measurement Period.

- Bob's first Standard Measurement Period begins October 4, 2015 and ends October 3, 2016. Bob is an ongoing employee because he was employed throughout an entire Standard Measurement Period (and subsequent administrative period).
- Bob was credited with 1750 Hours of Service during the first Standard Measurement Period ending October 3, 2016; therefore, Bob qualifies will be a Qualifying Full-time Employee during each month of the Stability Period beginning January 1, 2017 and ending December 31, 2017 (to the extent he remains employed).

Example #2; Bob takes an unpaid leave of absence during the 2017 Stability Period:

- Same facts as example #1 except that Bob takes an unpaid leave of absence (other than a special unpaid leave of absence) beginning August 1, 2017 and ending December 31, 2017. Bob resumes service on January 1, 2017.
- Under ABC's plan, employees who take an unpaid leave of absence cease to be eligible for coverage under the Plan. Bob loses coverage under the Plan on August 1, 2017. ABC offers Bob COBRA continuation coverage at 102% of the cost of the coverage. The coverage is not affordable for Bob so he elects coverage in the Marketplace and receives a Premium Subsidy.
- Bob is a Qualifying Full-time Employee throughout the Stability Period ending December 31, 2017.
- The COBRA continuation coverage qualifies as an offer of coverage through an Eligible Employer Sponsored Plan for purposes of the Substantially All Test for the period August through December 2017; however, ABC would be subject to excise taxes with respect to Bob since the COBRA coverage was not affordable and Bob received a Premium Subsidy during those months.
- NOTE: The transition period for employees who change positions during a Stability Period that allows the employer to apply a Monthly Measurement Period beginning the first day of the fourth full calendar month following the date the change in position occurs may apply here. See the next example for an illustration of this rule.
- At the time that Bob took the unpaid leave of absence, Bob was in a Standard Measurement Period beginning October 4, 2016 and ending October 3, 2017. Bob had sufficient Hours of Service during the period October 4, 2016 through July 31, 2017 (the date preceding Bob's unpaid leave of absence) to qualify as a Full-Time Employee for the Stability Period beginning January 1, 2017; however, Bob experiences a break in service (a period of at least 13 weeks during which Bob was not credited with any Hours of Service) during the period August 1, 2016 through December 31, 2016. Since Bob experienced a break in service, he is treated as a new employee when he resumes services on January 1, 2017.

Example #3: Bob transitions from full-time to part-time during the 2016 Stability Period.

- Same facts as Example #2 except that instead of taking an unpaid leave of absence on August 1, 2016, Bob changes from a full-time position to a part-time position such that if Bob had been hired in that part-time position, ABC could have made a determination that Bob was NOT reasonably expected to be employed 30 or more Hours of Service each week.

- Bob does not average 30 Hours of Service per week during the months August, September and October 2016 (the three full calendar month period following the date the change in positions occurs).
- Since Bob was offered affordable, minimum value coverage at all times since the 1st day of the fourth calendar month following his date of hire (actually Bob was offered coverage sooner because his plan only imposed a 60 day waiting period) until the date that his change in position occurred, and he did qualify as a Full-Time Employee during any of the three full calendar months following the position change, ABC may apply a Monthly Measurement Period to Bob beginning November 1, 2016 (the 1st day of the fourth full calendar month following the date of his employment status change). Although Bob qualifies as a Full-Time Employee to whom qualifying coverage must be offered for months August through October 2016 (Bob was still in a Stability Period during which he was required to be treated as full-time), Bob will not qualify as a Full-Time Employee during November and December of 2016 under the monthly Measurement Period Method since Bob did not actually average 30 Hours of Service per week in those months. Thus, ABC would not be subject to excise taxes with respect to Bob for failing to offer Bob qualifying coverage during those months.
- In addition, Bob experienced a break in service (i.e., he had a period of at least 13 weeks in which he was credited with no Hours of Service). Since he experienced a break in service, he will be treated as a new employee when he resumes service on January 1, 2017.

Example #4; Marty is a Variable Hour employee and has full-time Hours of Service during Initial Measurement Period and Standard Measurement Period (impact of cafeteria plan rules):

- Marty is hired by ABC Company on June 14, 2015. ABC is unable to make a determination on Marty's date of hire that Marty is reasonably expected to have 30 or more Hours of Service per week during the time that he is employed during the Initial Measurement Period; therefore, Marty is a Variable Hour Employee.
- Marty's Initial Measurement Period begins July 1, 2015 and ends May 30, 2016. Marty's administrative period ends July 31, 2015. Marty's 12-month Stability Period begins August 1, 2016.
- Marty averages 130 or more Hours of Service each month during the Initial Measurement Period ending May 30, 2016; therefore, Marty is a Qualifying Full-time Employee for each month in the Stability Period beginning August 1, 2016 and ending July 31, 2017. ABC will permit Marty to make an initial election that begins August 1, 2016 and ending December 31, 2016. During the annual enrollment period for 2017 plan year, Marty makes an election for the 2017 plan year. Whether Marty remains eligible for all of the 2017 plan year depends on whether Marty averages the requisite Hours of Service during the Standard Measurement Period ending October 3, 2016 to be a Qualifying Full-time Employee.
- Marty averages the requisite Hours of Service during the Standard Measurement Period ending October 3, 2016; therefore, Marty is a Qualifying Full-time Employee for each month of the Stability Period beginning January 1, 2017 through December 31, 2017. Since Marty's election during the annual enrollment period for the 2017 plan year was effective for the entire 2017 plan year, no additional action is required.

Example #5; Marty is a Variable Hour Employee and averages full-time Hours of Service during Initial Measurement Period but not the Standard Measurement Period.

- Same Facts as Example #4 except that Marty does not average the requisite Hours of Service during the Standard Measurement Period ending October 3, 2016.
- Although Marty did not average the requisite Hours of Service during the Standard Measurement Period ending October 3, 2016, which means he will not be a Qualifying Full-time Employee for each month of the Stability Period beginning January 1, 2017 and ending December 31, 2017, Marty did average the requisite Hours of Service during the Initial Measurement Period and, as a result, he is a Qualifying Full-time Employee Full-Time Employee to whom coverage must be offered during the first Stability Period ending July 31, 2017.
- Even though Marty made an election for the entire 2017 plan year, Marty ceases to be eligible on July 31, 2017. ABC may terminate his coverage and offer him COBRA without risk of any excise taxes. Alternatively, ABC may allow him to continue his coverage on the same terms as if he was still a Qualifying Full-time Employee.

Example #6; Joe is a "Seasonal Employee":

- Each year, ABC hires employees to work during the ski season. The ski season typically begins each year on October 1 and typically lasts only 5 months.
- Joe is hired on October 1, 2015 for the 2015-2016 ski season.
- When hired, ABC can make a determination that Joe is reasonable expected to be employed 200 Hours of Service each month that Joe works during the ski season. All things being equal, Joe would be a non-variable employee; however, since Joe is hired into a position that begins the same time each year and is expected to lasts 6 months or less, Joe is a "Seasonal Employee". Since Joe is a Seasonal Employee, Acme may treat Joe as a Variable Hour employee.
- Since Joe is Variable Hour employee, Joe is subject to an Initial Measurement Period beginning November 1, 2015 and ending September 30, 2016 to the extent that he does not experience a break in service.
- Joe's employment is terminated on February 28, 2016. He is not hired back until October 1, 2016. Since Joe has no Hours of Service between February 28, 2016 and October 1, 2016, Joe experiences a Break in Service such that he may be treated by ABC as a new employee when resumes services on October 1, 2016.
- Consequently, Joe never qualifies as a Full-Time Employee to whom qualifying coverage must be offered in order to avoid excise taxes.

Example #7; Joe is *not* a Seasonal Employee:

- Same facts as Example #6 except that Joe is hired into a position that typically lasts 8 months during the year. Since Joe's position is expected to last longer than 6 months, Joe is not a Seasonal Employee and will not be treated as Variable Hour or part-time if Acme can make a determination on Joe's hire date that Joe is reasonably expected to be employed 30 or more Hours of Service each week during the time that he is employed by Acme.
- Joe is reasonably expected to be employed 30 or more Hours of Service each month that he is employed during the Initial Measurement Period. Consequently, Joe is a Non-Variable Hour

employee. [note: the fact that Joe will only work 8 months isnt relevant to the variable/non-variable analysis]

- Under the terms of the plan, all Full-Time Employees are eligible for coverage after a 1 month orientation period and then they are subject to a 90 day waiting period. Thus, under the terms of the plan (and in accordance with PHSA Section 2708), Joe's coverage will become effective on January 30, 2017 (91st day after becoming eligible). Although Acme's plan complies with PHSA Section 2708, Acme must offer Joe coverage by January 1, 2017 (the 1st day of the fourth full calendar month following his date of hire) if it wishes to avoid excises taxes with respect to Joe for the months between October 1, 2016 through December 31, 2016.

The following assumptions apply to Examples 8-10 below.

- *Great Benefits Administration, Inc. (GBA) uses the monthly Measurement Period.*
- *GBA maintains a plan that offers coverage on the 91st day after becoming a Full-Time Employee.*
- *GBA also maintains a plan for union employees that impose a 1200 cumulative hour eligibility condition followed by 90-day waiting period.*

Example #8: Randy is hired as a Full-Time Employee.

- On February 15, 2015, Randy is hired as a Full-Time Employee. Randy is offered coverage that is effective on May 16, 2015.
- Randy qualifies is a Qualifying Full-Time Employee for the months March, April and May. Although Randy is not offered coverage for those months, these months are part of a Limited Non-Assessment Period because (i) Randy is eligible for coverage during that period but for a waiting period and (ii) Randy is offered coverage by the 1st day of the fourth full calendar month after Randy's date of hire. Thus, GBA may be able to avoid some or all excise taxes for months in the Limited Non-Assessment Period even though Randy is a Qualifying Full-time Employee.

Example #9; Randy terminates employment but is rehired without a break in service.

- Same facts as Example #8 except that Randy terminates employment on December 15, 2015 but is rehired as a Full-Time Employee 6 weeks later on January 31, 2016.
- GBA again imposes its 90-day waiting period on Randy. As a result Randy is offered coverage that will become effective on May 1, 2016. Randy qualifies as a Full-Time Employee in February, March, April and May.
- Since Randy is a Continuous Employee (i.e. he did not experience a break in service) Randy is NOT in a Limited Non-Assessment Period during the period beginning February 1, 2016 and ending May 1, 2016 (remember, the Limited Non-Assessment Period available through the monthly Measurement Period is available only once with respect to each Continuous Employee). Thus, GBA is NOT treated for purposes of the Substantially All Test as offering Randy coverage during the period ending May 1, 2016 and could be subject to excise taxes with respect to Randy for such period if Randy receives a Premium Subsidy during that period.

Example #10; Judy is union employee subject to 1200 hour eligibility requirement.

- GBA hires Judy on July 1, 2015. Judy is a union employee; therefore, Judy is not eligible for coverage until she accumulates 1200 Hours of Service. Once she becomes eligible, she will be subject to a 90 day waiting period in accordance with PHSA Section 2708.
- Judy accumulates 1200 hours by February 28, 2016. Judy has 150 Hours of Service in July, 200 hours in September, 220 hours in October, 250 hours in November, 250 hours in December, 100 hours in January 2016 and 30 hours in February 2016. She is offered coverage that is effective on May 30, 2016. Judy averages 130 Hours of Service in March, April and May.
- Judy qualified as a Full-Time Employee in all months prior to becoming eligible except January and February 2016. She also qualified as a Full-Time Employee during all months of her waiting period.
- Since Judy was not otherwise eligible for coverage during the first 3 full-calendar months after qualifying as a Full-Time Employee and was not offered coverage by the first day of the fourth full calendar month after such date, Judy is not in a Limited Non-Assessment Period. Consequently, GBA is not treated for purposes of the Substantially All Test as offering Judy coverage for any of the months preceding June 1, 2016 during which she qualified as a Full-Time Employee and GBA could be subject to an excise tax with respect to Judy for such months.
- NOTE: The fact that GBA's plan satisfied the requirements of PHSA Section 2708 isnt relevant for purpose of the 4980H Rules.
- NOTE also that had GBA used the Look Back Measurement Period Method, then GBA might have avoided any excise taxes with respect to Judy if Judy was a "Variable Hour" employee because Judy would have been in her Initial Measurement Period at all times prior to the date coverage was actually offered (assuming the duration of the Initial Measurement Period was longer than her eligibility and waiting period)

The following illustrates the application of the transition rule where the Stability Period following the Initial Measurement Period ends before the Stability Period following the first Standard Measurement Period begins.

<u>Example 11; Bob has a gap between end of Stability Period following Initial Measurement Period and the start of the Stability Period following the first Standard Measurement Period</u>.

- ABC Company imposes an 11 month Initial Measurement Period, a 2 month administrative period, and a 12 month Stability Period following the Initial Measurement Period.
- ABC also imposes a 12 month standard measurement period that runs October 15 through October 14 each year, an administrative period that ends December 31, and a 12 month Stability Period that begins the following January 1.
- Bob is hired October 20, 2015. His Initial Measurement Period starts November 1, 2015 and ends September 30, 2016, followed by an administrative period that ends November 30, 2016. Bob is determined to be full-time during the Initial Measurement Period; therefore, Bob qualifies

as a Full-Time Employee to whom qualifying coverage must be offered during the stability period beginning December 1, 2016 through November 30, 2017.

- Bob does not average 30 Hours of Service per week during the Standard Measurement Period that begins October 15, 2016 through October 14, 2017; therefore, he does not qualify as a Full-Time Employee to whom coverage must be offered during the subsequent Stability Period that begins January 1, 2018. Nevertheless, Bob qualifies as a Full-Time Employee to whom coverage must be offered during the remainder of the calendar year 2017 since qualified as such during the Stability Period that ended November 30, 2017.

The following examples illustrate the application of the rules applicable to employees who switch between positions that use different Measurement Period methods.

Example 12; Joe switches from a look back Measurement Period position to a monthly Measurement Period position.

- DBA, Inc. applies the Look Back Measurement Period Method to hourly employees and the Monthly Measurement Period Method to salaried employees.
- Joe, an hourly employee, averages 30 Hours of Service or more per week throughout the Measurement Period beginning October 15, 2014 and ending October 14, 2015; therefore, Joe qualifies as a Full-Time Employee to whom coverage must be offered during the Stability Period beginning January 1, 2016 and ending December 31, 2016.
- On August 3, 2016, Joe changes from an hourly to a salaried position.
- Even though Joe has changed to a position that is subject to the Monthly Measurement Period Method, Joe will continue to qualify as a Full-Time Employee to whom coverage must be offered during the remainder of the Stability Period ending December 31, 2016.
- In addition, Joe averaged 30 Hours of Service during the Standard Measurement Period beginning October 15, 2015 and ending October 14, 2016; therefore, Joe as also qualifies as a Full-Time Employee to whom qualifying coverage must be offered throughout the Stability Period beginning January 1, 2017 and ending December 31, 2017. Beginning January 1, 2018, DBA may apply the monthly Measurement Period to Joe.

Example 13; Same facts as Example except that Joe did not average 30 Hours of Service or more per week during the Standard Measurement Period ending October 14, 2016.

- Beginning January 1, 2017, Joe would only qualify as a Full-time Employee to whom coverage must be offered for months that Joe actually average 30 or more Hours of Service per week during the month (i.e., the monthly Measurement Period approach could be applied.

Example 14; Robert switches from a monthly Measurement Period position to a look back measurement position:

- Robert is hired as a full-time salaried employee. Robert has at all times since his start date qualified as a Full-Time Employee.
- On August 3, 2017, Robert changes from a salaried position to an hourly position. Robert's change in employment status occurred during the Stability Period for hourly employees that began January 1, 2017 and ends December 31, 2017.

- Since Robert averaged 30 Hours of Service or more per week during the Standard Measurement Period for hourly employees that ended October 14, 2016 (i.e. the Standard Measurement Period for hourly employees that preceded the Stability Period beginning January 1, 2017), Robert qualifies as a Full-Time Employee to whom coverage must be offered during the entire Stability Period.
- In addition, Robert averaged 30 Hours of Service during the Standard Measurement Period beginning October 15, 2016 and ending October 14, 2017; therefore, Robert qualifies as a Full-Time Employee to whom coverage must be offered throughout the Stability Period beginning January 1, 2018 and ending December 31, 2018.

Appendix D: Special Unpaid Leave Rules

If the employee takes a "special unpaid leave" during which no Hours of Service are credited to the employee, and the employee resumes service as a "Continuous Employee" as described above, special treatment is required for purposes of the look back Measurement Periods described above if the employee is considered to be a continuing employee as described above. Special leaves are defined as unpaid FMLA leave, USERRA leave, and jury duty. Special leaves are subject to the following rules:

- An employer who uses the look back Measurement Period must treat the duration of the special leave in one of the following ways for purpose of calculating hours during a Measurement Period:
    - The applicable large employer member may disregard the period that such employee was on a special leave when calculating the Hours of Service of the employee during the applicable Measurement Period (i.e., the Measurement Period for such an employee will be reduced by the period the employee is on a special leave), or
    - The employer may choose to treat the employee as credited with Hours of Service for any period of special unpaid leave at a rate equal to the average weekly rate at which the employee was credited with Hours of Service during the weeks in the Measurement Period that are not part of the special leave. Employers may use any reasonable method for calculating the average weekly rate.
- Likewise, "employment breaks" are afforded similar treatment as special leaves. Employment breaks are defined as a period of at least four consecutive weeks (disregarding unpaid special leave) during which an employee at an educational organization (as defined in 26 C.F.R. 1.170A-9(c)(1), without regard to whether they are a Code Section 501(c)(3) organization) is not credited with Hours of Service, other than a special unpaid leave. Unlike special leaves, though, no more than a period of 501 Hours of Services are required to be excluded or credited (depending on the particular averaging method described above that is used by the employer).

Appendix E: Transition Relief for Fiscal Year Plans

The Affordable Care Act ("ACA") created new Internal Revenue Code Section 4980H ("Employer Shared Responsibility"), which imposes excise taxes on "applicable large employers" who fail to offer qualifying coverage for a month to a full-time employee (as defined by the Employer Shared Responsibility Rules). Unless you qualify for a 1 year delay, the excise taxes imposed under the Employer Shared Responsibility requirements generally go into effect January 1, 2015.[1] The January effective can create administrative problems for employers who maintain plans that operate on a non-calendar year basis ("Fiscal Year Plan") because it generally means that you will only avoid excise taxes beginning in January 2015 with respect to a full-time employee if you have made an offer of affordable, minimum value coverage to such employee for the months that precede the beginning of your Fiscal Year Plan year.[2] If you haven't already offered such employees coverage that is both affordable and provides minimum value, you will generally need to extend an enrollment opportunity to such employees mid-plan year. Fortunately, there is transition relief available to certain employers that could, if you are eligible, delay the application of potential excise taxes with respect to certain full-time employees in months preceding the start of your plan year if certain conditions are met.

To determine whether the transition relief applies to a particular employee, two critical questions must be answered:

1. Is the employer eligible for the transition relief?
2. Does the relief apply to the full-time employee?

We discuss the transition relief, and help you answer these questions, below.

Which employers will be eligible for transition relief as a threshold matter?

The relief only applies to certain employees of employers who are, as a threshold matter, eligible for the transition relief. In order to be eligible for the transition relief, an employer must satisfy two conditions:

1. The employer must have maintained a Fiscal Year Plan on December 27, 2012 and

2. The employer must not have made a change to the plan year after that date.

[1] Applicable large employers who employed between 50 and 99 full-time equivalents and who meet certain other requirements are subject to a 1 year delay in the excise taxes. The same requirements discussed herein apply to such employers for the plan year that begins in 2016.

[2] You are treated as having made an "offer" of coverage for any month during the year if you offer them the opportunity to enroll at least once per plan year. Thus, if you offered employees qualifying coverage prior to the start of your fiscal year plan beginning in 2014, then you would not have to offer it again until the start of the plan year.

If you satisfy this requirement with respect to your group health plan (s), then you are eligible. The next step is to identify to which employees the relief applies.

NOTE: This relief applies on an employee by employee basis. It is possible that the relief will apply to some of your employees who are eligible for the Fiscal Year Plan and not to others. Employers are permitted to ignore employees to whom the relief applies when determining excise tax liability, if any, for months preceding the start of the Fiscal Year Plan in 2015, even if such employees qualify as full-time during one or more of those months and they receive a subsidy in the Exchange. Eligible employers may not, however, ignore employees who do not qualify for the relief when calculating excise tax liability during the months preceding the start of the Fiscal Year Plan year in 2015. Unless such employees are offered qualifying coverage for such months, they will trigger an excise tax for the employer if they qualify as full-time during such month and receive a subsidy in the exchange.

Does the transition relief apply to the employee?

If you are eligible for the transition relief, then relief is applied only with respect to an employee during the months preceding the start of the Fiscal Year Plan year if four conditions are satisfied:

1. The employee was not eligible for a calendar year plan maintained by the plan sponsor;
2. The employee fits into one of two qualification "buckets" described below;
3. The employer offers to the employee coverage that is both affordable and provides minimum value by the first day of the Fiscal Year Plan year in 2015; and
4. The employer satisfies the "substantially all" test for the month in 2015 in which the Fiscal Year Plan year begins.

NOTE: An eligible employer who maintains more than one Fiscal Year Plan will conduct this analysis with respect to employees eligible for each plan with a different non-calendar plan year.

Was the employee eligible for a calendar year plan?

The analysis stops before it begins if the employee was eligible for a calendar year plan maintained by the employer on 2/9/14. But if the employee was not eligible for a calendar year plan, then the next step is determine if they fit into one of the two qualification buckets.

Does the employee fit into one of the two qualification buckets?

There are two qualification buckets into which an employee must fit: the first bucket is limited to full-time employees who satisfy the terms of eligibility that were in effect under the Fiscal Year Plan. The second bucket applies to all others if the employer satisfies certain coverage or eligibility tests.

Each of these buckets is described below.

A. Employees who satisfy the terms of eligibility on 2/9/14

An employee who qualifies as a full-time employee in any month preceding the start of your plan year in 2015 will fit into this "bucket" if they satisfy the terms of eligibility in effect under the Fiscal Year Plan on 2/9/14. Employers can ask a simple question to determine if the employee fits into this bucket: If this employee was employed on 2/9/14, would the employee be eligible for coverage under the plan? If yes,

the employee fits. If no, the employee does not fit in *this* bucket. For example, if the Fiscal Year Plan's terms of eligibility on 2/9/14 indicated that only employees scheduled to work 32 hours or more per week were eligible for the plan, then any employee who is works 32 hours or more per week in one or more of the months preceding the start of your plan year fits into a qualification bucket.

B. All other employees

If the employee does not fit into the first bucket (i.e. the employee was not in an eligible class on 2/9/14), the employee still fits into a qualification bucket if one of the following eligibility or coverage tests is satisfied: the all employee test or the all "full-time" employee test. Each of these is described in more detail below.

NOTE: Reminder—the 4980H rules are applied to each applicable large employer member (i.e. each member of the controlled group of corporations). Consequently, these tests are conducted on an applicable large employer member basis.

B. 1. All Employee Test

This test is satisfied if (i) the employer offered coverage under the Fiscal Year Plan (or all plans with the same plan year) to at least 33% of ALL it employees (full-time and part- time) during the enrollment period preceding February 9, 2014, OR (ii) on any day between February 10, 2013 and February 9, 2014, 25% of All employees were covered under the plan.

B. 2. All Full-Time Employee Test

This test is similar to the All Employee Test except that it applies only to those employees who would qualify as a full-time employee under the 4980H rules (i.e. an average of 30 hours of service or more per week in a month) and the percentages are higher. More specifically, this test is satisfied if (i) the employer offered coverage under the Fiscal Year Plan (or all plans with the same plan year) to at least 50% of ALL it full-time employees (as defined by the 4980H rules) during the enrollment period preceding February 9, 2014, OR (ii) on any day between February 10, 2013 and February 9, 2014, 33% of the employer's full-time employees were covered under the plan.

If the employee fits into one of these qualification buckets, the next step is to determine whether qualifying coverage was offered by the start of the Fiscal Year Plan year in 2015.

Does the employer offer affordable and minimum value coverage by the first day of the Fiscal Year Plan year in 2015?

Not only must the employee fit into one of the qualification buckets, but the employer must offer Qualifying Coverage by the first day of the fiscal year in 2015. Offering coverage that is affordable but does not provide minimum value, or provides minimum value but is not affordable will only operate to help you avoid the Sledgehammer Tax-but not the Tackhammer Tax-- for months that the employee had the requisite Hours of Service to qualify as a Full-time Employee during the months in 2015 prior to the start of the Fiscal Plan Year. On the other hand, if the employee offers coverage through an Eligible Employer Sponsored Plan that is both affordable and provides minimum value, the ALE Member will avoid all excise taxes with respect to the Qualifying Full-time Employee for months preceding the start of

the Fiscal Plan Year that the employee had the requisite Hours of Service to qualify as a Full-time Employee.

Does the employer satisfy the substantially all test for the month that the Fiscal Year Plan year begins in 2015?

Even if an employee otherwise fits into a qualification bucket and was offered Qualifying Coverage by the first day of the Fiscal Year Plan year in 2015, no transition relief applies to such employee if the employer does not satisfy the substantially all test with respect to all employees who qualify as full-time during the month in which the Fiscal Year Plan year begins. An employer satisfies the substantially all test for a month in 2015 if the employer offers minimum essential coverage to at least 70% (95% beginning in 2016) of *all* its employees who qualify as a full-time employee during that month (other than those that are in a limited non-assessment period defined in the rules).

What reporting is required for employees to whom the transition relief applies?

Even if you have employees to whom the transition relief applies, the employer must still satisfy the Code Section 6056 reporting obligations for such employee (if employed) for months prior to the start of the Fiscal Year Plan in 2015. For such months, the employer will use an indicator code indicating that coverage was not offered BUT the transition relief applied to the employee.

Appendix F: Eligible Employer Sponsored Plan

Code Section 5000A(f) specifies the types of health plans that qualify as minimum essential coverage for purposes of the individual mandate. Included in the list of health coverage that qualifies as "minimum essential coverage" is coverage through an eligible employer sponsored plan as defined in Code Section 5000(f)(2). Excluded from the list is any coverage that constitutes "excepted benefits" as defined in PHSA 2791(c)(1)-(4) and does not qualify as minimum essential coverage under any circumstance.

Code Section 5000(f)(2) defines—albeit vaguely-- an eligible employer sponsored plan as follows:

> a group health plan or group health insurance coverage offered by an employer to the employee that is: (1) a governmental plan, within the meaning of section 2791(d)(8) of the Public Health Service Act, or (2) any other plan or coverage offered in the small or large group market within a State.

The statute also notes that an eligible employer sponsored plan also includes a grandfathered health plan.

The statutory definition of eligible employer sponsored plan raises more questions than it answers (e.g. can "self-insured" health plans qualify as "eligible employer sponsored plans?"). Fortunately, final regulations recently issued by the IRS provide some clarity.

The final regulations generally define an eligible employer sponsored plan as follows:

- A self-insured "group health plan" (including a grandfathered self-insured group health plan[3])
- "Group health insurance" that is a plan sponsored by a governmental employer, any other coverage that is offered in the small or large group market and a grandfathered health plan offered in the group market.[4]

IRS and Treasury officials have also informally indicated that the plans must comply with the applicable health insurance reforms.[5]

The keys to understanding the general definition of eligible employer sponsored plan, and ultimately clarity, are the following definitions: "group health plan", and "group health insurance". A group health plan is defined by reference to PHSA Section 2791(a). PHSA 2791(a) defines a "group health plan" as follows:

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[3] Although compliance with the health insurance reforms is not a specific requirement of Code Section 5000A(f)(2), it is implied even without the informal remarks of treasury and IRS officials. For example, the statute and the regulations indicate that "grandfathered" health plans constitute a separate category of minimum essential coverage and such coverage is defined to include any group health plan to which Section 1251 of the ACA applies.

[4] See Prop. Treas. Reg. 1.500A-2(c)

[5] Although neither the statute nor the regulations specifically note this requirement, it is implied by the fact that grandfathered health plans are specifically identified as minimum essential coverage. If compliance with the applicable health insurance reforms were not a requirement, then there would not be a need to specifically reference such plans.

> . . . .an employee welfare benefit plan (as defined in section 3(1) of the Employee Retirement Income Security Act of 1974) to the extent that the plan provides medical care (as defined in paragraph (2)) and including items and services paid for as medical care) to employees or their dependents (as defined under the terms of the plan) directly or through insurance, reimbursement, or otherwise

"Group health insurance" is defined by reference to PHSA Section 2791(b). PHSA section 2791(b) defines group health insurance as health insurance offered in connection with a group health plan.

When you put all the pieces of the puzzle together, a formula for qualifying as an eligible employer sponsored plan appears. Under this formula, a plan qualifies as an eligible employer sponsored plan if it satisfies the following three requirements:

#1: It is a "group health plan"

To qualify as a group health plan, the plan must provide medical care. "Medical care" is defined in Section 2791(a)(1) by reference to PHSA Section 2791(a)(2). PHSA Section 2791(a)(2) defines "medical care" as follows:

> The term "**medical care**" means amounts paid for— **(A)** the diagnosis, cure, mitigation, treatment, or prevention of disease, or amounts paid for the purpose of affecting any structure or function of the body, **(B)** amounts paid for transportation primarily for and essential to medical care referred to in subparagraph (A), and **(C)** amounts paid for insurance covering medical care referred to in subparagraphs (A) and (B).

Consequently, the plan will qualify as a group health plan as long as the benefits offered under a plan fit within any of the categories identified as medical care in PHSA Section 2791(a)(2).

#2: The coverage does not consist of "excepted benefits"

PHSA Section 2791(c)(1)-(4) identify the following as excepted benefits[6]:

- Benefits that are excluded under all circumstances:
  - Accident or disability income insurance;
  - Liability insurance, including general liability and auto liability insurance;
  - Workers' compensation;
  - Automobile medical payment insurance;
  - Credit only insurance;
  - Coverage for on-site medical clinics.
- The following benefits are exempt when offered through a separate policy or, alternatively, if they do not otherwise constitute an integral part of the plan. For this purpose a benefit is not an integral part of the plan if the participant has the right to elect the coverage separately from

[6] Although not specifically listed below, the corresponding regulations indicate that certain "health flexible spending arrangements" as defined in Code Section 106(c)(2) would also qualify as an excepted benefit.

medical and, if the participant elects to receive the coverage, the participant is charged a separate premium or contribution.

- "Limited scope" dental or vision benefits. "Limited scope dental coverage" is defined as coverage substantially all of which consists of treatment of the mouth. Likewise, limited scope vision coverage is defined as coverage substantially all of which is treatment for the eyes.
- Long-term care
- Nursing home care
- Home health care
- Community-based care

- Limited scope specified disease and hospital (or other fixed) indemnity coverage is exempt from HIPAA provided that:

  - Such coverage is provided under a separate policy, certificate or contract of insurance;
  - No coordination exists between the provision of such benefits and any exclusion under any plan maintained by that employer;
  - Benefits are paid for an event regardless of whether benefits are provided under any group health plan maintained by the same plan sponsor.

- The following types of benefits if offered under a separate policy or contract:
  - Medicare supplemental policy;
  - TRICARE supplemental policy;
  - Coverage providing "similar" supplemental coverage to a group health plan.[7]

Although it may be somewhat counterintuitive in light of how limited the benefits under the plan are, but a plan that only provides preventive care does not fit into any of these categories of excepted benefits. Consequently, the benefits provided under the preventive care only plan are <u>not</u> excepted benefits.

#3. The plan complies with the applicable health insurance reforms. Each of the applicable health insurance reforms and whether they apply to grandfathered plans or not is included below.

[7] The final regulations clarify that the exception for "similar supplemental coverage" is limited to coverage that is specifically designed to fill gaps in the primary health coverage such as coinsurance or deductibles (e.g., such as a Medi-Gap or CHAMPUS/TRICARE supplement plan). Coverage that is supplemental only because of the plan's coordination provisions is not "similar supplemental coverage."

HEALTH INSURANCE REFORM TABLE

The following table provides (in chronological order) the effective date of the application of Patient Protection and Affordable Care Act (PPACA) provisions to grandfathered health plans.

Insurance Reform (PHSA §)	Description	Applicable to Grandfathered Plans?
Plan years beginning on or after September 23, 2010		
Prohibition on lifetime/annual limits § 2711(a)	Prohibits group health plans and health insurance issuers offering group or individual health insurance coverage from establishing lifetime limits and annual limits on the dollar value of benefits.	Yes
Prohibition on preexisting condition exclusion of enrollees under age 19 § 2704	Group health plans and health insurance issuers offering group or individual coverage may not impose a preexisting condition exclusion or discriminate based on health status	Yes
Prohibition on rescissions § 2712	Group health plans and health insurance issuers may not rescind health coverage after coverage begins except in the case of fraud or intentional misrepresentation	Yes
Coverage of adult children § 2714	Group health plans and health insurance issuers offering group or individual health insurance coverage that provide dependent coverage must continue to make such coverage available to children until age 26	Yes
Uniform explanation of coverage § 2715	Requires the Federal government to develop standards for use by group health plans and health insurance issuers in compiling and providing an accurate summary of benefits and explanation of coverage for applicants, policyholders or certificate holders, and enrollees. The explanation of coverage must describe any cost sharing, exceptions, reductions, and limitations on coverage, and give examples to illustrate common benefits scenarios	Yes

Insurance Reform (PHSA §)	Description	Applicable to Grandfathered Plans?
Bringing down the cost of health coverage (minimum medical loss ratio) § 2718 Applicable only to fully insured plans	Requires health insurance issuers offering group or individual health insurance coverage to submit annual reports to the Federal government on the percentages of premiums that the coverage spends on reimbursement for clinical services and activities that improve health care quality, and to provide rebates to enrollees if this spending does not meet minimum standards for a given plan year	Yes (provision applies to insured plans only)
Coverage of preventive care (without cost sharing) § 2713	Group health plans and health insurance issuers offering group or individual health insurance coverage must cover certain preventive services, immunizations, and screenings, without any cost sharing	No
Provision of additional information (transparency requirements) §2715A	Requires group health plans and health insurance issuers offering group or individual health insurance coverage to disclose, to the Federal government and the State insurance commissioner, certain enrollee information such as claims payment policies and practices and enrollee rights. Requires such plans and issuers to provide information to enrollees on the amount of cost-sharing for a specific item or service	No
Nondiscrimination rules for insured plans §2716 Applicable only to fully insured plans.	Prohibits fully-insured group health plans from discriminating in favor of highly compensated individuals with respect to eligibility and benefits	No

Insurance Reform (PHSA §)	Description	Applicable to Grandfathered Plans?
Certain reporting requirements (statutory heading is "Ensuring Quality of Care") §2717	Requires the Federal government to develop guidelines for use by health insurance issuers to report information on initiatives and programs that improve health outcomes. Prohibits a wellness program from requiring the disclosure or collection of any information relating to the presence or storage of a lawfully possessed firearm or ammunition in the residence or the lawful use, possession or storage of a firearm or ammunition by an individual	No
Claims appeal procedures § 2719	Group health plans and health insurance issuers offering group or individual health insurance coverage must provide an effective internal appeals process of coverage determinations and claims and comply with any applicable State external review process. If the State has not established an external review process that meets minimum standards or the plan is self-insured, the plan or issuer shall implement an external review process that meets standards established by the Federal government	No
Patient protections (choice of primary care provider and emergency services without prior authorization) §2719A	Group health plans and health insurance issuers offering group or individual health insurance coverage must permit an individual to select a participating primary care provider, or pediatrician in the case of a child. Provides direct access to obstetrical or gynecological care without a referral. Prohibits prior authorization or increased cost sharing for out-of-network emergency services	No
Plan years beginning or after January 1, 2014		
Prohibition on preexisting condition exclusion on ALL enrollees § 2704	Group health plans and health insurance issuers offering group or individual coverage may not impose a pre-existing condition exclusion or discriminate based on health status.	Yes
Limitation on waiting periods §2708	Prohibits any waiting periods that exceed 90 days for group health plans and group health insurance coverage	Yes

Insurance Reform (PHSA §)	Description	Applicable to Grandfathered Plans?
Guaranteed renewability of coverage (applicable to health insurance issuers) §2703 Applicable only to fully insured plans	Requires guaranteed renewability of coverage regardless of health status, utilization of health services, or any other related factor. Coverage can only be cancelled under specific, enumerated circumstances.	No
Fair health insurance premiums (limits factors that can be used to determine premiums) §2701 Applicable only to fully insured plans	Health insurance issuers may not charge discriminatory premium rates. The rate may vary only by whether such plan or coverage covers an individual or family, rating area, actuarial value, age, and tobacco use.	No
Guaranteed availability of coverage (applicable to health insurance issuers) §2702 Applicable only to fully insured plans	Health insurance issuers in both the individual and group markets must accept every employer and individual in the State that applies for coverage, but are permitted to limit enrollment to annual open and special enrollment periods for those with qualifying lifetime events.	No
Nondiscrimination based on health status §2705	Retains the HIPAA nondiscrimination provisions for group health plans and group health insurance issuers. Specifically, plans and group health insurance issuers may not set eligibility rules based on factors such as health status and evidence of insurability – including acts of domestic violence or disability. Provides limits on the ability of plans and issuers to vary premiums and contributions based on health status. The Affordable Care Act adds new provisions regarding wellness programs.	No (grandfathered plans remain subject to the rules in effect before health care reform)
Prohibition on discrimination against providers §2706	Prohibits discrimination by group health plans and health insurance issuers against health care providers acting within the scope of their professional license and applicable State laws.	No

Insurance Reform (PHSA §)	Description	Applicable to Grandfathered Plans?
Comprehensive health insurance coverage (requirement to provide essential benefits and OOP and deductible cost sharing provisions) §2707	Requires health insurance issuers in the small group and individual markets (and large group markets in State Marketplaces) to include coverage which incorporates defined essential benefits, provides a specified actuarial value, and requires all group health plans to comply with limitations on allowable cost sharing.	No
Participation in clinical trials §2709*	Prohibits health insurance issuers from dropping coverage because an individual (who requires treatment for cancer or another life-threatening condition) chooses to participate in a clinical trial. Issuers also may not deny coverage for routine care that they would otherwise provide because an individual is enrolled in a clinical trial.	No

* Due to drafting errors, there are two sections 2709 of the PHSA after PPACA. The section referred to in the table is a new section. The other section 2709 (relating to disclosure of information) is renumbered from prior law PHSA section 2713. Grandfathered plans remain subject to the pre-PPACA requirements that are still in effect.

Appendix G: Electronic Enrollment Rules

The IRS has issued final regulations that establish a safe harbor rule regarding electronic notices and elections under certain plans, including, but not limited to, cafeteria plans. See 26 C.F.R. 1.401(a)-21. The safe harbor establishes two general requirements for electronic benefit plan elections.

First, the electronic system used to facilitate elections must be reasonably designed to provide the information in the election to a recipient in a manner that is no less understandable to the recipient than a written paper election.

Second, the regulations require the electronic process to satisfy the following requirements:

- The individual must have the "effective ability" to access the electronic medium that will be used to make the election. The regulations do not define "effective ability;"
- Safeguards must be established to unauthorized individuals from making an election on behalf of the participant (e.g., via use of a PIN);
- The process must provide the individual the opportunity to review, confirm, modify, or rescind the terms of the election prior to the effective date of the election; and
- Send confirmation of the election to the participant, either in writing or through one of the two approved electronic notice methods described in the regulations

Appendix H: Affordability Safe Harbors

- W-2 Safe Harbor: Coverage is deemed affordable for purposes of the Tackhammer Tax if the employee's share of the applicable large employer member's lowest cost, self-only coverage that provides minimum value for an entire calendar year is less than 9.5 percent of the employee's W-2, Box 1 wages from the employer for that same calendar year (other than a period during which an employee is receiving COBRA or other continuation coverage).

Key Point: Note that the benchmark is the employer's lowest cost option for self-only coverage that provides minimum value. We do not believe that all of the options offered by an applicable large employer member must be affordable and provide minimum value in order to avoid the Tackhammer Tax; we believe that the applicable large employer member must only offer one option that is both affordable and provides minimum value. However, this means that the lowest cost, self-only coverage offered by the employer may not be the benchmark for the affordability standard if it doesn't also provide minimum value. In that case, the employer will have to look to the next cheapest, self-only coverage that also provides minimum value.

This W-2 safe harbor is subject to the following additional rules:

- If the offer of coverage is only for a portion of the calendar year, the W-2 wages must be adjusted for the period that coverage was offered during the calendar year. To adjust the W-2 wages, the Form W-2 wages are multiplied by a fraction equal to the number of months during which coverage was offered over the number of months during the year in which the employee was employed.
- The employee contribution must remain a consistent dollar amount or percentage of all W-2 wages throughout the calendar year, or if the plan operates on a fiscal year, within each portion of the plan year during that calendar year.

Key Point: The wages in Box 1 of the W-2 do not include pre-tax salary reductions made through certain employer sponsored plans, such as a 401(k) or cafeteria plans. Thus, the employee's wages for purposes of this affordability safe harbor will be proportionally reduced by the contribution amount used as the basis for the affordability test if the employee enrolls in and elects to pay for such coverage with pre-tax dollars. Some employers may be tempted to increase the margins by requiring such amounts to be paid with after-tax dollars, which will increase the wage base on which that affordability standard is based under this safe harbor and allow the employer to charge a higher premium. Nevertheless, we caution employers so tempted to tread cautiously. This practice, if applied to lower wage employees, would most certainly run afoul of the cafeteria plan nondiscrimination rules. Moreover, it is unlikely that the increased margins gained by increasing the wages through after-tax payroll deductions will prove more valuable than the tax savings garnered from the pre-tax salary reductions. A better practice is to use the rate of pay safe harbor described below.

- Rate of Pay Safe Harbor: Under this safe harbor, coverage is deemed affordable for a month with respect to an employee if the required contributions for the month for the applicable large employer member's lowest-cost self-only coverage that provides minimum value does not exceed 9.5 percent of an amount equal to 130 hours multiplied by the employee's hourly rate of pay as of the first day of the coverage period (generally the first day of the plan year). For non-hourly employees, applicable large employer members must use monthly salary instead of 130 multiplied by hourly rate of pay.

    - In the proposed regulations, this safe harbor could only be used to the extent the Full-Time Employee's hourly rate of pay or monthly wages (as applicable) is not changed during the calendar year by the ALE Member or any other ALE Member to whom the Full-Time Employee is transferred. However, the final regulations changed this rule. If the hourly rate of pay changes during the coverage period, the ALE Member would simply use the lower of the hourly rate of pay in effect prior to the coverage period or the hourly rate of pay during the month. The rate of pay safe harbor is not available if the monthly salary changes after the coverage period begins.

- Federal Poverty Line Safe Harbor: The affordability safe harbor is satisfied for a calendar month if the employee's contribution for the applicable large employer member's lowest cost option that provides minimum value does not exceed 9.5 percent of an amount that is 1/12 of the federal, mainland poverty line for a single individual for the applicable calendar year. Applicable large employers may use the most recently published poverty guidelines as of the first day of the applicable large employer member's plan year.

Key Point: How do wellness incentives impact affordability? Regulations recently issued by the IRS regarding minimum value and the Premium Subsidy indicate that wellness incentives that impact employee contributions/premiums are handled for purposes of affordability in accordance with the following rules:

- Everyone is treated as a non-smoker with respect to penalties/incentives tied to tobacco use. For example, if the base premium is $100 per month but smokers are required to pay $110, then the premium for affordability purposes is $100. Likewise, if non-smokers pay $90 instead of $100, the premium for affordability purposes is $90.
- Everyone is treated as failing the applicable standard with respect to incentives not tied to tobacco use. For example, if the premium is typically $100 but individuals who have high cholesterol are required to pay $150 unless they participate in a program, then the premium for affordability purposes is $150.

Appendix I: Minimum Value

- First, employers must use a minimum value calculator ("MV Calculator") similar to the actuarial value calculator established by HHS for qualified health plans in the Marketplaces if they have a standard plan design. The difference is that the MV calculator would be based on continuance tables reflecting claims data of typical self-insured plans. You can find the MV Calculator at http://cciio.cms.gov/resources/regulations/index.html.

Key Point: "Allowed costs" is based on the essential health benefits defined by HHS—not on the scope of covered services under the plan. Self-insured plans and fully insured plans in the large group market are not required to offer essential health benefits so the MV Calculator permits adjustments in the event the plan does not offer essential health benefits. But plan sponsors should beware-- excluding essential health benefits will impact the plan's ability to satisfy the minimum value standard.

- Second, employers may be able to use a benefit plan design checklist. This would be available for plans that provide benefits in the four core categories (physician, hospital and emergency, pharmacy and lab) with cost sharing attributes at least as generous as any of the checklist options.

- Third, a plan with nonstandard features (the first two are for plans with standard features) that is unable to use either of the first two methods described above may obtain an actuarial certification that the plan provides minimum value.

Key Point: Also, as is the case with the AV calculator, employer HSA and HRA contributions are counted, to some extent, when making the minimum value determination. Annual allocations to an HRA are counted only to the extent the HRA is "integrated" with the major medical plan (i.e. participation in the HRA is limited to those who participate in the medical plan) and the reimbursements are limited to cost sharing expenses under the plan.

Appendix J: Tax Examples

NOTE: Excise taxes under 4980H are adjusted for inflation beginning in 2015 in accordance with Code Section 4980H(c)(5). It remains to be seen whether the IRS will apply the adjustments in light of the delays. The example below illustrates the potential excise tax without regard to potential adjustments.

In addition, these examples do NOT take into account the transition rules for 2015 that reduce the substantially all test percentage from 95% to 70% and increase the Full-Time Employee reduction for purposes of the Sledgehammer Tax from 30 to 80.

Last, the measurement method used by the ALE Member in these examples isnt relevant due to how we have defined an employee who qualifies as a full-time employee to whom qualifying coverage must be offered in ordered to avoid excise taxes.

Example #1:

- ABC is not a member of a controlled group of corporations.
- ABC employs 120 employees each month.
- Of the 120 employees, 40 are considered by ABC to be part-time.
- ABC offers affordable, minimum value coverage to the 80 full-time employees.
- In January, 5 of the 40 employees who ABC considers to be part-time qualify as Full-Time Employees to whom qualifying coverage must be offered in order to avoid excise taxes (i.e. all 5 had the requisite hours to qualify as a Full-Time Employee during that month and none of them are in a Limited Non-Assessment Period. Only 3 of the 5 receive a premium subsidy in the Marketplace.
- In August, 10 of the 40 employees who ABC considers to be part-time qualified as Full-Time Employees to whom coverage must be offered. 6 of the 10 received a Premium Subsidy for August.
- What are the excise taxes that ABC owes for the year?
- The only months for which ABC will owe excise taxes are January and August because those are the only 2 months in which an employee who qualifies as a Full-Time Employee to whom coverage must be offered was not offered qualifying coverage AND received a Premium Subsidy.
- January:
    - In January, ABC offered coverage through an Eligible Employer Sponsored Plan to 94% of its employees who qualify as Full-Time Employees to whom qualifying coverage must be offered in order to avoid excise taxes (80 of the 85 were offered coverage). Although that is less than 95% the number is less than 5 (you are permitted to exclude up to 5% or, if greater, 5). Consequently, ABC satisfies the 95% test. This means that ABC will be liable for the Tackhammer Tax.
    - In January, 3 of the 5 employees who qualified as Full-Time Employees to whom coverage must be offered in order to avoid excise taxes received a Premium Subsidy. Thus, ABC's excise tax for January is equal to $750 ($250 x 3).
- August:
    - In August, ABC offered coverage through an Eligible Employer Sponsored Plan to 88% of its employees who qualify as Full-Time Employees to whom qualifying coverage must be offered. Consequently, ABC is liable for the Sledgehammer Tax for August if at least one employee who qualified as a Full-time Employee to whom coverage must be offered received a Premium Subsidy.

    - Since at least 1 employee who qualified as a Full-Time Employee to whom coverage must be offered received a Premium Subsidy in August, then ABC is liable for the Sledgehammer Tax. ABC owes an excise tax equal to $10,200 for August ($167 x (90-30)).
- Thus, for the year ABC owes a nondeductible excise tax equal to 10,950 ($10,200 +750).

Example #2:

- Same facts as Example #1 except that ABC is a member of a controlled group of corporations that, in the aggregate (including ABC), have 2000 Full-Time Employees each month.
- Since ABC is a member of a controlled group of corporations, ABC may only reduce the number of Full-Time Employees used to calculate the Sledgehammer Tax by its allocable share of 30.
- ABC's allocable share of the controlled group's Full-Time Employees is 2 (the actual number is 1.2 but the rules allow you to round up to the next highest whole number). Thus, ABC's Sledgehammer Tax for August is $14,696 ($167 x (90-2)).
- ABC's total excise taxes for the year now equal $15,446.

Example #3:

- Same facts as Example #1 except that 5 of the 10 employees who had the requisite Hours of Service to qualify as Full-time Employees in August were in a Limited Non-Assessment Period and they were offered minimum value coverage when their limited Non-Assessment Period ended. Since they are in a Limited Non-Assessment Period, they are not counted towards the substantially all test. This means that ABC only had 85 employees who qualified as Full-Time Employees to whom coverage must be offered.
- Consequently, ABC satisfied the substantially all test in August (the percentage to whom qualifying coverage was offered is only 94% but the test is passed because number excluded is 5 or less). ABC will only be liable for the Tackhammer Tax.
- In August, only 1 employee who qualified as a Full-Time Employee to whom coverage must be offered received a Premium Subsidy. Therefore, ABC's tax for August is $250.

Appendix K: Code Section 6055 and 6056 Reporting Requirements

The following is a brief overview of issues associated with the IRS Form 1095-C, which is required by applicable large employers to report coverage offered to employees who qualified as full-time employees (as defined in Code Section 4980H) at least month during the calendar year (beginning in 2015) for purposes of the pay or play rules set forth in Code Section 4980H. Applicable large employer members who sponsor or participate in a self-insured plan must also use the Form 1095-C to report employees (and family members) who were actually covered by the plan at least one (1) day during a month in the reporting year (also beginning 2015).

NOTE: The following is not nor should it be construed as legal advice to the SPBA or its members. It is intended for educational and training purposes only.

A. ***How triggered?*** An employee of an applicable large employer member ("ALE Member") qualifies as a full-time employee for at least 1 month during the calendar year. This includes months during which the employee had the requisite hours of service to qualify as a full-time employee but who was in a limited non-assessment period. NOTE: Part III of the form is also used to identify employees (and family members) covered by the ALE Member under a self-insured plan that qualifies as minimum essential coverage, even if the employee never qualifies as a full-time employee (see the "1G" indicator code associated with Line 14).

Practice Pointer: It is still not clear whether an ALE Member would use 1095-C to report actual coverage for former employees, such as retirees and qualified beneficiaries receiving COBRA. The instructions do clarify that an ALE Member would NOT use 1095-C to report coverage for independent contractors and other self-employed individuals covered under the plan (e.g. non-employee Board of Directors); the employer would use 1095-B to report coverage for such individuals and their covered family members.

B. ***Who files?*** Each ALE Member. A third party may file the form on behalf of the ALE Member but the ALE Member remains responsible.

C. ***When due?*** Provid to affected employees by January 31 of the year following the year being reported. Furnished to the IRS no later than February 28 (if filing in paper) or March 31 (if filing electronically) following the reporting year.

D. ***Assessment of form:***

Item	*Comment*
Code Section 6056 reporting	
Part II: Line 14—offer of coverage code for the following: • Any employee who qualified as a 4980H full-time employee during any month of the year; and • Any employee who was enrolled at least 1 day of any month during the year in a self-insured plan providing minimum essential coverage.	Designed to indicate whether coverage was offered and the scope of any coverage that was offered (e.g. the scope of individuals eligible for such coverage and whether it provided minimum value). Generally, if the same Code applies for all 12 months during the year, then ALE Members may insert the applicable Code in the "All 12 Months" box and forgo completing the box for each individual month. NOTE: If reporting for an employee who was not a full-time employee during any month of the year but was enrolled in coverage at least one day of 1 month during the year, simply insert "1G" in the "All 12 months" box and then proceed to Section III of the Form. NOTE: Do NOT enter a Code for coverage that the ALE member is treated as having offered under the following transition relief: • Failure to offer dependent coverage • Non-calendar year transition relief • Multi-employer transition relief (e.g. for months that the employer made contributions to the plan but no coverage was offered). • Thus, if coverage was NOT actually offered for a month but the employer is treated as offering coverage under one of the transition relief identified above, then report as though the ALE Member was NOT treated as having offered coverage. See below for a more detailed discussion regarding applicable codes.
Part II, Line 15-employee share of lowest cost monthly premium for self-only coverage that provides minimum value. ONLY complete Line 15 if the covered offered provided minimum value AND the following	This is the lowest cost premium for employee only coverage providing minimum value that was *offered* to the employee without regard to the option actually elected by the employee (if any). If the employee was eligible to be covered under the same option *the entire*

Codes were included for any month on Line 14: • 1B, • 1C • 1D • 1E	*year*, and the employee premium for employee only coverage did not change during the year, then the ALE Member will only need to provide the applicable indicator code in the "All 12 months" column. Otherwise, the ALE Member will have to complete all 12 months of the form. NOTE: This is not related to the affordability safe harbor (that will be identified on Line 16, if at all). Unless a Qualifying Offer was made, it would appear that the IRS still needs to know the actual premium amount so that the IRS can properly administer the Code Section 36B premium (even if the ALE Member satisfies the affordability safe harbor (e.g. the W-2) the coverage may not be affordable for purposes of Code Section 36B). Presumably, no premium amount is required for any month in which a Qualifying Offer code was inserted on Line 14 ("1A"). See below for a more detailed discussion regarding the applicable codes.
Part II, Line 16—applicable section 4980H safe harbor	This Line is intended to identify for the IRS whether you may owe an excise tax or not with respect to an employee. Multiple indicator codes may actually apply to the situation; however, you will use ONLY one code. The instructions clarify when a Code should be used over other potentially applicable codes. For example, if the employer is eligible for the multi-employer plan relief in a month because the employer made contributions for that month to the plan even though coverage wasn't offered by the plan, and the employee is also in a limited non-assessment period, the ALE Member will use the Code applicable to the multi-employer plan relief. NOTE: Affordability safe harbors associated with Codes 2F-H apply only in months in which the employee qualified as a full-time employee and was offered coverage that provided minimum value. NOTE: Only use Code 2B—employee not a

	full-time employee—if the employee also did not enroll in minimum essential coverage (without regard to whether such coverage was self-insured or fully-insured). If the employee was not a full-time employee for a month but was enrolled in minimum essential coverage (without regard to whether fully insured or self-insured), use Code 2C. NOTE: The Code for limited non-assessment periods—2D-- would appear to be used only for months that the employee actually qualified as a full-time employee but was otherwise in a limited non-assessment period. If the employee was not a full-time employee during a month but was in a limited non-assessment period, it would appear, although not clear, that the ALE Member would use Code 2B (assuming that the employee was not also enrolled in coverage). Clarification from IRS would be helpful. Query: IRS clarification is needed for the limited non-assessment period Code with respect to the following issue: • The instructions only provide a Code for a 4980H(b) limited non-assessment period (i.e. coverage providing MV is offered following the limited non-assessment period); however, there is a 4980H(a) limited non-assessment period that will allow the employer to exclude the full-time employee from the substantially all test for purposes of the 4980H(a) excise tax but may still be subject to a 4980H(b) excise tax with respect to that full-time employee for months during the limited non-assessment period during which the employee was full-time and was not offered coverage.
<u>Code Section 6055 Reporting</u>	
Part III—Lines 17-22	This section identifies months during which the employee for whom Code 2C was used on Line 16 AND the coverage was provided

	through a self-insured plan in which the ALE Member participates. NOTE: Since the form is limited to "employees", it is unclear whether the ALE Member would also use this form to satisfy its 6055 obligation with respect to former employees (such as retirees and COBRA qualified beneficiaries). IRS clarification is needed.
Indicator Codes Applicable to Line 14	
1F-Minimum essential coverage not providing Minimum Value offered to employee; or employee and spouse or dependents; or employee, spouse and dependents.	From a practical perspective, this indicator code will likely be applicable only for months that the employee being reported is NOT a full-time employee but is otherwise offered some sort of coverage MEC that does NOT provide minimum value.
1G-Offer of coverage to employee who was not a full-time employee for ANY month of the calendar year AND who enrolled in self-insured coverage for one or more months of the calendar year	This appears to be the code that enables the ALE Member to satisfy its Section 6055 reporting obligation on this combined form with respect to an employee who is covered under the plan at any time during the year but is never a full-time employee (i.e. employee for whom you have no 6056 reporting obligation but for whom you have a 6055 reporting obligation). NOTE: As noted above, this indicator code is inserted into the "All 12 months" column associated with Line 14, even if not covered for all 12 months. This Code will indicate to the IRS that there is a 6055 reporting obligation with respect to this employee but no 6056 reporting obligation. If this Code is used, the ALE Member would skip line 15 and then, on line 16, identify the actual months the employee was covered under the plan during the year by inserting Code 2C in each covered month (or in the "All 12 months" box if covered at least day in all 12 months). Covered dependents would be identified in Part III.
1L—Qualified Offer Transition Relief for 2015	If the employer is eligible for the relief because the employer made a qualifying offer to at least 95% of the employer's full-time employees for one or more months during the year, the employer would use this Code on line 14 with respect to such

	months in which the relief is applicable.
Indicator Codes Applicable to Line 16	
2A-employee not employed during the month	It is clear from this code that ALE Members must report for months in the year that precedes the hire date of an employee for whom the ALE Member has a Section 6056 obligation (i.e. an employee who qualifies as a full-time employee during at least one month).
2C-employee enrolled in coverage	This includes any coverage that qualifies as minimum essential coverage without regard to whether it is affordable and/or provides minimum value and without regard to whether it is self-insured or fully insured
2D-employee in a section 4980H(b) limited non-assessment period	These limited non-assessment periods include the following: • Partial month of employment, • The first three full calendar months, beginning with the first full-month that the employee is full-time provided that the employee is (i) eligible for the plan but is in a waiting period and (ii) offered MEC coverage that provides minimum value by no later than the 1st day of the 4th full calendar month. • Months in an initial measurement period • The 3 full months following a change in status from variable/part-time/seasonal to non-variable provided that (i) the employee is eligible for the plan but is in a waiting period and (ii) the employee is offered coverage by the 1st day of the fourth full calendar month following the change (or if earlier, the first day of the stability period during which the employee would have qualified as full-time). NOTE: As noted above, there is no code for the employee who is in a limited non-assessment period after which minimum essential

	coverage that does not provide minimum value is offered. In such a case, the employee is disregarded for purposes of the substantially all test during those months but could trigger a 4980H(b) penalty. IRS clarification is still needed on this issue.
2E-Multi-employer plan relief rule	For employers eligible for the multi-employer plan relief[8] this would appear to be the code used for every month that the employer makes a contribution to the MET to the extent the employee is also a full-time employee. NOTE: If coverage offered by the MET is waived by the employee, it is unclear whether contributions have to be made for months following the waiver of coverage in order to qualify for the relief. Additional guidance from the IRS would be helpful.
2l-employee subject to fiscal year transition relief	This underscores the point that this transition relief is applied on an employee by employee basis. Whether it applies to the employee depends on which of the 3 potential "buckets" of fiscal year relief prescribed by the IRS. If applicable, this code would be used for each month prior to the start of the employer's plan year in 2015 (or 2016, if a small ALE). NOTE: The preamble to the regulations clearly indicate that transition relief is available with respect an employee ONLY if affordable coverage providing minimum value is offered. The instructions suggest that employers could at least avoid 4980H(a) excise tax with respect to such employees who are offered coverage that is not affordable or doesn't provide minimum value.

[8]As a threshold matter, employers are eligible for the relief if they are required by a collective bargaining agreement to make contributions with respect to some or all employees to an MET who offers affordable minimum value coverage to employees who satisfy the MET's eligible requirements.

Appendix L: Overview of Transition Rules

The final regulations include a number of important and helpful transition rules that are designed to ease the implementation of the 4980H rules during the first year. Many of the transition rules prescribed by the proposed regulations have been carried forward to the final regulations. The transition rules prescribed by the final regulations are described below.

- ALE Determination: For 2015, employers may use ANY period of at least six consecutive calendar months in 2014 to determine if they are an applicable large employer for 2015—a determination that is typically based on the entire preceding calendar year.

Example II.-1: Good Job, Inc. wants to know if it is an applicable large employer for 2015. It is not a member of a controlled group of corporations. Good Job needs a little bit of time prior to January 1, 2015 to identify Full-time Equivalents in 2014 and "run the numbers". Good Job uses the period March 2014 through August 2014 to determine if it employed on average at least 50 Full-time Equivalents on business days during the period March through August 2014.

- Small ALE Exemption: Applicable large employers with less than 100 Full-time Equivalents but at least 50 Full-time Equivalents during 2014 (or any 6 consecutive month period in 2014) will not be subject to any excise taxes in 2015 (and in the portion of the 2015 plan year that falls in 2016 if the ALE Member was otherwise eligible for the non-calendar year plan relief) if they satisfy certain requirements. Thus, the effective date of the 4980H rules for such employers will be January 1, 2016 or, if later, the first day of the plan year beginning in 2016 if eligible for the special transition relief applicable to ALE Members who maintain non-calendar year plans.

Key Point: This relief also applies to employer's whose first year in existence is 2015 so long as they do not reasonably expect to employ on average 50 or more Full-time Equivalents during 2015 and they do not actually employ, on average, 50 or more Full-time Equivalents.

To qualify for this limited exemption from the 4980H Rules, such employers must satisfy the following requirements:

- The employer does not reduce its workforce during the period beginning February 9, 2014 and ending December 31, 2014 (or for an employer with a non-calendar year plan, the last day of the plan year in 2015) except for "bona fide business reasons". Examples of "bona fide business reasons" include, but are not limited to, sale or acquisition, termination for poor performance, changes in the economic marketplace in which the employer operates, or other similar changes unrelated to eligibility for the transition relief.

- The employer does not eliminate or otherwise materially reduce the health coverage, if any, that it offered on February 9, 2014. This is called the "coverage maintenance requirement". In no event will an employer be treated as materially reducing coverage under the following circumstance: (i) the employer offers each employee who is eligible for coverage an employer contribution towards the cost of employee only coverage that is equal to 95% of the dollar amount the employer offered on February 9, 2014 or the same or higher percentage of the cost of coverage that the employer was offering to contribute toward coverage on February 9, 2014; (ii) in the event there is a change in employee only coverage, it continues to provide minimum value; and (iii) the employer does not amend the plan to narrow or alter the classes of employees (or dependents) to whom the coverage was offered on February 9, 2014.

- The employer must certify that it meets the requirements for the exemption.

Key Points: The relief is still available for 2015 even if the coverage maintenance requirement is not satisfied during the portion of the 2015 plan year that falls in 2016.

- Transition Relief for Non-Calendar Year Plans: Although the 4980H rules generally become effective on January 1, 2015 for employers with 100 or more Full-time Equivalents, ALE Members who maintain plans that operate on other than a calendar year basis may avoid penalties for months preceding the start of the plan year that begins in 2015 if certain conditions are satisfied. See Appendix E for more details on the non-calendar year plan relief.

Key Points: ALE Members who are able to take advantage of the non-calendar year plan transition relief must still satisfy the Code Section 6056 reporting requirements for months prior to the start of the plan year in 2015. See Appendix E for more details on the transition rules for ALE Members who maintain non-calendar year plans.

- Shorter Initial Measurement Period in 2014: ALE Members who generally desire to use a 12-month Stability Period in 2015 for employees who are not considered Full-Time Employees during the first standard measurement may nevertheless utilize a shorter Standard Measurement Period beginning in 2014, so long as the Measurement Period (i) begins on or before July 1, 2014, (ii) is at least six months in duration, and (iii) ends no later than 90 days prior to start of the Stability Period in 2015. This is significant relief because the Stability Period for employees who are determined to be other than full-time generally must be the same duration as the Standard Measurement Period.

Key Point: The first Standard Measurement Period beginning in 2014 will necessarily be longer than 6 months if the date by which the Stability Period starts in 2015 is July 1, 2015 or later. Also, ALE Members must determine how long of an administrative period they will need before they determine when to begin the Standard Measurement Period in 2014.

The follow examples illustrate the application of this transition rule.

Example II.-2: Employer, Inc. ("Employer") wishes to establish a 12 month Stability Period beginning January 1, 2015. Employer also wishes to utilize an administrative period of no less than 60 days. Employer may establish a 6 month Standard Measurement Period associated with the 2015 Stability Period that begins no later than May 1, 2014. The Standard Measurement Period will run May 1, 2014 through October 31, 2014. The administrative period will run November 1, 2014 through December 31, 2014.

Example II.-3: Bait and Switch, Inc. ("B&S") maintains a plan that operates on a non-calendar year basis, August 1 through July 31. B&S is able to take advantage of the transition relief for ALE Members with non-fiscal year plans; therefore, B&S wishes to use a 12 month Stability Period beginning August 1, 2015. B&S prefers to have a 90 day administrative period. B&S could establish an 11 month Standard Measurement Period ending May 30, 2015 followed by a 61 day administrative period ending July 31, 2015. B&S could not establish a shorter Standard Measurement Period because the administrative period between the end of the Standard Measurement Period and the start of the Stability Period would exceed 90 days.

Key Point: Nothing in the rules prevents B&S from changing its administrative period to 90 days for subsequent Standard Measurement Periods.

- Transition relief for employers who contribute to multiemployer plans: ALE Members who contribute to multi-employer plans will not be treated as failing to offer the opportunity to enroll in minimum essential coverage to a Full-Time Employee (or the employee's dependents) for purposes of the Sledgehammer Tax and will not be subject to a Tackhammer Tax with respect to a Full-Time Employee if (i) the employer is required to make a contribution to a multiemployer plan with respect to that Full-Time Employee pursuant to a collective bargaining agreement, (ii) coverage under the multiemployer plan is offered to Full-Time Employees (and the employee's dependents) who satisfy the multi-employer plan's terms of eligibility (without regard to whether the coverage is actually offered to that Full-Time Employee during a month) and (iii) the coverage offered by the multiemployer plan is affordable and provides minimum value. Moreover, coverage will be considered affordable if the Full-Time Employee's required contribution for self-only coverage does not exceed 9.5 percent of the wages reported by all employers to the multiemployer plan for that individual.

- Transition rule for plans that do not offer qualifying coverage to dependent children in 2013 and 2014: Any employer that takes steps during the 2014 or 2015 plan year (or both) toward satisfying the section 4980H provisions relating to the offering of coverage to Full-Time Employees' dependents will not be liable for excise taxes under the 4980H rules with respect to any such dependents to whom MEC coverage was not offered during both the 2013 and 2014 plan years solely on account of a failure to offer MEC coverage to such dependents for 2015.

Key Point: This rule only applies with respect to dependent children who were NOT offered MEC coverage in BOTH 2013 and 2014. Thus, if dependent MEC coverage was offered in either 2013 or 2014

and then dropped, the transition rule does NOT apply.

- Payroll Start Date for January 2015: For January 2015 ONLY, an ALE Member will be treated as offering coverage for the entire month of January so long as coverage is offered by the first day of the first payroll period that begins in January 2015.

  Example II.-4: The first payroll period in January 2015 for ABC, Inc. begins the first Monday in January (which is January 5, 2015). If coverage offered will be effective no later than January 5, 2015, ABC will be treated as offering coverage for the entire month of January.

- Revised Substantially All Test and Reduction Share: For 2015 only, the percentage threshold for the Substantially All Test used to determine liability for the Sledgehammer Tax is decreased from 95% to 70%. In addition, the applicable reduction share for ALE Members who are subject to the Sledgehammer Tax is increased from 30 to 80 for 2015. See Step #3 above and Appendix K for more details.

What about the transition relief related to non-calendar year cafeteria plans?

Although most of the transition relief provided in the proposed regulations was carried forward to the final regulations—even expanded it in some cases, the final regulations did not extend the transition relief prescribed in the proposed regulations for non-calendar year cafeteria plans. The IRS also subsequently addressed this transition relief in IRS Notice 2013-71. That transition relief was limited to cafeteria plans with plan years beginning in 2013 (and only 2013).

Appendix M: Summary of IRS Notice 2014-49

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