May 22, 2014

Question	Answer
Q: 4980H(a) penalty - $166.67 per mo per employee not counting first 80 in 2015. We have over 100 FTE's but only 94 FT employees based on look back period & currently offer 36 of the 94 insurance. So if I don't offer insurance to the 58 temps, I would only pay $166.67 * 14 employees (96-80 = 14) for 2015?	A: Yes, that's correct for 2015 on a monthly basis; it would be necessary to multiply that amount times 12 if choosing not to offer coverage all year. If the employer fails to offer coverage to at least 70% of full-time employees and their dependent children as required under Section 4980H(a), there is a waiver of the first 80 full-time employees when calculating the penalty. In 2016 and beyond, if the employer fails to offer coverage to at least 95% of full-time employees and their dependent children, there is only a waiver of the first 30 full-time employees when calculating the penalty (i.e. $166.67 * (96-30) per month).
Q: Are you even allowed to drop coverage and then re-instate coverage month to month for an employee? Once they are off, do they not have to have a qualifying event to be reinstated or wait until open enrollment?	A: Yes, coverage can still be dropped and then reinstated much like today if the employer determines full-time status on a month-to-month basis, subject to the underwriting requirements of the insurance carrier and/or the eligibility rules of the plan. For any month in which the employee does not achieve full-time hours of service, coverage may be dropped according to the plan rules (i.e. end of the month in which employee is no longer full-time); if the employee then earns full-time status again, coverage would need to be offered/reinstated no later than 1st of the month following to avoid 4980H penalty risk for the month.
Q: Back to what you said about teachers.. Do the rules related to adjunct faculty apply to all teachers? For example, if we have a teacher working 20 hours a week, multiply that by 2.5 hours and the employee is considered to be working 50 hours per week. So would that mean they are full time and need to be offered insurance?	A: For non-hourly employees, tracking actual hours of service can be difficult. Until further guidance is issued, employers are required to use a reasonable method of crediting hours of service that is consistent with the shared responsibility rules (the method cannot substantially understate hours of service in a way in which generally full-time employees are determined to be part-time). The final rules provided specific guidance for a small number of non-hourly positions (which can be used as examples of “reasonable methods” for other positions as well). Specific guidance was provided that MAY be used for adjunct faculty positions, or as an example for how to credit hours of service for other similar positions. This method is not required.

Question	Answer
Q: Can I use a separate measurement period for temporary employees than for permanent employees?	A: No, employers must generally apply a measurement period uniformly for all employees within certain categories defined in the guidance. An employer may differentiate (i) between using the monthly method versus the look-back measurement method, or (ii) the length or dates for the measurement/stability period for the following categories of employees: • Hourly vs. salaried employees • Union vs. non-union employees (or employees under separate collectively bargained agreements) • Employees in different states • Different entities within a controlled group or affiliated service group
Q: Can you clarify what happens to a PT employee who is not eligible (by hours) for coverage but then becomes FT. Can we put them on insurance right away if our plan allows? Or do we have to wait until the end of the current stability period?	A: The general ACA shared responsibility rules requirement is that after an employee is determined to be full-time or part-time using a look-back measurement period, that status carries through the entire stability period. However, an employer can always choose to be more generous and write its rules to offer coverage sooner upon a change to full-time status.
Q: Can you go over the "Contractor" requirement?	A: When determining "applicable large employer" status (50 or more FTEs) and determining which individuals are full-time and must be offered coverage to avoid potential penalties under the shared responsibility rules for employers (Section 4980H), the employer must consider all common-law employees. A leased employee, independent contractor, sole proprietor, partner in a partnership, and a 2% S corporation shareholder are not considered employees for these purposes. However, employers must be careful not to misclassify employees as independent contractors. The DOL and IRS are aggressively pursuing employers who treat individuals who should be classified as employees instead of independent contractors.
Q: Can you talk about "stand-by" or "on-call" pay? where they are not working, but waiting? Q: What about hospitals and nurse on "standby"? is that an hour of work. when they are being paid to wait.	A: The final rules provided guidance for on-call hours of what would be deemed 'reasonable.' An employer must credit an employee with an hour of service for any on-call hour for which payment is made or due by the employer, for which the employee is required to remain on-call on the employer's premises, or for which the employee's activities while remaining on-call are subject to substantial restrictions that prevent the employee from using the time effectively for the employee's own purposes.

Question	Answer
Q: How would per diem hours? These are EEs who come in to work when they are needed, sometimes with only a few hours of notice.	A: There isn't any direct guidance for such situation. Therefore employers are required to use a reasonable method of crediting hours of service that is consistent with the shared responsibility rules (method cannot substantially understate hours of service in a way in which generally full-time employees are determined to be part-time). For such position it may make sense to use one of the equivalency methods (credit 8 hours of service for any day in which the employee actually works). It may also be necessary to consider the guidance in regards to on-call hours - An employer must credit an employee with an hour of service for any on-call hour for which payment is made or due by the employer, for which the employee is required to remain on-call on the employer's premises, or for which the employee's activities while remaining on-call are subject to substantial restrictions that prevent the employee from using the time effectively for the employee's own purposes.

Question	Answer
Q: We have paid Interns who work 40 hours per week on an hourly basis for 3 months. Are we required to offer health insurance for the time they are working here? Does this include offering COBRA as well?	A: There are two rules that come into play for this question… • Shared Responsibility Rules In general, there is no special exception for an intern that is paid. If it is a paid position, the intern is required to be treated just like any other employee. Under the shared responsibility rules, the employer is required to offer coverage to all full-time employees, but there is an initial non-assessment period…so long as coverage is offered 1st of the month following 3 full calendar months from hire, no penalty will be assessed. If the intern is part-time (<30 hours of service per week or 130/mth) or is employed for 3 months or less (not making it to the 1st of the 4th month following hire), then there is no need to offer coverage. Also keep in mind that even if the intern is full-time, the risk of penalty is likely very low. 4980H(a) requires an offer of coverage to at least 70% of full-time employees in 2015 and 95% in 2016 and beyond. Assuming the employer offers coverage to most of its full-time employees, not providing coverage for a few interns is unlikely to expose the employer to risk of the 4980H(a) penalty. However, the employer could still be liable for the $250 month penalty under 4980H(b) if the full-time intern purchases subsidized individual health insurance. • Waiting Period Rules Under the waiting period rules, an eligible employee cannot be made to wait more than 90 calendar days for an offer of coverage. If the intern is not eligible according to the plan's eligibility rules, the waiting period rules do not apply. On the other hand, if the employer doesn't carve out the interns, but rather treats them as they treat any other employee, then the intern must be offered coverage according to the plan's waiting period if the intern is full-time. And finally, if the interns are not offered coverage, COBRA will not apply. On the other hand, if coverage is offered and accepted, the interns would then be eligible for COBRA upon termination (assuming the employer is large enough to be subject to COBRA and/or continuation laws).

Question	Answer
Q: If we hire summer help who work 37.5 hours for 2 - 3 months and are on a 12 month measurement period where does this fit? Q: We have summer help that work 3 months out of the year around 35 hours per week. Would they be counted as full time or is it an average of a complete year?	A: For employers choosing to implement the look-back measurement method, variable hour and seasonal employees may be subjected to an initial measurement period of up to 12 months. It is possible the summer help could be categorized as "seasonal" if the meet the definition. However, in most cases, temporary help cannot be subject to an initial measurement period, but rather must be offered coverage within 90 calendar days. But it may still be possible not to offer coverage to temporary help (3 months or less)… The shared responsibility rules don't require coverage until 1st of the month following 3 full calendar months from hire for full-time employees. If the temporary help is employed for 3 months or less (not making it to the 1st of the 4th month following hire), then there is no need to offer coverage. In addition, even if the temporary help is full-time a few months longer, the risk of penalty is likely very low – margin of error rule under 4980H(a) requires an offer of coverage to at least 70% of full-time employees in 2015 and 95% in 2016 and beyond. Assuming the employer sets up its eligibility rules and offers coverage in a way in which it will cover most of its full-time employees, not providing coverage for a few temporary employees is unlikely to expose the employer to much risk under these rules. The only other thing to consider are the waiting period rules which require an offer of coverage within 90 calendar days of eligibility. If the temporary help is not eligible according to the plan's eligibility rules, the waiting period rules do not apply. On the other hand, if the employer doesn't carve out the temporary positions, but rather treats them as they treat any other employee, then the temporary help must be offered coverage according to the plan's waiting period if the position is full-time.
Q: We have several Contractors who have been offered an (exempt) temporary position. They are paid through our regular payroll process - and do not send an invoice. We state in their offer letter that they are contract employee and will not be eligible for benefits. Do we NEED to offer health care benefits to them?	A: It is only necessary to offer coverage to full-time common-law employees. If the individuals are truly independent contractors, it is not necessary to offer coverage; but employers must be careful not to misclassify such individuals. Mentioning that you pay the individuals through your regular payroll process raises a red flag. You should seek the advice of an employment law attorney regarding the proper employment classification for these individuals.

Question	Answer
Q: Do you count hours of service if employee on unpaid FMLA? Q: An employee on FMLA who is not getting paid during this period. Would there be any hours of service?	A: Those employers choosing to use the look-back measurement method must follow special rules regarding counting hours of service during a measurement period for special unpaid leave. "Special unpaid leave" is unpaid leave under FMLA, USERRA or jury duty. To prevent periods of special unpaid leave from reducing an employee's hours of service during the measurement period, the employer is required to average hours of service using one of the two following methods: 1. Determine average hours of service by excluding any periods of special unpaid leave during the measurement period and applying that average for the remaining measurement period; or 2. Impute hours of service during the periods of special unpaid leave at a rate equal to the average weekly hours of service for weeks that are not part of a period of special unpaid leave.
Q: Do you know how the penalties for not offering insurance or any other penalties will be collected? As a non-profit we don't pay taxes-	A: The IRS will contact employers (typically after employees' individual tax returns are due and employer information reporting is completed under section 6056) to inform them of their potential liability under section 4980H and provide them an opportunity to respond before any liability is assessed or notice and demand for payment is made. If it is determined that an employer is liable for a penalty payment, the IRS would send a notice and demand for payment, including instructions on how to make the payment. The fees are not included on any tax return.
Q: Does the break in service rule apply to only those using the measurement period?	A: No, the break in service rules apply whether the employer chooses to determine full-time status on a monthly basis or by using the look-back measurement method.
Q: For FT employees that move to PT towards the end of the year and you choose not to terminate them from the plan 4 months after the change and wait until the end of the stability period, how does is work in calculating the stability period since they would have worked on average more than 30 hours and then you would have to offer them coverage for the next year?	A: For an employer choosing to implement the look-back measurement method, generally the status as full-time or part-time carries through the entire stability period unless the employer chooses to use the optional rules for a status change from full-time to part-time. Regardless of whether or not the employer chooses to use the optional rules for the status change, for the following stability period, status will depend upon the average hours during the previous measurement period. Therefore it is possible that even with a change to part-time status part way into the year, the employee could still earn full-time hours status when averaging over the previous measurement period .

Question	Answer
Q: How does a employer treat an employee that during the stability period is on the plan but now doesn't work any hours because a contract is over and the portion the employee pays isn't available to be payroll deducted. Is the employer responsible for entire premium?	A: The employer is not responsible to pay anything beyond the employer contribution. If at any point in time the employee is unable to pay the employee contribution, the coverage can be terminated. Think if it this way - the measurement period determines if the employee needs to be treated as a full-time employee. Plans often have eligibility rules that terminate employee coverage for non-payment of required premiums.
Q: I was told that once they qualify you must keep them on for the balance of the plan year.	A: During the stability period, if an employee has a change in status (i.e. part-time to full-time or vice versa), eligibility for coverage is generally not affected through the end of the stability period; the change would be captured in the subsequent stability period. However, the final rules provided an exception…for an employee originally hired as full-time (and offered coverage within the required 90 calendar days) that is then moved to part-time, the employer may choose to terminate coverage the 1st of the 4th month following the status change to part-time so long as the employee averages less than 30 hours of service per week for the 3 months following the status change. This is optional – the employer may choose not to take advantage of this option and always capture status changes in the subsequent stability periods for ease of administration.
Q: If a full-time employee later moved to a part-time position and the employee wants to drop coverage, would they be prohibited from dropping coverage due to the employer's administration of their stability period?	A: The employer is only obligated to OFFER coverage. The employee generally has the option to accept or decline coverage. The employee could therefore choose to drop coverage at anytime. Also, under Section 125, a change in employment status would allow an employee to make a change to their pre-tax election.
Q: If I fail to offer coverage to an employee who is variable and we offer to more than 95%, would the variable employee still be eligible for subsidized exchange coverage?	A: Yes. If an individual is not eligible/offered coverage under an employer-sponsored group health plan, and doesn't have any other disqualifying coverage, the individual may qualify for subsidized coverage through a public Exchange/Market place assuming the individual meets the household income requirements (100-400% of FPL).

Question	Answer
Q: In regards to the 4980H(b) Penalty, does affordability apply to just the employee coverage? Or does this also count when an employee adds spouse/dependents to their plan? For example, our employee only pays about $50 per month for employee coverage because we contribute for the remainder of the monthly premium. But we do not contribute when adding dependents to a plan, and the employee is responsible for that portion of the monthly premium. So if an employee were to add a spouse, they could potentially spend up to $400/month.	A: For purposes of 'affordability' under section 4980H(b), so long as the coverage is affordable for the employee-only (single) coverage, it will be considered affordable for dependents as well. In other words, so long as the employee contribution for employee-only coverage doesn't exceed 9.5% of the employee's household income, the coverage will be deemed affordable for the employee and dependents. The cost for spouses and dependents is not considered in the determination of plan affordability.
Q: Am I correctly hearing that there is no need to measure for the balance of 2014?	A: Not necessarily. First of all, it depends on when the employer is subject to compliance with the shared responsibility rules under section 4980H. Employers with 100 or more full-time equivalents (FTEs) must comply in 2015, but employers with 50-99 FTEs don't have to comply until 2016 (and therefore don't necessarily have to worry about measuring until 2015). Second, it depends on whether the employer is choosing to use the monthly measurement method or the look-back measurement method. If using the monthly measurement method, it will not be necessary to track hours of service for compliance purposes until January 2015. If using the look-back measurement method, it will be necessary to begin tracking hours of service prior to the 2015 plan year to determine who is eligible for coverage beginning in 2015.

Question	Answer
Q: Is the employer required to do a continual measuring period throughout the stability period?	A: Yes. Employers choosing to implement the look-back measurement method must establish a standard measurement and stability period for all ongoing employees. Basically, the measurement period continues on a rolling basis. Example for a 12-month measurement/stability period for a calendar year plan: - Standard measurement period: Nov 1 - Oct 31 every year - Administrative period: Nov 1 - Dec 31 every year - Standard stability period: Jan 1 - Dec 31 every year So every Nov 1 the employer will look back 12 months to determine eligibility for the next Jan 1 plan year.
Q: Is the penalty applied to all full time employees or only those eligible for insurance (i.e., those still on probation)	A: Penalty 4980H(a), if applicable, applies against all full-time employees that should have been offered coverage under the rules (not those currently in a probationary/waiting period or those subject to an initial measurement period).
Q: is the stability period the plan year? just want to make sure	A: The stability period does not have to be the same as the plan year. Some employers may choose to use a shorter measurement/stability period (i.e. 6 months), which would not line up with the plan year. However, for ease of administration, most employers choosing to use a 12-month measurement/stability period align the stability period and plan year.

Question	Answer
Q: Is there an exception for school districts? Our "full time" teachers are paid for 1316 hours per year. They would not have 1560 hours in a 12 month measurement period. Q: What about teachers who do not work during summer months?	A: Yes, there are special rules that apply for educational organizations choosing to implement the look-back measurement method. For any “employment break period” (a period of at least 4 consecutive weeks during which an employee of an educational organization is not credited with hours of service), to prevent otherwise full-time employees from being considered part-time and not eligible for benefits, employers must determine the employee's average hours of service during the measurement period by: • Excluding any employment break period occurring during the measurement period and applying that average for the remaining measurement period (e.g. average hours of service over 9 mths and exclude the 3 mth summer break); or • Imputing hours of service for the employment break period at a rate equal to the average weekly hours of service for weeks that are not part of an employment break period; however, an educational organization is not required to take into account more than 501 hours of service for all employment break periods occurring in a single calendar year if using this second method. Under these rules, a teacher averaging 30 or more hours of service per week for the 9-month school year would be eligible for benefits for the corresponding stability period.
Q: Does one month of exceeding the 130 hour limit qualify them full time status for the year. In other words if they work 120 in Jan., 115 in Feb, 135, in March and 110 in April, etc..... are they full time?	A: If the employer is using the monthly measurement method, the first time the employee is considered eligible, there is an initial non-assessment period to allow for a waiting period. If the employer is using a waiting period, in your example the employee would lose eligibility before the coverage even begins. If the employer is using the look-back measurement method, hours of service are averaged over the measurement period. If the employee only exceeds 130 hours of service in one month during the measurement period, the average will fall below the required threshold and the employee will not need to be treated as full-time.

Question	Answer
Q: Should the 130 hours of service per month be based on the pay date, which may fall in another month, or the actual hours worked in month?	A: When measuring hours of service using the look-back measurement method, the employer can choose to use payroll dates rather than calendar months, so long as the stability period is based on calendar months. When measuring hours of service using the monthly measurement method, to help employers coordinate with payroll periods, the final regulations allow an employer to determine an employee's full-time employee status for a calendar month based on the hours of service over successive one-week periods. Under this optional method, referred to as the weekly rule, full-time employee status for certain calendar months is based on hours of service over 4-week periods and for certain other calendar months on hours of service over 5-week periods. In general, the period measured for the month must contain either the week that includes the first day of the month or the week that includes the last day of the month, but not both. For calendar months calculated using 4-week periods, an employee with at least 120 hours of service is a full-time employee, and for calendar months calculated using 5-week periods, an employee with at least 150 hours of service is a full-time employee.
Q: Temp & Staffing companies who is responsible for counting the hours of service of that employee	A: The important thing to consider for the shared responsibility rules for employers under section 4980H is who is the common law employer? The common law employer is responsible for tracking hours of service and offering coverage to all full-time employees or facing potential penalties under the rules. It is possible the contract between the employer and the staffing agency will designate who is considered the common law employer. If not, it will be necessary to discuss and potentially get some advice from an employment law attorney based on the circumstances.
Q: Was the 13 week rule previously 26 weeks?	A: Yes, that's correct. The break in service rules previously stated that employees rehired or resuming services within less than 26 consecutive weeks were to be treated as continuing employees rather than new hires. The final rules reduced this requirement to 13 consecutive weeks, except in the case of educational organizations, which are still subject to the 26-week rule.

Question	Answer
Q: We hire only full time employees; 90% are hourly. We are a construction company and our field employees are not paid for days not worked due to weather issues, not paid for holidays, and not paid sick leave. However, we still count them as full time and offer health coverage to every one of them after no more than 90 days. Do we still need to keep track of service hours?	A: If the employees are being offered coverage, there is little reason for the employer to track hours of service for purposes of the shared responsibility rules (although they may need to be tracked for other purposes). Hours need to be tracked and documented by employers who want to be able to defend a decision not to offer coverage for employees that are considered part-time.
Q: Our employees usually work over 130 hours per month but , if they don't, we don't cancel their coverage. We aren't required to, are we?	A: No. The shared responsibility rules define minimum standards for offering coverage; an employer can always choose to be more generous.
Q: we waiver between 48 up to 52 or 53 employees - what is the rule for determining 50 or more employees?	A: Applicable Large Employer status is based on number of full-time equivalents (FTEs) during the previous calendar year. To determine total FTEs for 2015: 1. Choose any 6 consecutive months during 2014 and add: a. Total full-time employees (30 hours of service per week); and b. Total hours of service for all other (PT) employees ÷ 120 2. Then average the monthly totals for the 6 consecutive months chosen to determine total FTEs a. 100 or more FTEs subject to the rules in 2015 b. 50 or more FTEs subject to the rules in 2016 and beyond ***Keep in mind, for 2016 and beyond, employers will need to perform this same calculation, but use all 12 months of the previous calendar year. Employers are only allowed to use a 6-mth period as transition relief going into 2015.
Q: What about when you are paying interns a stipend?	A: Only unpaid interns can be ignored for purposes of the shared responsibility rules under section 4980H. Interns that are being paid, even if only a stipend (unless they meet the definition of a "bona fide volunteer"), must have their hours of service tracked and may need to be offered coverage if they are full-time.

Question	Answer
Q: what if we chose the annual look back period and now find that the monthly process would be more advantageous?	A: The employer may choose to use the monthly measurement method or the look-back measurement method. The method chosen must be used for the entire year, but could change from year to year (although there may be some administrative struggles transitioning between the two). If an employer changes methods, employees who have earned full-time status based on the previous measurement period should not lose that status until the end of their "earned" stability period.