

---

January 2, 2013

## **Employer Shared Responsibility Provisions under the ACA**

Treasury and the IRS released proposed regulations on the new Employer Shared Responsibility provisions (a/k/a Play or Pay, or IRC Section 4980H) under the ACA on December 28, 2012. This Quick Start Overview is intended to provide a high level summary of the proposed guidance to help you hit the ground running in 2013 as you prepare for 2014.

### **QUICK SUMMARY OF CODE SECTION 4980H**

Starting in 2014, employers employing at least a certain number of employees will be subject to the Employer Shared Responsibility provisions under section 4980H of the Internal Revenue Code (added to the Code by the Affordable Care Act, or ACA). Under these provisions, if these employers do not offer affordable health coverage that provides a minimum level of coverage to their full-time employees, they may be subject to an Employer Shared Responsibility payment/assessment if at least one of their full-time employees receives a premium tax credit for purchasing individual coverage in an insurance Exchange.

To be subject to these Employer Shared Responsibility provisions, an employer must have at least 50 full-time employees or a combination of full-time and part-time employees that is equivalent to at least 50 full-time employees.

### **THE 50+ FULL TIME EQUIVALENT (FTE) THRESHOLD**

- Employers will determine each year, based on their current number of FTE employees, whether they will be considered a large employer for the next year. The FTE calculation is used solely to determine the employer's size for purposes of the 50+ Employer Shared Responsibility threshold and is not used to calculate any assessment amounts.
- According to the proposed regulation, employers will use information about the employees they employ during 2013 to determine whether they employ enough employees to be subject to these new provisions in 2014.
- Employers average their number of FTE employees per month across the months in the year to see whether they meet the large employer threshold.

- Monthly FTEs = the number of full-time employees plus all part-time hours in the month converted to a full-time equivalent.
- Full-time employee is an employee who is employed an average of at least 30 hours of service per week with an employer. For this purpose, 130 hours of service in a calendar month is treated as the monthly equivalent of at least 30 hours of service per week.
- The number of full-time equivalent employees for each calendar month is determined by calculating the aggregate number of hours of service for that calendar month for employees who were not full-time employees (but not more than 120 hours of service for any employee) and dividing that number by 120.
- For purposes of section 4980H, a sole proprietor, a partner in a partnership, or a 2-percent S corporation shareholder is not an employee.
- Companies that have a common owner or are otherwise related generally are combined together for purposes of determining whether or not they employ at least 50 FTEs.
  - If the combined total meets the threshold, then each separate company is subject to the Employer Shared Responsibility provisions, even those companies that individually do not employ enough employees to meet the threshold.
- For purposes of determining whether an employer meets the 50+ FTE threshold, an employer generally will take into account only work performed in the United States.
  - Foreign employers with less than 50 FTEs in the United States would not be subject to the Employer Shared Responsibility provisions
  - Likewise, employees working only abroad, whether or not U.S. citizens, generally will not be taken into account for purposes of determining whether an employer meets the 50+ FTE threshold.

## LIABILITY FOR AND CALCULATION OF THE EMPLOYER SHARED RESPONSIBILITY PAYMENT

In 2014, if an employer meets the 50+ FTE threshold, the employer generally will be liable for an Employer Shared Responsibility payment only if:

- The employer does not offer health coverage or offers coverage to less than 95% of its full-time employees (after 2014 offers coverage to less than 95% of its full-time employees AND the dependents of those employees), and at least one of the full-time employees receives a premium tax credit to help pay for coverage from an Exchange.
  - PAYMENT = number of actual full-time employees (NOT FTE employees) the employer employed for the year (minus 30) multiplied by \$2,000.
  - If the employer is related to other employers, then the 30 full-time employee exclusion is allocated among all the related employers.

OR

- The employer offers health coverage to at least 95% of its full-time employees, (after 2014 offers coverage to at least 95% of its full-time employees AND the dependents of those employees) but at least one full-time employee receives a premium tax credit to help pay for coverage from an Exchange (because the coverage offered was not affordable or did not provide minimum value).
  - PAYMENT (computed separately for each month) = the number of full-time employees who receive a premium tax credit for that month multiplied by \$250 (1/12 of \$3,000).
  - The amount of the payment for any calendar month is capped at the number of the employer's full-time employees for the month (minus up to 30 full-time employees) multiplied by 1/12 of \$2,000 or \$167.
    - The cap ensures that the payment for an employer that offers coverage can never exceed the payment that employer would owe if it did not offer coverage.

Dependents of the employee means dependent children to age 26 as required by the ACA and do not mean the employee's spouse.

#### MAKING AN EMPLOYER SHARED RESPONSIBILITY PAYMENT – THE IRS WILL FIND YOU

- The IRS will contact employers to inform them of their potential liability and provide them an opportunity to respond before any liability is assessed or notice and demand for payment is made.

- IRS contact for a given calendar year will not occur until after employees' individual tax returns are due for that year claiming premium tax credits and after the due date for employers that meet the 50+ FTE threshold to file the required information returns identifying their full-time employees and describing the coverage that was offered (if any).
- If it is determined that an employer is liable for an Employer Shared Responsibility payment after the employer has responded to the initial IRS contact, the IRS will send a notice and demand for payment. That notice will instruct the employer on how to make the payment.
- Employers will not be required to include the Employer Shared Responsibility payment on any tax return that they file.

#### INFORMATION REPORTING BY EMPLOYERS

- Beginning in 2015, employers subject to the Employer Shared Responsibility provisions are required to report certain information about their employer-provided health coverage offered on or after January 1, 2014.
- The proposed regulation indicates that the Treasury Department and the IRS intend to publish separate proposed regulations on information reporting by employers for this purpose.

#### EFFECTIVE DATE AND TRANSITION RULES FOR FISCAL YEAR PLANS

The Employer Shared Responsibility provisions generally go into effect for months beginning on or after January 1, 2014.

- This works fine for calendar year health plans but not for fiscal year plans (plans operating on plan years other than the calendar year). See the Transition Relief Section later in this overview for transitional rules for fiscal year plans.
- Employers may rely on the proposed regulation pending issuance of final regulations or other guidance.
- If future guidance is more restrictive than the guidance in the proposed regulation, the future guidance will be applied without retroactive effect and employers will be provided with sufficient time to come into compliance with the final regulation.

## TRANSITION RELIEF RULES

### Transition Rule for Measuring 50+ Full Time Equivalent Employees:

- Rather than being required to use the full twelve months of 2013 to measure whether it has 50+ FTE employees, an employer may measure using any six-consecutive-month period in 2013.

### Transition Relief for Employers Maintaining a Fiscal Year Plan as of December 27, 2012:

- First, for any employee (whenever hired) who is eligible to participate in the health plan under its terms in effect as of December 27, 2012 (whether or not they take the coverage), the employer will not be subject to a potential payment until the first day of the fiscal plan year starting in 2014 IF the employee is offered affordable, minimum value coverage no later than the first day of the 2014 fiscal plan year.
- Second, if (a) the fiscal year plan was offered to at least one third of the employer's employees (full-time and part-time) at the most recent open season or (b) at least 25% of the employer's employees were enrolled in the fiscal year plan, then the employer will not be subject to the Employer Shared Responsibility payment with respect to any of its full-time employees until the first day of the fiscal plan year starting in 2014, provided that those full-time employees are offered affordable coverage that provides minimum value no later than that first day.
  - For purposes of determining whether the plan covers at least 25% of the employer's employees, an employer may look at any day between October 31, 2012 and December 27, 2012.

### Transition Relief for Salary Reduction Elections for Health Coverage under Cafeteria Plans with Fiscal Cafeteria Plan Years Beginning in 2013:

The availability of health plan coverage through an Exchange beginning in 2014 does not constitute a change in status under current cafeteria plan rules. Therefore, under the proposed regulation, employers subject to the Employer Shared Responsibility requirements are permitted to amend their written cafeteria plans to permit one or both of the following changes to salary reduction elections:

- An employee who elected to salary reduce through the cafeteria plan for health plan coverage with a fiscal plan year beginning in 2013 may prospectively revoke

or change his or her health plan election once, during that plan year, without regard to whether the employee experienced a change in status event.

- An employee who failed to make a salary reduction election through his or her employer's cafeteria plan for health plan coverage with a fiscal plan year beginning in 2013 before the deadline for making elections for the cafeteria plan year beginning in 2013 is allowed to make a prospective salary reduction election for health plan coverage on or after the first day of the 2013 plan year of the cafeteria plan, without regard to whether the employee experienced a change in status event.

\* \* \* \* \*

This document is not intended to be a comprehensive summary of the proposed regulation. Rather, it is intended to provide a high level summary of portions of the regulation that describe the overall operation of the Employer Shared Responsibility requirement. The proposed regulation addresses other issues not summarized in this document, including hours of service rules (both those addressed in IRS Notice 2012-58 and additional clarifications), minimum value and affordability provisions. These items will be addressed in detail at a later date.

Please contact me if you have any questions.

**Richard A. Szczebak, Esq.**

617-399-0441 | [rszczebak@parkerbrown.com](mailto:rszczebak@parkerbrown.com)

*The foregoing has been prepared for the general information of clients and friends of the firm. It is not meant to provide legal advice with respect to any specific matter and should not be acted upon without professional counsel. If you have any questions or require any further information regarding these or other related matters, please contact your Parker Brown Macaulay & Sheerin representative. This material may be considered advertising under certain rules of professional conduct.*