§4980H Offer Requirements and Associated Penalties

Issue Date: December 2017

We are entering another season of employer reporting deadlines, and the first round of letters from the IRS proposing employer shared responsibility payments under §4980H has been released. This reminds us that the employer mandate under §4980H of the ACA remains in effect and requires compliance to avoid potential penalties. All applicable large employers (ALEs) are subject to §4980H offer of coverage requirements and §6056 employer reporting requirements. ALEs who fail to comply with §4980H offer of coverage requirements and report accordingly to the IRS via Forms 1094-C and 1095-C may find themselves subject to penalties (employer shared responsibility payments). Following is a discussion of the offer of coverage requirements and the associated penalties for employers who fail to comply.

Determining Applicable Large Employer Status

Status as an ALE is determined based on data from the previous calendar year, regardless of plan year. It doesn't matter whether the employer exceeded 50 FTEs in any given month, but rather whether the employer *averaged* 50 or more FTEs over all 12 months *of the previous calendar year*. Here are the general calculation steps for determining ALE status:

Step 1: Calculate the number of employees with 120 or more hours of service for each calendar month.
Step 2: Aggregate hours of service for each month for any other employees and divide the total by 120.
Step 3: Add the numbers obtained in Steps 1 and 2 for each month.
Step 4: Add up the totals from each month from Step 3 and divide the sum by 12.

For each month, count all hours of service for any employee employed for at least one day during the month.

When more than one entity is involved due to common ownership or shared services (e.g. a controlled group or affiliated service group under §414 rules), the entities must aggregate FTEs to determine the average for the previous calendar year. If when combined the entities average 50 or more FTEs, then each entity is considered an ALE, subject to §4980H offer of coverage requirements and §6056 employer reporting requirements for the following calendar year.

§4980H Offer of Coverage Requirements

The offer of coverage requirements for ALEs under §4980H is as follows:

- **§4980H(a)** – ALEs must offer minimum essential coverage (MEC) to at least 95% of (or all but 5, if greater) full-time employees and their dependent children each month.

- **§4980H(b)** – ALEs must offer coverage that provides minimum value AND is affordable to all full-time employees each month.

Minimum Essential Coverage (MEC)

Most employer-sponsored group health plans will be considered minimum essential coverage (MEC) plans because very few specific requirements and little guidance are offered. Even plans referred to as "limited medical" or preventive-only will meet this requirement. The definition includes any coverage under an "eligible employer-sponsored plan"—a term that means a group health plan or group health insurance coverage offered by an employer to an employee that is (a) a governmental plan, or (b) any other plan or coverage offered in a

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state's small or large group market. In addition, IRS regulations clarify that self-funded employer coverage qualifies as an eligible employer-sponsored plan.

Minimum Value

The requirement to provide "minimum value" is a higher standard than the requirement to offer a MEC plan. A plan provides minimum value if the plan's share of the total allowed cost of benefits provided to an employee is at least 60% (actuarial value of 60% or better). Whether a plan provides minimum value is required content in the summary of benefits and coverage (SBC).

Affordability

Affordability is generally determined by applying the particular affordability percentage (see below) to an individual's household income. However, because an employer will not typically know household income, the employer is protected from any potential penalties under §4980H(b) so long as the coverage is affordable under one of three safe harbors:

- Federal poverty level (FPL) safe harbor;
- Rate of pay safe harbor; or
- Form W-2 safe harbor.

For more details about affordability requirements and use of an affordability safe harbor, see our issue brief on affordability found at http://benefitcomply.com/%E2%80%A2-affordability-considerations/.

	2015	2016	2017	2018
Affordability Percentage	9.56%	9.66%	9.69%	9.56%

§4980H Penalties (Employer Shared Responsibility Payments)

- **§4980H(a)** – If the employer fails to offer minimum essential coverage (MEC) to at least 95% of (or all but 5, if greater) full-time employees and their dependent children in any given month, a penalty will apply if any full-time employee enrolls through a public Exchange and qualifies for a tax subsidy. The penalty is multiplied by the total full-time employee count minus the first 30, regardless of how many employees were offered coverage.
    - Penalty calculation = (full-time employee count – 30) X §4980H(a) penalty

- **§4980H(b)** – If the employer satisfies §4980H(a) requirements, the employer may still owe a penalty for any full-time employee who is not offered minimum-value, affordable coverage if that employee enrolls through a public Exchange and qualifies for a tax subsidy. This penalty applies on a per-employee basis rather than against the total full-time employee count.
    - Penalty calculation = §4980H(b) for each full-time employee who is not offered minimum-value, affordable coverage who enrolls through a public Exchange and qualifies for a tax subsidy.

	2015	2016	2017	2018
§4980H(a)	$2,080 ($173.33/month)	$2,160 ($180/month)	$2,260 ($188.33/month)	$2,320 ($193.33/month)
§4980H(b)	$3,120 ($260/month)	$3,240 ($270/month)	$3,390 ($282.50/month)	$3,480 ($290/month)

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Penalties apply on a monthly basis. In other words, penalties will constitute 1/12 of the annual penalty for each month that the employer fails to satisfy §4980H requirements and a full-time employee is enrolled through a public Exchange and qualifies for a tax subsidy.

An employer will not be subject to both (a) and (b) penalties in any one month. If the (a) penalty applies, that is the maximum penalty that could be assessed. However, if the employer is in compliance with (a) requirements and fails to satisfy (b) requirements, there may be a penalty under (b).

Reporting and Reconciliation

ALEs are required to self-report to the IRS regardless of whether §4980H requirements were met for the calendar year. The reporting is done via a Form 1094-C and a Form 1095-C for each employee who was full time for at least one month. The ALE indicates whether MEC was offered to 95% or more of full-time employees on Form 1094-C (Part III, Column (a)). Specific offer of coverage information for each full-time employee, including information about whether the offer provided minimum value and was affordable, is reported on Lines 14 through 16 of Form 1095-C.

The IRS then reconciles the employer reporting with personal tax returns and data from the public Exchanges to determine which ALEs may owe penalties. If it appears that an ALE owes penalties, the ALE will receive a Letter 226J from the IRS. More information about the IRS' collection process via Letter 226J may be found at http://benefitcomply.com/wp-content/uploads/2017/11/IRS-Letter-226J.pdf.

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