June 4, 2013

Mr. Daniel Werfel
Acting Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20024

Re: Comments on Proposed Regulations Issued Under Section 4980H

Dear Acting Commissioner Werfel:

Enclosed are comments on the proposed regulations issued under Section 4980H. These comments represent the view of the American Bar Association Section of Taxation. They have not been approved by the Board of Governors or the House of Delegates of the American Bar Association, and should not be construed as representing the policy of the American Bar Association.

Sincerely,

Rudolph R. Ramelli
Chair, Section of Taxation

Enclosure

cc: Mark J. Mazur, Assistant Secretary (Tax Policy), Department of the Treasury
    William J. Wilkins, Chief Counsel, Internal Revenue Service
    J. Mark Irw, Senior Advisor and Deputy Assistant Secretary (Tax Policy), Department of the Treasury
    George Bostick, Benefits Tax Counsel, Department of the Treasury
    Victoria A. Judson, Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities), Internal Revenue Service
ABA SECTION OF TAXATION
COMMENTS ON THE PROPOSED REGULATIONS [REG-138006-12, RIN 1545-BL33] REGARDING SHARED RESPONSIBILITY FOR EMPLOYERS REGARDING HEALTH COVERAGE UNDER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT

These comments (“Comments”) are submitted on behalf of the American Bar Association Section of Taxation and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these comments was exercised by Linda R. Mendel of the Section’s Employee Benefits Committee (the “Committee”). Substantive contributions were made by Jacquelyn Abbott, Sarah Downie, William Freedman, Evelyn Haralampu, Sarah Krause, Norbert Kugele, Thomas Nichols, Andrew Oringer, Fritz Richter, Laura Westfall and Matthew J. Eickman. These Comments were reviewed by W. Waldan Lloyd, a Vice Chair of the Committee, and Mark A. Bodron, Chair of the Committee. The Comments were further reviewed by Roberta Casper Watson and James R. Raborn on behalf of the Section’s Committee on Government Submissions and by Pamela Baker, Council Director for the Committee.

Although the members of the Section of Taxation who participated in preparing these Comments have clients who might be affected by the federal income tax principles addressed by these Comments, no such member or the firm or organization to which such member belongs has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

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Date: June 4, 2013
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COMMENTS

I. Executive summary

On December 28, 2012, the Department of Treasury ("Treasury") and the Internal Revenue Service (the "Service") issued proposed regulations ("Proposed Regulations")\(^1\) under section 4980H,\(^2\) which addresses the employer shared responsibility requirements regarding health coverage.

Section 4980H was added by section 1513 of the Patient Protection and Affordable Care Act of 2010 (the "Affordable Care Act" or "Act").\(^3\) In general, section 4980H provides that an "applicable large employer" is subject to an assessable payment in either of two situations: (1) the employer fails to offer to its full-time employees (and their dependents) minimum essential coverage or "MEC"\(^4\) under an eligible employer-sponsored plan ("employer plan"), and a full-time employee is certified to the employer as having received an applicable premium tax credit or cost-sharing reduction; or (2) the employer offers its full-time employees (and their dependents) an employer plan with MEC, and one or more full-time employees is certified to the employer as having received an applicable premium tax credit or cost-sharing reduction because, with respect to such employee or employees, the employer’s coverage is either unaffordable or does not provide minimum value within the meaning of section 36B(c)(2)(C)(i) and (ii).

Section 4980H is effective for months beginning on and after January 1, 2014.

The Proposed Regulations provide guidance and clarification with respect to a number of issues related to the application and operation of section 4980H, including, but not limited to, rules for determining whether an employer is an applicable large employer (and thus subject to section 4980H), who is a fulltime employee, and how the assessable payments are determined. We appreciate Treasury’s and the Service’s efforts to provide comprehensive guidance regarding the application of section 4980H. In response to the invitation in the preamble to the Proposed Regulations, we appreciate the opportunity to provide these Comments regarding the Proposed Regulations.

\(^2\) References to a "section" are to a section of the Internal Revenue Code of 1986, as amended (the "Code"), unless otherwise indicated.
\(^4\) MEC is defined in section 5000A(f).
A summary of our recommendations for the Regulations, when finalized, are as follows:

With regard to applicable large employer status:

- We recommend that (i) when an applicable large employer sells the stock of a member, the former member be treated as a new employer under section 4980H(c)(2)(C)(ii), and (ii) after the sale, the applicable large employer not be treated as the predecessor of a former member.

- We recommend that when an applicable large employer acquires the stock of a small employer, the applicable large employer be permitted to treat the employees of the small employer as new employees.

With regard to the allocation of responsibility among applicable large employer members:

- We recommend that a full-time employee be treated as having been offered minimum essential coverage by his or her employer if any applicable large employer member offers minimum essential coverage to the full-time employee.

- We recommend that (i) when an employee is classified as full-time as a result of hours of service for two or more applicable large employer members, the applicable large employer be permitted to select one applicable large employer member that will treat the employee as its full-time employee, and (ii) the selected applicable large employer member report an employee as its full-time employee under section 6056 and be responsible for payment of any penalties imposed under section 4980H with respect to the employee.

With regard to the identification of full-time employees:

- Because the common law employer test can result in ambiguous situations, including situations where a temporary worker is the common law employee of two different employers, we recommend the addition of the following safe harbor rule: if the entity that reports a worker’s salary or wages on Form W-2 (e.g., a staffing agency) offers a worker affordable health care coverage with minimum value, but that entity is subsequently determined by the Service not to be the common law employer of the worker, then the entity that is the common law employer of the worker will not be subject to an assessable payment under section 4980H with respect to such worker.

- We recommend that an applicable large employer be permitted to treat an employee as a seasonal employee if, as of the date of hire, the employer
has a reasonable expectation that the employee will work for a defined period that is less than a specified time limit, as follows:

(i) nine months, if other employees performing similar work with the same (or a similar) employer are classified as full-time or variable hour (i.e., other than seasonal); or

(ii) in all other cases, seven months.

- We recommend that, when a variable hour employee is rehired after a period of at least 26 weeks during which no hours are credited, an applicable large employer member be permitted to choose whether to treat the employee as a new employee or an ongoing employee.

- We believe that aspects of the Department of Labor’s definition of “hour of service” in Department of Labor regulation section 2530.200b-2 should not apply to the full-time status safe harbor, especially in light of the Service’s decision not to cap the number of hours of service that must be credited during a period of time during which no duties are performed, and therefore recommend that:

  (i) no hours of service be credited for any period after the employment relationship is terminated; and

  (ii) amounts payable by a third party sick pay payor should not be treated as paid by the employer.

- We recommend that the reasonable classification test be expanded to include other potential methods for classifying employees, as well as including a catch-all category of “any other reasonable classification of employees.”

With regard to dependents:

- We recommend that the definition of minimum essential coverage be clarified to provide that the offer to enroll in MEC does not have to include dependents who are not “applicable individuals” under section 5000A(d)(3), such as a non-resident dependent.

- We recommend that the definition of “dependents” be clarified to provide that an employee’s “dependent” for purposes of section 4980H is “a child (as defined in section 152(f)(1)(A)(i)) of an employee who has not yet attained age 26.” This would result in limiting “dependents” for purposes of section 4980H to an employee’s son, daughter, stepson, or stepdaughter (including an adopted child and a child legally placed for adoption), who has not yet attained age 26, and would clearly exclude a foster child from this definition.
With regard to affordability:

- We recommend that affordability be determined after the application of any premium discount available under an employer’s wellness program that may be applied to the employee contribution for self-only coverage for the lowest cost option offered by the employer that provides minimum essential coverage and minimum value, provided that the premium discount available under the employer’s wellness program complies with applicable nondiscrimination and wellness program requirements under the Health Insurance Portability and Accountability Act of 1996 and the Affordable Care Act.

- We recommend that an employee who takes a leave of absence for illness, injury, or disability and who receives less than his or her hourly wage or salary during that leave of absence not be treated as having experienced a reduction in hourly wage or salary for purposes of the Rate of Pay Safe Harbor.

With regard to certain suggested clarifications:

- We recommend that the definition of “month” be slightly rephrased so that it applies to the “period that begins on any date other than the first day of a calendar month and that ends on the immediately preceding date in the immediately following calendar month (or on the last day of February if there is no such immediately preceding date).”

- We recommend that the word “member” be added to the phrase “applicable large employer [member]” in the third line of the last sentence of section 54.4980H-5(a) of the Proposed Regulations.

- We recommend that the words “for the entire month” and “entire” be added to the phrase “if the employee would have been offered coverage [for the entire month] if the employee had been employed for the entire month, the employee is treated as having been offered coverage during that [entire] month” in the last sentence of section 54.4980H-5(c) of the Proposed Regulations.

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II. **Applicable large employer status**

A. **Disposition of a member by an applicable large employer**

1. **Summary**

   The requirements of section 4980H and the potential liability for the assessable payments are limited to applicable large employers.\(^6\) Section 4980H(c)(2)(C)(iii) provides that, for purposes of determining applicable large employer status, an employer includes a predecessor employer. However, it is possible that a multi-member applicable large employer may sell the stock of a member that would, if considered separately from its former controlled group, be a small employer. The Proposed Regulations reserve for later guidance the definition of a predecessor employer\(^7\) but ask for comments on application of the definition applied in the employment tax context.\(^8\)

2. **Recommendation**

   We recommend that (i) when an applicable large employer sells the stock of a member, the former member be treated as a new employer under section 4980H(c)(2)(C)(ii), and (ii) after the sale, the applicable large employer not be treated as the predecessor of a former member.

3. **Explanation**

   If an applicable large employer were treated as the predecessor of its former members, a former member with fewer than 50 full-time employees would continue to be classified as an applicable large employer for the remainder of the calendar year of the sale. This would put the former member in the untenable position of being subject to penalties under section 4980H if it failed to offer coverage to its full-time employees but unable to purchase a small group policy on a Small Business Health Options Program or “SHOP” Exchange.\(^9\)

   Instead of treating an applicable large employer as the predecessor of a former member, we recommend that a former member be treated as a new employer. An entity ceases to be a member of a controlled group of corporations or trades or businesses under common control due to a sale of its stock or other ownership interests. As a new

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\(^6\) The term “applicable large employer” is defined under section 4980H(c)(2).

\(^7\) Prop. Reg. § 54.4980H-1(a)(31).


\(^9\) A “qualified employer” (i.e., an employer permitted to purchase coverage on a SHOP Exchange) is a small employer that elects to make all full-time employees eligible for one or more qualified health plans offered on a SHOP Exchange. 45 CFR § 155.710. “Large employer” and “small employer” are defined by reference to section 4890H(c)(2), effective for plan years beginning on or after January 1, 2016. 45 CFR § 155.20 (except for operations of a Federally-facilitated SHOP for which the method shall be used for plan years beginning on or after January 1, 2014 and in connection with open enrollment activities beginning October 1, 2013).
employer, its status as an applicable large employer (or a small employer) would be based on “the average number of employees that it is reasonably expected such employer will employ on business days in the current calendar year.”\(^{10}\) We recommend that only days in the calendar year after the termination of the relationship to the controlled group or trades or business under common control be considered for this purpose.

B. Acquisition of a small employer by an applicable large employer

1. Summary

There will be situations where an applicable large employer will acquire the stock of a small employer. However, section 4980H does not address or provide a transitional period for an applicable large employer to organize coverage for the employees of an acquired entity.

2. Recommendation

We recommend that when an applicable large employer acquires the stock of a small employer, the applicable large employer be permitted to treat the employees of the small employer as new employees.

3. Explanation

We are concerned it is unlikely that a small employer will keep the records of employees’ full-time or part-time status in accordance with the safe harbor in section 54.4980H-3 of the Proposed Regulations. Therefore, when an applicable large employer acquires a small employer, the applicable large employer will need a transition period during which it can create records and processes for identifying full-time employees. If the employees of an acquired entity are treated as newly hired employees, the applicable large employer would make reasonable determinations as to which employees are expected to work full-time on a prospective basis. For those employees that the applicable large employer reasonably expects to work full-time on a prospective basis, the employer could apply a waiting period not in excess of 90 days. For those employees that the applicable large employer reasonably expects will have variable hours or will be seasonal on a prospective basis, the employer could use a measurement period to determine the employees’ full-time or part-time status.

When an applicable large employer hires the former employees of a small employer in connection with the purchase of assets of a small employer, the applicable large employer will treat the former employees of the small employer as its newly hired employees. Our recommendation would provide equivalent treatment for employees of a small employer in connection with an applicable large employer’s purchase of stock in a small employer.

\(^{10}\) I.R.C. § 4980H(c)(2)(C)(ii).
III. Allocation of responsibility among applicable large employer members

A. Offer of coverage by an applicable large employer member to another member’s full-time employee

   1. Summary

      If an applicable large employer member fails to offer minimum essential coverage to at least 95% of its full-time employees (and their dependents) for a calendar month, and the applicable large employer member receives a “Section 1411 Certification”11 with respect to at least one full-time employee, an assessable payment is imposed.12

   2. Recommendation

      We recommend that a full-time employee be treated as having been offered minimum essential coverage by his or her employer if any applicable large employer member offers minimum essential coverage to the full-time employee.

   3. Explanation

      An applicable large employer’s employees are identified under the common law standard.13 However, application of the common law employment standard to typical situations within a multi-member applicable large employer would be difficult and unnecessary.

      Within a controlled group of corporations, an employee of one member of the controlled group could, under some circumstances, be the common law employee of another member of the controlled group. The common law employer member should not be subject to an assessable payment under section 4980H(a) where an affiliated member has offered minimum essential coverage to the employee. Sharing of employees through intercompany service agreements would be impacted if this were not allowed. In addition, enforcement of the common law employment standard within a multi-member applicable large employer would require the Service to review and analyze an applicable large employer’s business motives (such as business strategy and initiatives) for employee assignments and transfers, an exercise that would be unduly burdensome for both the Service and the applicable large employer member.

      In general, the Affordable Care Act is intended to influence the behavior of employers as it relates to the goal of providing its employees with affordable and

11 Prop. Reg. § 54.4980H-1(a)(35) (“The term Section 1411 Certification means the certification received as part of the process established by the Secretary of Health and Human Services under which an employee is certified to the employer under section 1411 of the Affordable Care Act as having enrolled for a calendar month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee.”).


accessible health coverage. We do not believe that the Act is intended to impede the ability of private or public employers to direct the activities and location of their employees. To this end, we recommend that an applicable large employer have the freedom to assign and transfer employees to members of its controlled group as it sees fit, subject to its corporate governance documents and business needs. The movement of employees is commonplace today and often essential to an employer’s business in order to make sure that the right people are in the right place at the right time.

We believe that Example 1 in section 54.4980H-2(d) of the Proposed Regulations, where P owns 100% of all classes of stock of Corporations S and T, could be expanded as follows to illustrate the point:

Corporation P has one full-time employee, Employee D, Corporation S has 40 full-time employees, and Corporation T has 60 full-time employees. P, S, and T are each members of the same applicable large employer. Corporation S sponsors a group health plan and Corporation T is a participating employer. Corporation P is not a participating employer.

During 2015, Corporation T seconds (transfers) six employees to Corporation P under an intercompany services agreement and those six employees become common law employees of Corporation P. Corporation T continues to pay these six employees and offers to these employees (and their dependents) the opportunity to enroll in minimum essential coverage. Corporation P and Corporation T have an intercompany services agreement whereby Corporation P reimburses Corporation T for all compensation and benefit expenses for the six seconded employees. Employee D of Corporation P is not offered minimum essential coverage and Corporation P receives a Section 1411 Certification for 2015 with respect to Employee D.

In the example, Corporation P would not be subject to an assessable payment under section 4980H(a), provided that Corporation T’s offer of coverage to the six seconded employees be treated as Corporation P’s offer of coverage to the six seconded employees. Since an offer of coverage to all but one full-time employee is sufficient to avoid an assessable payment under section 4980H(a), Corporation P would not be subject to an assessable payment under section 4980H(a) as a result of its failure to offer coverage to Employee D.

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14 Prop. Reg. § 54.4980H-4(d), which provides in part “[i]f an applicable large employer member’s total allocation is a fractional number that is less than one, it will be rounded up to one.”
B. Full-time employee working for two or more applicable large employer members

1. Summary

For all purposes under section 4980H, an hour of service for one applicable large employer member is treated as an hour of service for all applicable large employer members.\(^{15}\) As a result, an employee who is classified as full-time on the basis of hours worked for two or more applicable large employer members would be treated as the full-time employee of each of the applicable large employer members for which the employee performed services. However, it is not clear whether all of the applicable large employer members will be (a) required to report (under section 6056) the employee as a full-time employee, and (b) responsible for penalties imposed under section 4980H with respect to the employee.

2. Recommendation

We recommend that (i) when an employee is classified as full-time as a result of hours of service for two or more applicable large employer members, the applicable large employer be permitted to select one applicable large employer member that will treat the employee as its full-time employee, and (ii) that selected applicable large employer member report an employee as its full-time employee under section 6056 and be responsible for payment of any penalties imposed under section 4980H with respect to the employee.

3. Explanation

If an applicable large employer fails to offer affordable, adequate coverage to a full-time employee, we recommend that only one applicable large employer member be responsible for penalties under section 4980H. If multiple applicable large employer members were potentially subject to penalties with respect to a full-time employee who performs services for multiple applicable large employer members, an applicable large employer would be understandably reluctant to permit such arrangements, leading to a less efficient allocation of human resources.

IV. Identification of full-time employees

A. Workers obtained through a staffing agency

1. Summary

As noted above, if an applicable large employer member fails to offer MEC to at least 95% of its full-time employees (and their dependents) for a calendar month, and the applicable large employer member receives a Section 1411 Certification with respect to at least one full-time employee, an assessable payment is imposed.\(^{16}\) For this purpose, an


\(^{16}\) Prop. Reg. § 54.4980H-4(a).
employee is “an individual who is an employee under the common-law standard”, and an
employer is “the person that is the employer of an employee under the common-law
standard.”17

2. Recommendation

Because the common law employer test can result in ambiguous situations,
including situations where a temporary worker is the common law employee of two
different employers, we recommend the addition of the following safe harbor rule: if the
entity that reports a worker’s salary or wages on Form W-2 (e.g., a staffing agency) offers
a worker affordable health care coverage with minimum value, but that entity is
subsequently determined by the Service not to be the common law employer of the
worker, then the entity that is the common law employer of the worker will not be subject
to an assessable payment under section 4980H with respect to such worker.

3. Explanation

An employer may use temporary workers for a number of reasons. For example,
an employer may use temporary workers to: (a) meet increased production demands that
are anticipated to be of short-term duration; (b) meet seasonal fluctuations in demand for
products; or (c) help staff special projects of short-term duration. Because of the high
cost of hiring workers, the employer (“service recipient company”) may turn to a staffing
agency for such workers. If the Service were to determine that a temporary worker is the
common law employee of the service recipient company, the service recipient company
could be subject to penalties under section 4980H with respect to the temporary worker
even if the temporary worker is offered affordable coverage with minimum value by the
staffing agency.

To determine who is the common law employer, courts use a common law test
adopted by the U.S. Supreme Court in Nationwide Mutual Insurance Co. v. Darden.18 As
explained by the Ninth Circuit court in Vizcaino v. Microsoft,19 Darden applied the
common law of agency, and under these common law principles it is possible that a
temporary worker could be the common law employee of both the staffing agency and a
service recipient company.20 Since no one Darden factor is the most important, the
outcome is dependent to some degree on a subjective balancing of the factors. In many
situations, reasonable minds could reach different conclusions as to who is a common law
employer, and even over whether both the service recipient and the staffing agency are
common law employers of the same worker.

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19 173 F.3d 713, 723-24 (9th Cir. 1999).
20 See also Arrow Electronics v. Adecco Employment Services, Inc. 195 S.W.3d 646 (Tenn. Ct. App. 2005)
(relying on loaned servant doctrine to allocate liability between the two employers of a temporary worker).
The possibility that both the staffing agency and the service recipient company could be common law employers of the worker raises the possibility that both the staffing agency and the service recipient company may be subject to penalties under section 54.4980H-4 of the Proposed Regulations for failure to offer coverage to a worker—including the possibility that one could be penalized even though the other is offering coverage.

For example, suppose that Company A has 100 full-time employees, including six temporary workers obtained from Staffing Agency B who have been with Company A for more than 90 days. Company A offers coverage to 93 of its employees. Company A fails to offer coverage to seven of its employees, including the six temporary workers obtained through Staffing Agency B. However, Staffing Agency B offers affordable minimum essential coverage to Company A’s six temporary workers. The seventh employee qualifies for subsidized coverage through an exchange. Because in this example Company A is not offering coverage to at least 95% of its full-time employees (and their dependents), Company A is subject to an assessable payment under section 54.4980H-4 of the Proposed Regulations—even though these temporary workers are being offered minimum essential coverage by Staffing Agency B.

A significant goal of the Affordable Care Act is to expand the number of individuals who are able to obtain health plan coverage. With respect to temporary workers, this goal is met as long as either the service recipient company or the staffing agency is offering minimum essential coverage to the temporary workers.

We recommend that the Regulations, when finalized, establish a rule that will not penalize the service recipient company if the staffing agency offers affordable minimum essential coverage to a worker. Given the ambiguity inherent in using the Darden factors, we recommend that this rule apply even if the Service were to later determine that the staffing agency was not a common law employer of the worker. As long as the staffing agency offers affordable minimum essential coverage to the worker, the service recipient company will be deemed to have satisfied the employer responsibility requirements under section 4980H. Conversely, if neither the service recipient company nor the staffing agency offers the worker affordable minimal essential coverage, then the common law employer remains responsible for penalties. We believe that a rule for staffing agencies is consistent with and supports the Act’s goal of expanding the number of individuals who are provided affordable health care coverage.

B. **Seasonal employees**

1. **Summary**

An employer may apply a look-back measurement period to determine whether variable hour and seasonal employees are full-time employees for purposes of section 4980H. While the Proposed Regulations define a “variable hour employee,” the definition of “seasonal employee” is “reserved” under the Proposed Regulations.  

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2. **Recommendation**

We recommend that an applicable large employer be permitted to treat an employee as a seasonal employee if, as of the employee’s start date, the employer has a reasonable expectation that the employee will work for a defined period that is less than a specified time limit, as follows:

(i) nine months, if other employees performing similar work with the same (or a similar) employer are classified as full-time or variable hour (*i.e.*, other than seasonal); or

(ii) in all other cases, seven months.

3. **Explanation**

Under the Proposed Regulations, a new employee must be classified as:

(a) a full-time employee;

(b) a variable hour employee; or

(c) a seasonal employee.

An applicable large employer member may avoid the assessable payment under section 4980H(a) by offering coverage to a new full-time employee immediately after his or her first three full calendar months of employment.\(^24\) However, an applicable large employer member may also avoid the assessable payment under section 4980H(a) by offering coverage to a new variable hour or seasonal employee after a measurement period during which the variable hour or seasonal employee had an average of at least 30 hours of service per week. If a variable hour or seasonal employee averages at least 30 hours per week during a measurement period, the employee would then be re-classified as a full-time employee.

Under the Proposed Regulations, an applicable large employer is not permitted to take into account the likelihood that a variable hour employee will terminate employment before the end of his or her initial measurement period.\(^25\) However, as noted in the

\(^{22}\) Prop. Reg. § 54.4980H-1(a)(43) (a variable hour employee means an “employee if, based on the facts and circumstances at the employee’s start date, the applicable large employer member cannot determine whether the employee is reasonably expected to be employed on average at least 30 hours of service per week during the initial measurement period because the employee’s hours are variable or otherwise uncertain. For this purpose, the applicable large employer member may not take into account the likelihood that the employee may terminate employment with the applicable large employer (including any member of the applicable large employer) before the end of the initial measurement period.”).

\(^{23}\) Prop. Reg. § 54.4980H-1(a)(33).

\(^{24}\) Prop. Reg. § 54.4980H-3(c)(2).

preamble to the Proposed Regulations, this rule does not apply to seasonal employees.\textsuperscript{26} We believe that, if an employee is hired with the expectation that he or she would work for a defined period not in excess of the specified time limit, the employer should be permitted (i) to classify the employee as seasonal and (ii) to take into account the likelihood that the employee’s employment will terminate at the end of the defined period.

As referenced in Notice 2012-58\textsuperscript{27} and noted in the preamble to the Proposed Regulations,\textsuperscript{28} section 105 provides a standard for defining seasonal employees. In testing a self-insured health plan for discrimination under section 105(h), the following employees may be excluded:

Part-time employees whose customary weekly employment is less than 35 hours, if other employees in similar work with the same employer (or, if no employees of the employer are in similar work, in similar work in the same industry and location) have substantially more hours, and seasonal employees whose customary annual employment is less than 9 months, if other employees in similar work with the same employer (or, if no employees of the employer are in similar work, in similar work in the same industry and location) have substantially more months. Notwithstanding the preceding sentence, any employee whose customary weekly employment is less than 25 hours or any employee whose customary annual employment is less than 7 months may be considered as a part-time or seasonal employee.\textsuperscript{29}

The rule under section 105(h) requires that an employer determine the typical employment period of non-seasonal employees performing work similar to the seasonal employees.

We believe the rule under section 105(h) could be modified for use under section 4980H to provide that a seasonal employee is an employee that the employer reasonably expects will work for a defined period that is less than:

\textsuperscript{26} 78 Fed. Reg. 218, 227 (2013) (“Effective as of January 1, 2015, \textit{and except in the case of seasonal employees}, the employer will be required to assume for this purpose that although the employee’s hours of service might be expected to vary, the employee will continue to be employed by the employer for the entire initial measurement period; accordingly, the employer will not be permitted to take into account the likelihood that the employee’s employment will terminate before the end of the initial measurement period.”) (emphasis added).

\textsuperscript{27} 2012–41 I.R.B. 436. Notice 2012-58 describes possible safe harbor methods that may be used by employers to determine which of their employees should be classified as “full-time employees” for purposes of section 4980H.


\textsuperscript{29} Reg. § 1.105-11(c)(2)(iii)(C).
(i) nine months, if other employees performing similar work with the same (or a similar) employer are classified as full-time or variable hour (i.e., other than seasonal); or

(ii) in all other cases, seven months.

Under this approach, the defined period would generally be limited to less than seven months. The exception would be the situation where employees performing similar work are employed for an indefinite time period (and thus are classified as full-time or variable hour employees, rather than seasonal employees). In that situation, an employee employed for a defined period not to exceed nine months could be classified as seasonal. (Moreover, under this approach, the employer would not be required to make the determination that is required under the rule under section 105(h), which should promote a more certain administrative structure for employers.)

Classification as a seasonal employee is only relevant to an individual who is a new employee. It is based on the expectation that the employee’s employment will end during a specified period. If a seasonal employee terminates employment and is subsequently rehired within 26 weeks, he or she would be treated as an ongoing employee. Due to this break in service rule, a seasonal employee who: (i) is hired each year on June 15; (ii) works 35 hours per week for a period of just under seven months (for a total of 1,062 hours); and (iii) then terminates employment on December 13, would be treated the same as a variable hour employee who works 1,062 hours (an average of 20.4 hours per week) during a 12-month measurement period.

C. Application of the break in service rules to rehired variable hour employees

1. Summary

Section 54.4980H-3 of the Proposed Regulations provides a safe harbor method (the “Full-Time Status Safe Harbor”) for an applicable large employer member to identify its full-time employees for purposes of the employer shared responsibility penalties under section 4980H. A new variable hour employee’s status is based on hours credited during an initial measurement period that starts no later than the first of the month after the employee commences work. An ongoing employee’s status is based on hours credited during a standard measurement period that may start on any day of the year, provided the same period is used for all variable hour employees in the employee category.

Section 54.4980H-3(c)(1) of the Proposed Regulations addresses the circumstances under which an applicable large employer member may treat a rehired variable hour employee as a new employee for purposes of the Full-Time Status Safe

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30 Prop. Reg. § 54.4980H-3(e)(1).
31 Prop. Reg. § 54.4980H-3(c)(3).
32 Prop. Reg. § 54.5980H-3(c)(1).
Harbor. Generally, a variable hour employee rehired after a period of at least 26 weeks during which no hours are credited may be treated as a new employee.

2. Recommendation

We recommend the Regulations, when finalized, provide that when a variable hour employee is rehired after a period of at least 26 weeks during which no hours are credited, that an applicable large employer member be permitted to choose whether to treat the employee as a new employee or an ongoing employee.

3. Explanation

Section 54.4980H-3(e)(1) of the Proposed Regulations allows an applicable large employer member to treat a rehired variable hour employee as a new employee if the employee is rehired after a period of at least 26 weeks during which no hours are credited. Section 54.4980H-3(e)(1) of the Proposed Regulations does not, however, require an applicable large employer member to treat a rehired variable hour employee as a new employee. Programming the break in service rules for purposes of the Full-Time Status Safe Harbor will be challenging for many applicable large employer members. For some employers, a more administrable alternative to applying the break in service rules would be to maintain a permanent record (starting with the first measurement period in 2013) of individuals who have been employed by the applicable large employer. In the event one of these individuals is rehired, he or she could be treated as an ongoing employee for purposes of the Full-Time Status Safe Harbor.

D. Crediting hours of service during a period that an employee is receiving third party sick pay

1. Summary

Under the Full-Time Status Safe Harbor, an employee’s full-time status is based on hours of service credited during a measurement period. Section 54.4980H-1(a)(21)(i) of the Proposed Regulations provides that:

The term hour of service means each hour for which an employee is paid, or entitled to payment, for the performance of duties for the employer; and each hour for which an employee is paid, or entitled to payment by the employer for a period of time during which no duties are performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence (as defined in [Department of Labor regulation] 29 CFR 2530.200b-2(a)). For the rules for determining an employee’s hour of service, see §54.4980H-3.

A Department of Labor regulation addresses hours of service for which no duties are performed as follows:
(2) An hour of service is each hour for which an employee is paid, or entitled to payment, by the employer on account of a period of time during which no duties are performed (irrespective of whether the employment relationship has terminated) due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence. Notwithstanding the preceding sentence,

(i) No more than 501 hours of service are required to be credited under this paragraph (a)(2) to an employee on account of any single continuous period during which the employee performs no duties (whether or not such period occurs in a single computation period);

(ii) An hour for which an employee is directly or indirectly paid, or entitled to payment, on account of a period during which no duties are performed is not required to be credited to the employee if such payment is made or due under a plan maintained solely for the purpose of complying with applicable workmen’s compensation, or unemployment compensation or disability insurance laws; and

(iii) Hours of service are not required to be credited for a payment which solely reimburses an employee for medical or medically related expenses incurred by the employee.

For purposes of this paragraph (a)(2), a payment shall be deemed to be made by or due from an employer regardless of whether such payment is made by or due from the employer directly, or indirectly through, among others, a trust fund, or insurer, to which the employer contributes or pays premiums and regardless of whether contributions made or due to the trust fund, insurer or other entity are for the benefit of particular employees or are on behalf of a group of employees in the aggregate.33

We note that the Department of Labor regulation requires that hours of service be credited “irrespective of whether the employment relationship has terminated” and that amounts paid by third parties be deemed to be paid by the employer.

The Service rejected a 160-hour limit on the number of hours of service that must be credited for periods during which no services are performed and instead decided that all periods of paid leave must be taken into account.34

2. Recommendation

We believe that aspects of the Department of Labor’s definition of “hour of service”35 should not apply to the Full-Time Status Safe Harbor, especially in light of the

33 29 CFR § 2530.200b-2(a)(2) (emphasis added).
Service’s decision not to cap the number of hours of service that must be credited during a period of time during which no duties are performed. Thus, we recommend that:

(i) no hours of service be credited for any period after the employment relationship is terminated; and

(ii) amounts payable by a third party sick pay payor not be treated as paid by the employer.

3. **Explanation**

A leave of absence (paid or unpaid) ends when the employment relationship terminates. Even if the Service requires an applicable large employer member to credit hours of service throughout a paid leave, the Service should not require an applicable large employer to credit hours of service to any period after the employee’s employment terminates.

We recommend that amounts payable by a third party sick pay payor (such disability benefits payable by an insurer) not be deemed to be paid by an employer. This would simplify post-year end data matching. Amounts payable by a third party sick pay payor may be reported on a Form W-2 filed by either the third party sick pay payor or the employer, depending on the contractual arrangements between the parties. However, in many cases the employer may not have access to the payment information (e.g., amount paid, applicable time period, etc.) when disability pay or sick pay is provided by the third party insurer. Also, regardless of which party files the Form W-2, the payments are designated in Box 13 of Form W-2 as third party sick pay. Excluding all third party sick pay from the calculation of hours of service would provide consistent and administrable treatment for disability benefits and other amounts not actually paid by the employer to the employee.

E. **Reasonable classification test for purposes of determining full-time employees**

1. **Summary**

Section 54.4980H-3(b)(2)(ii) of the Proposed Regulations provides that employers may use different equivalency tests for different classes of employees for purposes of calculating hours of service for non-hourly employees, “provided the classifications are reasonable and consistently applied.” Section 54.4980H-3(c)(1)(v) of the Proposed Regulations provides that an employer may establish different measurement and stability periods for the following categories of employees:

(a) collectively bargained employees and the non-collectively bargained employees;

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(b) each group of collectively bargained employees covered by a separate bargaining agreement;
(c) salaried employees and hourly employees; and
(d) employees whose primary places of employment are in different states.

It is unclear whether different measurement and stability periods can be established for any categories of employees, other than the four set forth above.

2. Recommendation

We recommend that the reasonable classification test be expanded to include other potential methods for classifying employees, as well as including a catch-all category of any other of “any other reasonable classification of employees.”

3. Explanation

In our experience, employers classify and analyze employees in any number of different ways throughout the economy. For example, many employers are engaged in separate lines of business and with full justification treat the employees of those separate lines of business differently even if their primary places of employment are in the same state. Similarly, even within a particular line of business, some employees may be paid purely on the basis of commission, whereas other employees might be salaried. The Proposed Regulations appear to be very carefully crafted in very detailed fashion in order to prevent manipulation of any of the various methods of calculating full-time and part-time status, regardless of how employees are classified, assuming such classification is reasonable. There does not appear to be any need to make these rules even more rigid by precluding flexibility within each employer’s workforce.  

V. Dependents

A. Dependents who are neither citizens nor United States residents

1. Summary

Section 54.4980H-1(a)(11) of the Proposed Regulations defines the term “dependent” with reference to the definition of child under section 152(f)(1). In recognition that different treatment is appropriate for non-citizens residing outside the United States, section 152(b)(2) excludes from the definition of a “qualifying child” (and a “qualifying relative”) an “individual who is not a citizen or national of the United States unless such individual is a resident of the United States or a country contiguous to the

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United States.”37 However, the Proposed Regulations do not include a similar limitation, so the definition of dependent would include non-citizen/non-national dependents living abroad.

2. **Recommendation**

We recommend that the definition of minimum essential coverage be clarified to provide that the offer to enroll in MEC does not have to include dependents who are not “applicable individuals” under section 5000A(d)(3), such as a non-resident dependent.

3. **Explanation**

Under section 5000A, for each month beginning after 2013, an “applicable individual” must ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under MEC for such month. If the taxpayer who is an applicable individual fails to meet this requirement, the taxpayer must pay a penalty under section 5000A(c).

Section 5000A(d) enumerates the classes of individuals who are excluded from the definition of “applicable individual.” Section 5000A(d)(3) excludes “an individual for any month if for the month the individual is not a citizen or national of the United States or an alien lawfully present in the United States.”

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

Moreover, we would expect that whatever arrangements an inpatriate (who in many cases will be an executive) has made for the health care of family members (be it through a governmental program, insurance, or otherwise) in his or her home country would remain in place for family members who do not accompany the inpatriate on his or her assignment in the United States. Further, the non-resident dependents would not be eligible for premium assistance under section 36B so the cost of their health care would not be shifted to the United States government in the absence of coverage from the applicable large employer member in the United States.38 For these reasons, we believe that an applicable large employer member should not be potentially subject to the

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37 Thus, such children are not qualifying children (or qualifying relatives) under section 152 for purposes of the dependency exemption and other tax benefits.

38 Act § 1412(d).
assessable payment for failing to offer coverage to dependents who are not “applicable individuals” under section 5000A(d)(3).

For example, assume French foreign Company F is an affiliate of United States Company S (an applicable large employer). Company F seconds Employee FS to Company S, which has 100 full-time employees, including Employee FS who is a common law employee of Company S with U.S. source income. Employee FS has left his family in France. Company S offers Employee FS the opportunity to enroll in MEC under its employer plan. However, Company S does not offer coverage to the children of Employee FS as they are neither citizens nor legal residents of the United States. Furthermore, Company S fails to offer coverage to five of its full-time employees and one of those employees obtains coverage from the exchange and receives the premium tax credit. Company S receives a 1411 Certification related to that employee. The status of Employee FS would in such a case determine the assessable payment imposed on Company S.

The Proposed Regulations provide that an applicable large employer is treated as having offered an employer plan with MEC to all of its full time employees (and their dependents) if, for a particular month, such coverage is offered to all but the greater of 5% or five of its full time employees.\(^{39}\) Thus, if the failure to offer coverage to the foreign dependents of Employee FS is treated as a failure to offer coverage to Employee FS, then Company S would have failed to offer coverage to six full time employees (and thus greater than 5%) and its assessable payment would be $140,000.\(^{40}\)

However, if the failure to offer coverage to the foreign dependents of Employee FS is not treated as a failure to offer coverage to Employee FS, then Company S would have failed to offer coverage to only five employees. In that case, Company S would not be subject to the assessable payment under section 4980H(a) because it offered coverage to all but five of its employees (and thus equal to 5% of its full time employees). However, Company S would be subject to an assessable payment of $3,000 under section 4980H(b) as a result of one employee’s receipt of the premium tax credit.

B. Inclusion of foster children in the definition of dependents

1. Summary

Section 4980H does not contain a statutory definition of the term “dependent” for purposes of the references to the term in section 4980H(a) and (b). The Proposed Regulations define the term “dependent” as “a child (as defined in section 152(f)(1)) of an employee who has not yet attained age 26,” and further provide that the term does not include an employee’s spouse or any individual other than an employee’s child for purposes of section 4980H.\(^{41}\) Section 152(f)(1) defines a “child” as an individual who is

\(^{39}\) Prop. Reg. § 54.4980H-4(a).

\(^{40}\) The penalty under section 4980H(a) would be \([100 - 30] \times 2,000 = 140,000\) on an annual basis.

\(^{41}\) Prop. Reg. § 54.4980H-1(a)(11).
a son, daughter, stepson, or stepdaughter (including a child that has been legally adopted by, or has been legally placed for adoption with, the employee), or an eligible foster child of the employee.

2. **Recommendation**

   We recommend that the definition of “dependents” be clarified to provide that an employee’s “dependent” for purposes of section 4980H is “a child (as defined in section 152(f)(1)(A)(i)) of an employee who has not yet attained age 26.” This would result in limiting “dependents” for purposes of section 4980H to an employee’s son, daughter, stepson, or stepdaughter (including an adopted child and a child legally placed for adoption), who has not yet attained age 26, and would clearly exclude a foster child from this definition.

3. **Explanation**

   The inclusion of foster children in the definition of “dependents” for purposes of section 4980H would represent an almost total reversal regarding the eligibility of foster children for employer-provided benefits and would represent a significant departure from the Code’s existing standards for determination of eligibility of foster children for employer-provided benefits. Such inclusion would present considerable and ongoing administrative hardship for plan sponsors and we believe it is not necessary, given that such children are already eligible for Medicaid.

   First, the rule in the Proposed Regulations that would include foster children in the class of “dependents” that must be offered MEC under an employer plan in order to avoid the assessment of a penalty does not reflect, in our experience, the dependent coverage currently offered by the majority of private U.S. employers. Although official statistics are not available regarding the actual percentage of private employer plan sponsors that currently make coverage available to their employees’ foster children, it has been our experience that offering such coverage would be highly unusual. In most instances, plan sponsors that offer dependent child coverage make such coverage available to biological and adopted children of their employees, as well as step-children of their employees, but do not extend eligibility for coverage to foster children living with their employees. A requirement that foster children be eligible as “dependents” for coverage under employer-sponsored plans would thus be inconsistent with our understanding of present practice.

   Second, we note that the inclusion of foster children in the definition of “dependents” for purposes of section 4980H would represent a significant departure from the Code’s existing deference to the plan’s definition of “child” for purposes of establishing eligibility for employer-provided benefits. With a single exception, the sections of the Code that address income taxes, Subtitle A (Income Taxes), that incorporate the term “child,” as defined in section 152(f)(1), are designed to allow a deduction for certain expenses incurred, or an exclusion for certain amounts reimbursed,
in connection with such child.\textsuperscript{42} Several of those sections incorporate the term “child” (as defined in section 152(f)(1)) by reference for purposes of determining the taxability of benefits received by dependents covered by an employer-sponsored plan. However, none of the sections in Subtitle A that incorporate the term “child” (as defined in section 152(f)(1)) by reference override the underlying plan’s eligibility rules: in fact, such sections would be applicable only after an individual becomes eligible for coverage pursuant to a plan’s eligibility rules, becomes covered by the plan, and actually receives a benefit under such plan. This deference extends to related Federal statutes that incorporate the term “child” (as defined in section 152(f)(1)). For example, under section 2714 of the Public Health Service Act,\textsuperscript{43} if a group health plan or insurer offers dependent coverage to categories of children listed in section 152(f)(1), the plan makes such coverage available to such children to age 26.\textsuperscript{44} In contrast, the definition of “dependent”...

\textsuperscript{42} The sections in Subtitle A of the Code that incorporate the term “child” as defined in section 152(f)(1) are as follows: (i) section 21(e)(6)(B), expenses reimbursable for household and dependent care services necessary for gainful employment are not excludible if expenses are paid to a “child” of the taxpayer who has not attained age 19 at the end of the taxable year; (ii) section 72(t)(7)(A)(iii), exception for 10% early distribution penalty for distributions from individual retirement plans for qualified higher education expenses for education furnished to a “child” of the taxpayer; (iii) section 105(b), exclusion from gross income of amounts reimbursed to taxpayer for expenses incurred by taxpayer for medical care of taxpayer’s “child”; (iv) section 129(c)(2), expenses reimbursable for dependent care assistance program are not reimbursable if payment is made to a “child” of the taxpayer who has not attained age 19 at the end of the taxable year; (v) section 132(h)(2)(B), exclusion from gross income for certain fringe benefits provided to certain “children” of a taxpayer; (vi) section 162(l)(1)(D), deduction from income for amounts paid for medical care insurance for a self-employed taxpayer’s “child” who has not attained age 27 at the end of the taxable year; (vii) section 401(h), pension plans allowed to provide for payment of benefits for sickness, accident, hospitalization, and medical expenses of retired employees, their spouses and their dependents (including any “child” of the retired employee who has not attained age 27 at the end of the taxable year); (viii) section 501(c)(9), organizations exempt from taxation under Subtitle I of the Code include voluntary employees’ beneficiary associations providing for the payment of life, sick, accident, or other benefits to the members of such association or their dependents (including a member’s “child” who has not attained age 27 at the end of the taxable year); and (ix) section 1361(c)(1)(C), a foster child is counted as a “child” for purposes of determining members of family treated as one shareholder, under the definition of a small business corporation.

\textsuperscript{43} Pub. L. No. 78-410, 58 Stat. 682 (1944).

\textsuperscript{44} ACA FAQs Part I (http://www.dol.gov/ebsa/faqs/faq-aca.html), FAQ-14 provides:

Q-14: Will a group health plan or issuer fail to satisfy section 2714 of the Public Health Service Act (PHS Act) and its implementing interim final regulations merely because it conditions health coverage on support, residency, or other dependency factors for individuals under age 26 who are not described in section 152(f)(1) of the Internal Revenue Code (Code)? (That section of the Code defines children to include only sons, daughters, stepchildren, adopted children (including children place[d] for adoption), and foster children.)

No. A plan or issuer does not fail to satisfy the requirements of PHS Act section 2714 or its implementing regulations because the plan limits health coverage for children until the child turns 26 to only those children who are described in section 152(f)(1) of the Code. For an individual not described in Code section 152(f)(1), such as a grandchild or niece, a plan may impose additional conditions on eligibility for health coverage, such as a condition that the individual be a dependent for income tax purposes.

We would assert that, since status as a foster child would end when a child reaches the age of majority, extension of coverage to age 26 would not be meaningful in the case of foster children.
in the Proposed Regulations effectively supersedes an underlying plan’s definition of “child,” meaning that the plan sponsor will need to amend the plan’s eligibility requirements to offer coverage to all individuals meeting the Proposed Regulations’ definition of “dependent,” in order to avoid the assessment of a penalty under section 4980H.

Third, by including foster children in the class of “dependents” for purposes of section 4980H, plan sponsors would likely be required to offer Consolidated Omnibus Budget Reconciliation Act of 1985\textsuperscript{45} (“COBRA”) continuation coverage under section 4980B to such foster children as “qualified beneficiaries.” Unlike Subtitle A, the sections of the Code that address excise taxes, Subtitle D of the Code (Miscellaneous Excise Taxes), does not include a definition of the term “dependent,” nor does it incorporate the defined term “child” by reference. As such, COBRA does not define the term “dependent child” for purposes of determining whether a child can be a “qualified beneficiary” for purposes of eligibility for COBRA; instead, identification of “dependent children” is determined by the terms of the group health plan. The requirement in the Proposed Regulations that the terms of an employer-sponsored plan offer minimum essential coverage to foster children of its employees would therefore, in effect, expand the category of “qualified beneficiaries” to whom COBRA is required to be offered. The practical administration by a plan sponsor of such an expansion would likely be extremely difficult. For example, who would have the right to elect COBRA on a foster child’s behalf—the employee (who would likely no longer have a foster parent relationship to the child if such foster child was placed in another living situation), the state (as the child’s temporary guardian), or another party? In addition, given the fact that many foster placements are relatively short, simply keeping track of the eligibility of such foster children for COBRA would be an undue administrative burden.

Finally, and more generally, we understand that a significant goal of the Affordable Care Act is to expand the number of individuals who are able to obtain health plan coverage. However, requiring foster children to be included in the class of “dependents” that must be offered minimum essential coverage under an eligible employer-sponsored plan in order to avoid the assessment of a penalty does not advance this goal, as foster children are already currently eligible for medical coverage under existing state and governmental programs, such as Medicaid. Thus, as a policy matter, foster children will continue to be able to obtain health plan coverage, whether or not employer-sponsored plans are required to offer minimum essential coverage to such foster children pursuant to regulations under section 4980H. However, any requirement under the Proposed Regulations that plan sponsors be required to offer minimum essential coverage to foster children of employees in order to avoid assessable penalties may raise substantial and complex coordination of benefits issues, if a foster child is placed with an employee by a state or other governmental agency and the child also has coverage under a state or governmental program such as Medicaid.

\textsuperscript{45} Pub. L. No. 99-272, 100 Stat. 82.
VI. **Affordability**

A. **Impact of a wellness program premium discount on affordability**

1. **Summary**

Section 54.4980H-5 of the Proposed Regulations provides safe harbor methods for an applicable large employer member to determine whether the employee contribution for self-only coverage for the lowest cost health plan option offered by the employer that provides minimum essential coverage and minimum value is affordable for purposes of the employer shared responsibility penalty under section 4980H(b). The safe harbors include the Form W-2 Safe Harbor, the Rate of Pay Safe Harbor, and the Federal Poverty Line Safe Harbor.46

Under the Form W-2 Safe Harbor, the required employee contribution for self-only coverage for the lowest cost option that provides minimum essential coverage and minimum value must not exceed 9.5% of the employee’s Form W-2 wages for that calendar year.47 If an employee was not a full-time employee for the entire calendar year, the Proposed Regulations provide that Form W-2 wages may be adjusted to reflect the period with respect to which the employee was offered coverage.

Under the Rate of Pay Safe Harbor, the required employee contribution for self-only coverage for the lowest cost option that provides minimum essential coverage and minimum value must not exceed 9.5% 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 an hourly employee and an amount equal to the monthly salary of the employee for a salaried employee.48

The Health Insurance Portability and Accountability Act of 199649 (“HIPAA”) and the Affordable Care Act allow an employer to offer health plan premium discounts under a wellness program if such program adheres to certain conditions. However, section 54.4980H-5 of the Proposed Regulations does not indicate how the affordability determination and the affordability safe harbors are affected by a premium discount provided in connection with a wellness program.50

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48 Prop. Reg. § 54.4980H-5(e)(2)(iii). Under the Federal poverty line safe harbor in Proposed Regulation section 54.4980H-5(e)(2)(iv), the required employee contribution for a month for self-only coverage for the lowest cost option that provides minimum essential coverage and minimum value must not exceed 9.5% of the most recently published Federal poverty level for a single individual for the applicable calendar year, divided by 12.
50 Prop. Reg. § 1.36B-2(c)(3)(v)(A)(4) provides that the Commissioner may provide rules in published guidance for determining how wellness incentives are treated in determining the affordability of eligible employer-sponsored coverage for purposes of determining eligibility for the health insurance premium tax credit under section 36. In the preamble to the Proposed Regulations under section 36B, the Service
2. **Recommendation**

We recommend that the final Regulations provide for affordability to be determined after the application of any premium discount available under an employer’s wellness program that may be applied to the employee contribution for self-only coverage for the lowest cost option offered by the employer that provides minimum essential coverage and minimum value, provided that the premium discount available under the employer’s wellness program complies with applicable nondiscrimination and wellness program requirements under HIPAA and the Affordable Care Act.

3. **Explanation**

We believe that the application of section 4980H should be structured in a manner that supports the use of wellness programs. In the preamble to the proposed regulations issued November 26, 2012, \(^{51}\) that amended the nondiscrimination and wellness program provisions of the regulations under HIPAA, the Service, the Department of Labor, and the Department of Health and Human Services acknowledged that “appropriately designed wellness programs have the potential to contribute importantly to promoting health and preventing disease.” \(^{52}\) Since the recommended approach would provide another incentive for employers to provide premium discounts through wellness programs, it supports the goal of promoting health and preventing disease.

The recommended approach under the Proposed Regulations would align the affordability determination with the true cost to an employee of self-only coverage. Provided that an employee satisfies applicable eligibility criteria for a wellness program’s premium discount(s), the employee may elect to purchase coverage by paying the premium less the premium discount. When an employee receives a premium discount, the employer pays the portion of the premium that otherwise would have been paid by the employee. Accordingly, if a premium discount is not taken into account for the affordability determination, the employer could lose a benefit associated with increasing its subsidy of the health plan premium.

Although employees may be required to satisfy eligibility criteria to receive a premium discount, the nondiscrimination and wellness program requirements under HIPAA and the Affordable Care Act ensure that a premium discount available under a wellness program is reasonably designed to be available to all similarly situated individuals. Specifically, if a wellness program requires employees to satisfy a standard related to a health factor in order to receive a premium discount, the wellness program must offer a reasonable alternative means of qualifying for the premium discount to

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\(^{52}\) 77 Fed. Reg. 70,620, 70,622 (2012).
individuals whose medical conditions make it unreasonably difficult, or for whom it is medically inadvisable, to meet the specified health-related standard. If a wellness program complies with the applicable nondiscrimination and wellness program requirements under HIPAA and the Affordable Care Act with respect to an employee, then a premium discount under the wellness program is reasonably available to the employee and should be taken into account in determining whether the premium is affordable to the employee regardless of whether the employee actually satisfies the criteria to actually receive the premium discount.

Finally, by allowing an employer to take into account all available premium discounts in the affordability determination, the recommended approach allows the employer to use a single dollar amount as the employee contribution for all similarly situated employees who may satisfy the eligibility criteria to receive the premium discount(s). This means an employer would not have the administrative burden of determining which employee contribution amount should be used for an individual employee’s affordability determination depending on whether that employee actually satisfied the applicable eligibility criteria to receive the premium discount(s).

B. Application of the Rate of Pay Safe Harbor to employees on sick leave

1. Summary

Under the Rate of Pay Safe Harbor, an applicable large employer member’s health coverage is deemed to be affordable for purposes of the assessable payment under section 4980H(b) if the employee contribution for single coverage divided by the employee’s rate of pay does not exceed 9.5%. However, the Rate of Pay Safe Harbor is only available if the applicable large employer member “does not reduce the hourly wage of hourly employees or the monthly wages of salaried employees during the calendar year.”

2. Recommendation

We recommend that an employee who takes a leave of absence for illness, injury, or disability and who receives less than his or her hourly wage or salary during that leave of absence not be treated as having experienced a reduction in hourly wage or salary for purposes of the Rate of Pay Safe Harbor.

3. Explanation

If an employee were to take an unpaid leave for illness, injury, or disability, the unpaid leave would not constitute a reduction in the employee’s hourly wage or salary. It would simply be a reduction in hours and the rate of pay safe harbor could continue to apply throughout the leave.

Many employers provide paid leave to employees who cannot work due to illness, injury, or disability. These sick leave benefits may be less than the full hourly wages or salary that an employee would have received had he or she been working. Therefore, we believe it is appropriate for the Service to clarify that the receipt of sick leave benefits during a leave of absence should not be treated as a reduction in an employee’s rate or pay or salary. To do otherwise would put an applicable large employer member that provides sick leave benefits in a worse position than an applicable large employer member that provides only unpaid sick leave. Over time, this could have a negative impact on the length and/or availability of sick leave benefits. For that reason, we recommend that an employee who takes a leave of absence for illness, injury, or disability and who receives less than his or her hourly wage or salary during that leave of absence not be treated as having experienced a reduction in hourly wage or salary.

VII. Requested clarifications

A. Adjustments to definition of month

1. Summary

The term “month” is defined in section 54.4980H-1(a)(25) of the Proposed Regulations as any “period that begins on any date following the first day of a calendar month and that ends on the immediately preceding date in the immediately following calendar month.” This definition could be revised to better handle situations involving months beginning at the end of January and to otherwise improve for clarity.

2. Recommendation

We recommend that the definition of “month” be slightly rephrased so that it applies to the “period that begins on any date other than the first day of a calendar month and that ends on the immediately preceding date in the immediately following calendar month (or on the last day of February if there is no such immediately preceding date).”

3. Explanation

Technically, all future dates “follow” “the first day of a calendar month,” even dates in subsequent calendar months. This slight variation in language makes it clear that the term “month” will not apply to any period starting on the first day of a calendar month, even though technically the first day of any such month does in fact “follow” “the first day of [the preceding] calendar month.” Also, for all months commencing on January 31 and all months commencing on January 30 in non-leap years, there is no “immediately preceding date in the immediately following calendar month.” This slightly revised language will resolve this issue also.

In this regard, we recommend that the language of section 54.4980H-3(d)(1) of the Proposed Regulations be clarified by inserting the word “calendar” in the phrase “the first day of the fourth [calendar] month” in the sixth line of that section. It appears that the term “calendar month” was intended, rather than “month” as defined in the above section.
B. **Clarification of language for purposes of section 4980H(b) penalty**

1. **Summary**

Certain language contained in sections 54.4980H-5(a) and (c) of the Proposed Regulations could be clarified to assist employers in complying with the rules.

2. **Recommendation**

We recommend that the word “member” should be added to the phrase “applicable large employer [member]” in the third line of the last sentence of section 54.4980H-5(a) of the Proposed Regulations.

We recommend that the words “for the entire month” and “entire” should be added to the phrase “if the employee would have been offered coverage [for the entire month] if the employee had been employed for the entire month, the employee is treated as having been offered coverage during that [entire] month” in the last sentence of section 54.4980H-5(c) of the Proposed Regulations.

3. **Explanation**

The first of the above changes simply clarifies, as appears to be the intent of that particular provision of the Proposed Regulations, that the overall cap under the section 4980H(b) penalty calculation should be applied separately for each applicable large employer member.

The second set of proposed changes merely conforms the language of section 54.4980H-5(c) of the Proposed Regulations to the corresponding language of section 54.4980H-4(c) of the Proposed Regulations.

No substantive change is intended by either of these recommendations.