

Final Shared Responsibility Regulations Issued

On February 12, 2014 [final regulations](#) regarding the Affordable Care Act (ACA) shared responsibility provisions were issued. Some key changes in the final regulations include:

- Delay the shared responsibility mandate for employers with 50-99 employees
- Extend certain transition rules
- Temporarily liberalize the requirement to offer coverage from 95% to 70% of employees
- Provide a definition of seasonal employee as well as other types of employees

We previously covered the shared responsibility requirements in ErisaALERT [2012-13](#), [2013-01](#) and [2013-02](#). Many of the provisions in the proposed rule carry over to the final regulations. The regulations continue to be very complex and will require careful review as it relates to your particular situation. In this ALERT we will discuss some of the key transitional guidance of the final regulations.

Brief overview of some key changes

| Proposed | Final |
|---|---|
| Applicable larger employer (ALE) with 50 or more full time equivalents subject to the shared responsibility mandate effective January 1, 2015 | Mandate delayed until January 1, 2016 for ALE with more than 50 full time equivalents but less than 100 subject to employer certification of certain requirements. |
| ALE required to offer coverage to 95% of full time employees to avoid the no coverage or 4980H(a) penalty of \$2,000 per employee | ALE required to offer coverage to 70% of eligible employees in 2015. The 95% requirement is delayed until 2016. |
| 4980(H)(a) penalty calculated as \$2,000 multiplied by the number of full-time employees not covered reduced by 30 | For 2015 only, the 4980(H)(a) penalty calculated as \$2,000 multiplied by the number of full-time employees not covered reduced by 80. |
| Transition rule for non-calendar year plan years beginning in 2014 | Transition rule extended to calendar year beginning in 2015 rather than effective January 1, 2015. Certification of specific requirements necessary. An additional transitional rule is provided. |
| Transition rule for dependent coverage | Extended to 2016, i.e., no penalty for failure to offer dependent coverage if plan sponsors are taking steps to offer coverage in 2016. |
| Break in service (BIS) rules allowed treating an employee as a new employee if there was a break in service of 26 weeks | BIS period reduced to 13 weeks except for certain educational organizations. |
| Treatment of student interns and other similar employees not clear | Students participating in a federal or state work-study program not counted as an employee; religious who have taken a vow of poverty not included; other clarification provided. |

What has stayed basically the same?

- Affordability safe harbors
- Method to determine ALE status
- Measurement, look-back and stability period calculations

Quick review of the shared responsibility assessable penalty

IRC §4980H applies to applicable large employers (ALE) that with respect to a calendar year employed on average at least 50 full time employees (an employee who averages 30 or more hours per week). For example, an ALE that employed an average of 50 full time employees during 2015 is considered an ALE for 2016. Both full time employees and full-time equivalents (FTE) are counted in the ALE determination. FTEs are determined based on the hours of service (HOS) worked by non full-time employees.

There are two prongs to the assessable penalty IRC §4980H(a) – the (a) penalty and §4980H(b) – the (b) penalty. The (a) penalty is applicable if an ALE fails to provide minimum essential coverage (MEC) and one or more employees receives a tax credit or cost sharing reduction. The (b) penalty is applicable if the ALE offers MEC but it is not affordable or does not provide minimum value and one or more employees receive a tax credit or cost sharing reduction.

The (a) penalty is calculated on a monthly basis by multiplying the number of all full-time employees in excess of 30 (80 in 2015 only) by $\frac{1}{2}$ of \$2,000. The (b) penalty is based on the number of full-time employees who receive a tax credit or cost sharing reduction multiplied by $\frac{1}{12}$ of \$3,000 for each calendar month the tax credit or cost sharing reduction is in effect. In no event will the (b) penalty exceed the (a) penalty.

Provisions to assist businesses

Employers subject to the employer shared responsibility provisions in 2015 must offer coverage to at least 70% of full-time employees rather than 95%. The 95% requirement will resume in 2016.

The employer shared responsibility provisions continue to apply in 2015 to employers with 100 full-time employees but will not apply until 2016 to employers with at least 50 but less than 100 full-time employees if the employer certifies that:

1. it employs at least 50 full-time employees (including 50 FTEs) on business days during 2014.
2. It does not reduce the size of its workforce or overall HOS of its employees during the period beginning February 9, 2014 and ending December 31, 2014 to satisfy the 50 full-time employee requirement. A reduction in workforce or HOS for bona fide business reasons is allowed.
3. Coverage offered as of February 9, 2014 is not eliminated or materially reduced.

The certification will be provided as part of IRC §6056 reporting. (Note: final regulations for both IRC §6055 and §6056 were issued on March 10, 2014 and will be discussed in a future ALERT).

Various employee categories

Clarifications were added in response to comments to the proposed regulations:

Volunteers – HOS rendered by bona fide volunteers for a government or tax-exempt entity, such as volunteer firefighters and emergency responders can be disregarded.

Educational employees – teachers and other educational employees will not be treated as part-time employees because the school is closed or on a limited summer schedule.

Seasonal employees – positions for which the customary annual employment period is six months or less will not be considered full-time employees.

Student work-study programs – service performed under federal or state work-study programs will not be included when calculating full-time employees

Adjunct faculty – use a method of crediting HOS that is reasonable and consistent until final regulations are issued. However, the final regulations permit crediting an adjunct faculty member with 2 ¼ hours of service per week for each hour of teaching or classroom time.

Other specific 2015 provisions

Employers can determine whether they had 100 full-time or FTEs in the previous year by utilizing a six consecutive month period instead of a full year.

Plans may use a measurement period of six months in 2014 with respect to a stability period of up to 12 months in 2015.

The provision requiring extending coverage to dependents will not apply in 2015 to employers that are taking steps to arrange for such coverage to begin in 2016.

The transition guidance for non-calendar years has been carried forward and an additional transition rule added. Non-calendar year plans will not be subject to an assessable penalty for the period from January 1, 2015 until the beginning of the 2015 plan year if certain conditions are satisfied.

In each transition method, the employer:

- Must have maintained the plan on 12/27/2012
- The plan year was not changed to a later date
- Employees are eligible for the plan on the first day of the 2015 plan year in accordance with the eligibility requirements in effect on 2/9/2014 and the plan is affordable and provides minimum value.
- Employees are not eligible for coverage under another employer sponsored plan maintained by the ALE on a calendar basis in effect on 2/9/2014

However, there is a caveat that an ALE may be subject to an assessable penalty for any month in 2015 if the ALE does not offer coverage to all but 5% (30% for 2015 only) of its full-time employees.

There are now three non-calendar year transition methods:

- Pre-2015 eligibility transition - the pre-2015 eligibility transition criteria require all of the above
- Significant percentage transition (all employees)
- Significant percentage transition (full-time employees)

The significant percentage transition (all employees) requires all of the above transition requirements **AND** as of any date in the 12 months ending on 2/9/2014, at least ¼ of its employees were covered under the plan **OR** 1/3 or more of its employees were offered coverage during the open enrollment period that ended most recently before 2/9/2014.

The significant percentage transition (full-time employees) requires all of the above transition requirements **AND** as of any date in the 12 months ending on 2/9/2014, at least 1/3 of its full-time employees were covered under the plan **OR one-half** or more of its full-time employees were offered coverage during the open enrollment period that ended most recently before 2/9/2014.

What plan sponsors should be focusing on now?

1. Carefully review the regulations as it applies to your situation.
2. Counting employees and assigning categories/classifications (full-time, part-time etc.) is critical for purposes of the potential shared responsibility assessment as well as the reporting requirements.
3. Seek advice from you consultant or counsel
4. Document your calculation methodology

Note: all links are active as of the date of issuance of this ErisaALERT.

Disclaimer: This material is for the sole purpose of providing general information and does not under any circumstances constitute legal advice and should not be used as a substitute for legal advice. You should seek the advice of counsel when applying the requirements to your plan. For more information on this ErisaALERT contact us by phone at 610-524-5351 and ask for Mary Andersen or 201-857-1137 and ask for Leanne Fosbre or 215-508-5629 and ask for Theresa Borzelli of SFE&G.