

Section 4980H – Shared Responsibility for Employers Regarding Health Coverage – Approach to Changes in Measurement Periods or Methods Applicable to an Employee

Notice 2014-49

I. PURPOSE

This notice describes a proposed approach to the application of the look-back measurement method, which may be used to determine if an employee is a full-time employee for purposes of § 4980H of the Internal Revenue Code (Code), in situations in which the measurement period applicable to an employee changes. This change may occur because the employee transfers within the same applicable large employer (or within the same applicable large employer member (ALE member)) from a position to which one measurement period applies to a position to which a different measurement period applies. This situation may also arise when the ALE member modifies the measurement period applicable to a position. This notice is intended to address the topics for which guidance was anticipated in section VII.G of the preamble to the final § 4980H regulations (79 FR 8544, 8563 (Feb. 12, 2014)).

The Treasury Department and the IRS invite comments on this proposed approach. However, taxpayers may rely on the approach proposed in this notice until further guidance is issued, and in any case through the end of the 2016 calendar year.

The look-back measurement method generally involves using an employee's average hours of service per week during a period (referred to in this notice as a measurement period and in the final § 4980H regulations as either an initial measurement period or a standard measurement period, depending on the circumstances) to determine if an employee is a full-time employee during a subsequent period (referred to both in this notice and the final regulations as a stability period).¹ The look-back measurement method is one of two alternative methods for identifying full-time employees for purposes of determining whether an ALE member is potentially subject to a payment under § 4980H. Under §54.4980H-3(d)(1)(v), each ALE member that uses the look-back measurement method may establish its own measurement and stability periods, subject to rules on maximum and minimum period lengths, and may also establish different measurement and stability periods for different specified categories of employees.

This notice addresses application of the look-back measurement method to the following situations:

- (1) An employee in a position to which one measurement period applies transfers

¹ Unless otherwise noted, all terms used in this notice have the same meaning as provided in the final § 4980H regulations.

within the same applicable large employer (whether or not within the same ALE member) to a position to which a different measurement period applies (for example, an employee moves from an hourly position to which a 12-month measurement period applies to a salaried position to which a 6-month measurement period applies); and

(2) An ALE member changes the measurement method applicable to employees within a permissible category (for example, an ALE member changes the measurement period for all hourly employees for the next calendar year from a 6-month to a 12-month measurement period).

This notice describes how to address these situations, in both the case in which the employee is in a stability period at the time of the transfer and the case in which the employee is not yet in a stability period at that time. In general, for an employee who has been employed for a full measurement period at the time of transfer (and thus has a status as either a full-time employee or non-full-time employee for the stability period associated with that measurement period), the employee retains his or her status through the end of the associated stability period. For an employee who is not in a stability period (or administrative period) at the time of transfer, the employee's status is determined using the measurement period applicable to the second position, but including hours of service in the first position in applying that measurement period.

II. BACKGROUND

A. Section 4980H - In General

The Patient Protection and Affordable Care Act (Pub. L. 111-148) was enacted on March 23, 2010. The Health Care and Education Reconciliation Act of 2010 (Pub. L. 111-152) was enacted on March 30, 2010. These statutes are collectively known as the Affordable Care Act. The Affordable Care Act added Section 4980H to the Code, and that section was amended by the Department of Defense and Full-Year Continuing Appropriations Act, 2011 (enacted April 15, 2011, Pub. L. No. 112-10). Section 4980H applies to applicable large employers (generally, employers who employed at least 50 full-time employees, including full-time equivalent employees, on business days during the preceding calendar year).

Section 4980H generally provides that an applicable large employer is subject to an assessable payment if either (1) § 4980H(a) applies because the employer fails to offer its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan and any full-time employee is certified to receive a premium tax credit or cost-sharing reduction; or (2) § 4980H(b) applies because the employer offers its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage and one or more full-time employees is certified to receive a premium tax credit or cost-sharing reduction. Section 4980H is generally applicable for months beginning after December 31, 2013; however, Notice 2013-45 provides transition relief under which § 4980H does not apply for 2014.

B. Section 4980H – Identification of Full-Time Employees

Section 4980H(c)(4) provides that a full-time employee for any month is an employee who is employed on average at least 30 hours of service per week. The final § 4980H regulations (79 FR 8544 (Feb. 12, 2014)) provide two alternative methods for determining if an employee is a full-time employee for purposes of § 4980H: (1) the monthly measurement method; and (2) the look-back measurement method.

Under the monthly measurement method, an employee generally is treated as a full-time employee for any calendar month in which the employee averages 30 or more hours of service per week. See §54.4980H-3(c)(1). Under the look-back measurement method, an employee generally is treated as a full-time employee for any month within a stability period if the employee averaged 30 or more hours of service per week during the applicable measurement period preceding the stability period. See §54.4980H-3(d)(1). The look-back measurement method for identifying full-time employees is available only for determining potential liability under § 4980H and not for determining status as an applicable large employer.

An employer that uses the look-back measurement method sets the starting date and length of two separate measurement periods: (1) the standard measurement period, which is used for ongoing employees (generally, all employees who have been employed for at least one full standard measurement period); and (2) the initial measurement period, which is used for new variable hour, seasonal, or part-time employees.² Each ALE member (that is, each separate entity within a group of entities that constitutes a single applicable large employer) may establish different measurement methods or may use measurement periods that differ in duration or that start on a different date, and each ALE member is also permitted to use different measurement methods or to use measurement periods that differ in duration or that start on a different date for certain specified categories of employees. These categories are (A) collectively bargained and non-collectively bargained employees, (B) each group of collectively bargained employees covered by a separate collective bargaining agreement, (C) salaried employees and hourly employees, and (D) employees whose primary places of employment are in different States. See §54.4980H-3(d)(1)(v).

III. PROPOSED APPROACH

This section III proposes an approach for applying the look-back measurement method if the measurement period applicable to a particular employee changes. Section III.A addresses situations in which an employee transfers from one position to another within the same applicable large employer (or ALE member), in cases in which the employer uses a different measurement period for each position. Section III.B addresses

² An initial measurement period does not apply to new employees who are full-time employees (because they are reasonably expected at time of hire to average at least 30 hours of service per week for the months after hire), and so are not variable-hour, seasonal, or part-time employees. See §54.4980H-3(d)(2).

situations in which the employer changes the measurement period applicable to one or more categories of employees, and also addresses situations in which an employer changes the measurement method (in other words, from the look-back measurement method to the monthly measurement method or vice versa) for one or more categories of employees.

Nothing in this notice is intended to prohibit or discourage employers from adopting eligibility provisions that make some employees eligible for coverage before they would be considered a full-time employee under this approach.

A. Employee transferring from a position to which one measurement period applies to a position to which a different measurement period applies

This section III.A addresses changes in measurement methods under the following circumstances: the employee, who has been employed by an ALE member in a position (referred to as the first position) for which the employer uses the look-back measurement method, transfers to another position (referred to as the second position) for the same applicable large employer (whether or not with the same ALE member) for which the employer also uses the look-back measurement method, but with a measurement period that is different from the measurement period applicable to the first position. For this purpose, two measurement periods are different if they are of different durations or if they start on different dates (or both).

A transfer that may result in a change of applicable measurement method includes a transfer from one ALE member to another ALE member of the same applicable large employer or a transfer from one category of employees identified in §54.4980H-3(d)(1)(v) to another.

For purposes of this proposed approach, following a transfer, an employer includes hours of service earned in the first position either by (1) counting the hours of service using the counting method applied to the employee in the first position (for example, using a weekly equivalency method for non-hourly employees), or (2) recalculating the hours of service earned in the first position using the hours of service counting method applied to the employee in the second position (for example, using a monthly equivalency method for non-hourly employees), provided that the employer treats all similarly situated employees consistently.

1. Proposed Approach to Application of Look-Back Measurement Method

Beginning with the date on which an employee described above transfers from the first position to the second position, the look-back measurement method is applied as follows:

(i) *Employees in a stability period or administrative period.* If an employee is in a stability period applicable to the first position as of the date of transfer, the employee's status as a full-time or non-full-time employee for the first position remains in effect until

the end of that stability period. For this purpose, an employee is deemed to be in a stability period if as of the date of transfer the employee has been assigned a status for that stability period as a result of having been employed by the ALE member for a full standard measurement period or, if the employee has been a new variable hour, part-time, or seasonal employee, for a full initial measurement period.

Similarly, in the case of a new employee who is in an administrative period immediately following the end of the initial measurement period as of the date of transfer, the employee's status as a full-time or non-full-time employee based on hours of service in the initial measurement period under the first position will apply from the start of the associated stability period following the end of that administrative period through the end of that stability period.

At the end of the stability period during which the transfer occurs (or, if the employee was in an administrative period at the date of transfer, the end of the immediately following stability period), the employee assumes the full-time employee or non-full-time employee status that the employee would have under the look-back measurement method applicable to the second position, but including hours of service in the first position when applying that measurement method. For this purpose, if an employee's status in the second position cannot be determined under the measurement method applicable to the second position because, for example, the employee is a variable hour employee and, even including service performed in the first position, has not yet been employed for a full initial measurement period for the second position (and the administrative period immediately following that measurement period for the second position), then the rule in section III.A.1.ii applies to the employee in the second position.

(ii) *Employees not in a stability period.* If an employee is not in a stability period or in an administrative period immediately following the end of the initial measurement period under the look-back measurement method applicable to the first position as of the date of transfer as determined in paragraph (i) above, the employee's status as a full-time or non-full-time employee is determined solely under the look-back measurement method applicable to the second position as of the date of transfer, including all hours of service in the first position.

In all other respects, the rules generally applicable to the look-back measurement method under §54.4980H-3(d) continue to apply. For example, whether a new employee is a variable hour, part-time, seasonal, or full-time employee is determined based on the applicable large employer's reasonable expectations at the time of hire in accordance with §54.4980H-3(d)(2). However, a transfer of a new variable hour, part-time, or seasonal employee from the first position to the second position may be a change in employment status described in §54.4980H-3(d)(3)(vii), if after the transfer the employee is reasonably expected to average at least 30 hours of service per week in the second position.

As provided in the final § 4980H regulations, a new employee who is not a variable hour

or seasonal employee and who is reasonably expected to average at least 30 hours of service per week at the time of hire (and so is expected to be a full-time employee) is not subject to an initial measurement period. Instead, the status of such a new employee as a full-time employee or non-full-time employee for § 4980H purposes is determined on the basis of hours of service in each month. See §54.4980H-3(d)(2)(i). Such a new employee by definition will never be in a stability period for purposes of this section A.1.ii (unless the employee has been employed for a full standard measurement period at the date of transfer, in which case the employee would be a continuing rather than a new employee).

Until a new employee described in the preceding paragraph has been employed for a full standard measurement period applicable to the second position (including service in the first position), the status of the employee as a full-time or non-full-time employee for § 4980H purposes continues to be determined on the basis of hours of service in each calendar month. If such an employee has been employed for a full standard measurement period applicable to the second position but not the first position as of the date of transfer, the employee's status as a full-time or non-full-time employee is determined on the basis of the employee's average hours of service during that standard measurement period for the second position (but counting the hours of service accumulated during that standard measurement period for the first position), applied starting on the first day of the first month following the date of transfer and continuing through the end of the associated stability period.

2. Examples

The following examples illustrate the approach described in section III.A.1 of this notice. For each example, Position 1 and Position 2 are two positions at the same applicable large employer. Except as otherwise noted, the employer does not apply an optional administrative period described in §54.4980H-3(d)(1)(vi) or §54.4980H-3(d)(3)(vi).

Example 1: Ongoing employee. For Position 1, the employer uses 12-month standard measurement and stability periods beginning January 1. For Position 2, the employer uses 12-month standard measurement and stability periods beginning July 1.

Employee A is a long-time employee in Position 1 and so is not in an initial measurement period during the relevant periods. Employee A continues working in Position 1 and averages less than 30 hours of service per week during the period from January 1, 2015 through December 31, 2015. Employee A averages 30 or more hours of service per week during the period from July 1, 2015 through June 30, 2016.

On August 15, 2016, Employee A transfers from Position 1 to Position 2. At the date of the transfer, Employee A is in a stability period under Position 1 under which Employee A is treated as a non-full-time employee because Employee A averaged less than 30 hours of service per week during the measurement period

applicable to Position 1 beginning January 1, 2015 and ending December 31, 2015. For the period from August 15, 2016 through December 31, 2016 (the end of the stability period for Position 1 during which the transfer occurs), Employee A retains his status as a non-full-time employee (although the employer may choose to nonetheless extend an offer of coverage to the employee).

As of January 1, 2017 (the date immediately following the end of the stability period for Position 1), Employee A's status is determined under the look-back measurement method applicable to Position 2. Employee A is a full-time employee starting January 1, 2017, because Employee A averaged 30 or more hours of service per week in the measurement period for Position 2 beginning July 1, 2015 and ending June 30, 2016 (which has a stability period of July 1, 2016 through June 30, 2017). Employee A remains a full-time employee through the end of that stability period (in other words, through June 30, 2017). After June 30, 2017, Employee A's status continues to be determined using the applicable measurement period for Position 2.

Example 2: New variable hour employee in initial measurement period transfers to position in which employee has completed initial measurement period. For Position 1, the employer uses 12-month standard measurement and stability periods beginning January 1 and a 12-month initial measurement period beginning on each employee's start date. For Position 2, the employer uses 6-month standard measurement and stability periods beginning January 1 and July 1 and a 6-month initial measurement period beginning on an employee's start date.

The employer hires Employee B into Position 1 as a new variable-hour employee on January 1, 2015. Employee B averages 30 or more hours of service per week during the period from January 1 through June 30, 2015. On October 1, 2015, at which time Employee B is in the initial measurement period for Position 1, Employee B transfers from Position 1 to Position 2.

At the date of the transfer, Employee B is not in a stability period for Position 1 because Employee B has not been employed for a full initial measurement period or a full standard measurement period. Accordingly, Employee B's status is determined under the measurement method applicable to Position 2 as of the date of transfer, taking into account Employee B's hours of service in Position 1.

Employee B is a full-time employee from the date of transfer (October 1, 2015) through the end of the applicable stability period for Position 2 (December 31, 2015) because Employee B averaged 30 or more hours of service per week during the applicable measurement period for Position 2 ending June 30, 2015 (for Employee B, the initial measurement period and standard measurement period ran simultaneously from January 1, 2015 through June 30, 2015). After December 31, 2015, Employee B's status continues to be determined using the applicable measurement period for Position 2.

Example 3: New variable hour employee in initial measurement period transfers to position in which employee is also in initial measurement period. For Position 1, the employer uses a 3-month initial measurement period that begins on the first day of the month following the start date and, if the employee is full-time during the initial measurement period, a 6-month stability period immediately following the initial measurement period. For Position 2, the employer uses a 12-month initial measurement period beginning on each employee's start date, applies an administrative period that runs from the end of the initial measurement period until the end of the month in which that date falls, and uses a one-year stability period starting the day after the end of the administrative period.

The employer hires Employee C into Position 1 as a new variable-hour employee on February 15, 2015. On May 1, 2015, Employee C transfers from Position 1 to Position 2. Employee C is not reasonably expected to average 30 or more hours of service per week in Position 2 (and thus the transfer from Position 1 to Position 2 does not constitute a change in employment status for purposes of §54.4980H-3(d)(3)(vii)). Employee C does not average 30 or more hours of service per week during the period from February 15, 2015 through February 14, 2016.

As of the date of transfer, Employee C had not been employed for the full initial measurement period for Position 1 and so, as of the date of transfer, Employee C is not in a stability period. Accordingly, Employee C's status is determined using the measurement method applicable to Position 2 (February 15, 2015 through February 14, 2016).

Employee C continues to be treated as a new variable hour employee from the date of transfer through February 28, 2016 (the end of the initial measurement period and associated administrative period for Position 2). For the stability period beginning March 1, 2016, Employee C's status is determined on the basis of Employee C's average hours of service in the initial measurement period for Position 2, taking into account the hours of service in Position 1. Employee C is not a full-time employee for the stability period from March 1, 2016 through February 28, 2017.

Example 4: New variable hour employee in initial measurement period transfers to new position and has a change in employment status. Same facts as Example 3, except that as of the date of transfer Employee C is reasonably expected to average 30 or more hours of service per week in Position 2.

Because Employee C had not been employed for the full initial measurement period for Position 1, Employee C is not in a stability period as of the date of transfer. Accordingly, Employee C's status is determined using the measurement method for Position 2.

Because as of the date of transfer to Position 2, Employee C is reasonably expected to average more than 30 hours of service per week in Position 2, the rules set forth in §54.4980H-3(d)(3)(vii) for changes in employment status during the initial measurement period apply.

Example 5: Transfer of employee during administrative period. For Position 1, the employer uses a 12-month standard measurement period starting January 1 for ongoing employees and an 11-month initial measurement period starting on the first day of the month following the start date combined with a one-month administrative period for new variable hour, part-time, and seasonal employees. With respect to Position 2, the employer uses 6-month standard measurement and stability periods beginning January 1 and July 1.

The employer hires Employee D into Position 1 on March 15, 2016 as a new variable hour employee. For the 11-month initial measurement period from April 1, 2016 through February 28, 2017, Employee D averages 30 or more hours of service per week. On March 10, 2017, during the administrative period for Position 1 from March 1, 2017 through March 31, 2017, Employee D transfers from Position 1 to Position 2.

The date of transfer occurs during the administrative period following the completion of Employee D's initial measurement period applicable to Position 1. Employee D's status must be determined using the initial measurement method applicable to Position 1 and applied from the start of the stability period following the end of the administrative period through the end of that stability period.

Accordingly, for the 12-month stability period starting April 1, 2017, Employee D is a full-time employee because Employee D averaged 30 or more hours of service per week in the associated initial measurement period ending February 28, 2017. After the completion of the stability period (March 31, 2018), Employee D's status as a full-time employee is determined using the measurement method applicable to Position 2.

B. Employer-initiated changes in measurement methods for one or more permissible categories of employees.

Pursuant to this notice, an employer may change the measurement method applicable to a category of employees identified in §54.4980H-3(d)(1)(v), provided that for a transition period following the date of any such change, the status of each employee in that category is determined in accordance with this section III.B. A change in measurement method may include a change from the look-back measurement method to the monthly measurement method (or vice versa), or a change in the duration or start date of any applicable measurement period under the look-back measurement method.

The § 4980H final regulations address how to determine the full-time status of employees who transfer from a category to which the monthly measurement method

applies to a category to which the look-back measurement method (or vice versa). See §54.4980H-3(f)(2). The final regulations do not address whether, or under what conditions, an employer that uses a measurement method for a category of employees may subsequently change that measurement method. This section III.B clarifies that an employer may change the measurement method applicable to a category of employees, provided that the transition rules for employees who change between the monthly and look-back measurement methods due to such a change by the employer as provided in §54.4980H-3(f)(2) apply to all employees impacted by the change for a transition period after the effective date of the change in method. For a change from the look-back measurement method to the monthly measurement method (or vice versa), the status of each affected employee as of the date of the change is determined in accordance with §54.4980H-3(f)(2) as if on the date of the change each of those employees had transferred from a position to which the original measurement method applied, to a position to which the revised measurement method applied.

The status of any employee whose applicable measurement period under the look-back measurement method is changed by the employer is determined as if the employee had transferred from a position to which the original measurement method applies to a position to which the revised measurement method applies as of the effective date of the change. Accordingly, if an employer changes the duration or start date of the measurement period under the look-back measurement method for a category of employees, the status of each employee in that category as a full-time employee after the date of the change is determined in accordance with this notice as if on the date of the change each employee in the category had transferred from a position to which the original measurement method applied, to a position to which the revised measurement method applied.

Example 6: Employer-initiated change in measurement periods. Starting January 1, 2015, the employer determines the full-time employee status of employees covered by a particular collective bargaining agreement (CBA) using 6-month measurement and stability periods each starting April 1 and October 1 and determines the status of employees not covered by the CBA using 12-month measurement and stability periods each starting January 1.

On April 1, 2017, the employer changes the look-back measurement method for employees not covered by the CBA to be the same as that used for employees covered by the CBA.

For a transition period following the date of this change, the status of employees not covered by the CBA must be made in a manner consistent with this notice, treating each employee who is subject to the measurement method applicable to employees not covered by the CBA as if on April 1, 2017, that employee had transferred from a position subject to the original measurement method to a position subject to the revised measurement method.

Accordingly, each employee subject to the measurement method applicable to

employees not covered by the CBA who is in a stability period as of April 1, 2017 retains his or her status as a full-time employee or non-full-time employee, as determined under the original measurement method for the remainder of the 12-month stability period applicable to that employee. Each such employee who is not in a stability period as of April 1, 2017 has his or her status determined as of April 1, 2017 in accordance with the 6-month measurement method.

IV. RELIANCE

The Treasury Department and the IRS anticipate issuing further guidance after consideration of all comments received pursuant to section V of this notice. However, taxpayers may rely on the approach described in this notice to determine an employee's status as a full-time employee for purposes of § 4980H until such guidance is issued, and in any case, through the end of calendar year 2016.

V. REQUEST FOR COMMENTS AND APPLICATION TO CORPORATE TRANSACTIONS

The Treasury Department and the IRS invite public comments on the proposed approach described in this notice, and on the potential application of the proposed approach described in this notice, or similar rules, in the context of a corporate transaction such as a merger or acquisition involving employers using different measurement methods. In such a corporate transaction, the two (or more) entities may have different measurement methods for their respective employees in a particular category under §54.4980H-3(d)(1)(v) (for example, salaried employees). As a result of the corporate transaction, these groups of employees may become employed by the same ALE member.

Until further guidance is issued, and in any case through the end of calendar year 2016, taxpayers involved in a corporate transaction in which employers use different measurement methods may rely on the approach described in this notice in determining an employee's status as a full-time employee for purposes of § 4980H. For example, assume that one corporation (Target) merges into another corporation (Acquirer) and that both corporations use the look-back measurement method but with different measurement periods. The corporations may apply the approach set forth in section III of this notice by treating the Target employees as having transferred at the date of the merger from one position (at Target) to another position (at Acquirer) with a different measurement period.

In addition, if a merger, acquisition or similar corporate transaction occurs and, in connection with the corporate transaction, individuals not employed immediately prior to the transaction by an ALE member become employed by that ALE member (new ALE member employees), the ALE member will not be treated as applying an impermissible categorization of employees under §54.4980H-3(d)(1)(v) merely because it applies during the transition period, to some or all of the new ALE member employees, the measurement method applicable to those employees immediately before the corporate

transaction. For this purpose, the transition period is the period beginning on the date of the corporate transaction and ending on the last day of the first stability period following a standard measurement period that would have applied to the new ALE member employees absent the corporate transaction and that begins after the date of such corporate transaction (or, in the case of an ALE member that uses the monthly measurement method with respect to a category of employees, the last day of the first calendar year that begins after the date of the transaction).

Recognizing that the approach described in the immediately preceding paragraphs to addressing the consequences of corporate transactions is not necessarily the only permissible approach and might in some cases present practical issues, the Treasury Department and the IRS encourage comments on this and other possible approaches. As with the other provisions of this notice, nothing in this section of the notice prohibits employers from adopting eligibility provisions that make some employees eligible for coverage in situations in which the employee could potentially be classified as a non-full-time employee under the approach described in this paragraph.

Comments are also requested on whether additional rules are necessary to address situations where an applicable large employer transfers employees to another employment category or to a different ALE member that uses a different look-back measurement method for the purpose of delaying or avoiding the classification of the employee as a full-time employee for § 4980H purposes.

Public comments should be submitted no later than December 29, 2014. Comments should include a reference to Notice 2014-49. Send submissions to CC:PA:LPD:PR (Notice 2014-49), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (Notice 2014-49), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC 20044, or sent electronically, via the following e-mail address: Notice.comments@irs.counsel.treas.gov. Please include "Notice 2014-49" in the subject line of any electronic communication. All material submitted will be available for public inspection and copying.

VI. DRAFTING INFORMATION

The principal author of this notice is Shad C. Fagerland of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). For further information regarding this notice contact Mr. Fagerland at (202) 317-5500 (not a toll-free call).