Provided by Clarke & Company Benefits, LLC

FAQs on the Employer Shared Responsibility Rules

The Affordable Care Act (ACA) requires applicable large employers (ALEs) to offer affordable, minimum value health coverage to their full-time employees (and dependents) or pay a penalty. This employer mandate is also known as the "employer shared responsibility" or "pay or play" rules.

An ALE will face a penalty if one or more full-time employees obtain a subsidy through an Exchange. An individual may be eligible for a subsidy either because the ALE does not offer coverage, or offers coverage that is "unaffordable" or does not provide "minimum value."

This ACA Overview contains IRS questions and answers (Q&As) on the employer shared responsibility rules to help employers comply.

LINKS AND RESOURCES

- On July 9, 2013, the Internal Revenue Service (IRS) issued Notice 2013-45 to provide formal guidance on the one-year delay.
- On Feb. 12, 2014, the IRS published final regulations on the ACA's employer shared responsibility rules.
- The IRS has also provided Questions and Answers for employers on the employer shared responsibility rules.
- On Dec. 16, 2015, the IRS issued Notice 2015-87 to confirm the adjusted penalty amounts for 2015 and 2016.

HIGHLIGHTS

APPLICABLE LARGE EMPLOYERS

Only ALEs are subject to the employer shared responsibility rules.

- ALEs are employers that employ, on average, **at least 50 full-time employees, including full-time equivalent employees (FTEs)**, during the preceding calendar year.
- All ALEs are subject to these rules, including for-profit, nonprofit and government employers.

POTENTIAL PENALTIES

- Two separate penalties can apply under the employer shared responsibility rules—the Section 4980H(a) penalty and the Section 4980H(b) penalty.
- Only one of the penalties will apply for an ALE in a given situation; both penalties cannot apply to the same ALE at the same time.

CLARKE & COMPANY
BENEFITS LLC

BASICS OF THE EMPLOYER SHARED RESPONSIBILITY RULES

1. What are the employer shared responsibility rules?

The employer shared responsibility rules were added under Code Section 4980H by the ACA. Under these rules, certain employers (called applicable large employers, or ALEs) must either:

- Offer health coverage that is "affordable" and that provides "minimum value" to their full-time employees (and offer coverage to the full-time employees' dependents); or
- Potentially pay an employer shared responsibility penalty to the IRS, if at least one of their full-time employees receives a premium tax credit for purchasing individual coverage through a Health Insurance Marketplace (Marketplace), also called the Exchange.

Whether an employer is an ALE, and is therefore subject to the employer shared responsibility rules, depends on the size of its workforce. In general, employers employing at least a certain threshold number of employees (generally, **50 full-time employees, including full-time equivalent employees**, which means a combination of part-time employees that count as one or more full-time employees) are ALEs. The vast majority of employers fall below the ALE size threshold, and therefore are not subject to the employer shared responsibility rules.

2. When did the employer shared responsibility rules take effect?

The employer shared responsibility rules generally were first effective in 2015, but several forms of transition relief were available for 2015**.** Several forms of transition relief also were available to some ALEs for 2016. **No transition relief is available for 2017 and future years.** For more information, see "Limited Transition Relief in 2016" below.

3. Are there information reporting requirements related to the employer shared responsibility rules?

Yes. Employers that are subject to the employer shared responsibility rules (that is, ALEs) are required to report information about whether they offered coverage to full-time employees and, if so, information about the offer of coverage. ALEs are required to send this information to the IRS on Form 1094-C, *Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns*, and Form 1095-C, *Employer-Provided Health Insurance Offer and Coverage*. ALEs are also required to send the Form 1095-C for each full-time employee to that employee. The information on these forms is used to determine whether an ALE owes a penalty under the employer shared responsibility rules and whether employees are eligible for the premium tax credit. For additional information, see the Section 6056 final regulations, the instructions for Forms 1094-C and 1095-C, the Q&As about Information Reporting by Employers on Form 1094-C and Form 1095-C and the IRS Q&A page for offers of health insurance coverage by employers (Section 6056).

12/12; BR 9/19

Also, an employer that sponsors self-insured health coverage—whether or not the employer is an ALE—has information reporting responsibilities as a provider of minimum essential coverage (MEC). In general, an ALE that sponsors self-insured health coverage will use the same form it uses to report about offers of coverage (Form 1095-C) to satisfy this requirement by filling out an additional section (Part III) for employees and family members who enroll in the coverage. See the instructions for Forms 1094-C and 1095-C.

For additional information, including for employers that are not ALEs but that sponsor self-insured health coverage, see the Section 6055 final regulations, the instructions for Forms 1094-B and 1095-B and the IRS Q&A page for information reporting by coverage providers (Section 6055).

4. Is more detailed information available about the employer shared responsibility rules and the related information reporting requirements?

Yes. The latest news and a list of resources are available at the ALE Information Center and the ACA Legal Guidance and Other Resources page. The information available includes links to recorded webinars that anyone can review at any time to better understand the employer shared responsibility rules and the related information reporting requirements.

- The ALE Information Center includes links to a wide variety of resources regarding the employer shared responsibility rules, such as links to current webinars, tax provisions, Q&As, forms and instructions, and other publications.
- The ACA Legal Guidance and Other Resources page includes links to YouTube videos, podcasts and other IRS outreach materials regarding the employer shared responsibility rules and other ACA topics.

EMPLOYERS SUBJECT TO THE EMPLOYER SHARED RESPONSIBILITY RULES

5. I understand that the employer shared responsibility rules apply only to employers that are ALEs, meaning that they employ at least a certain number of employees. How many employees must an employer have to be an ALE and, therefore, be subject to the employer shared responsibility rules?

Whether an employer is an ALE in a particular calendar year generally depends on the size of the employer's workforce in the preceding calendar year. For example, an employer will use information about the size of its workforce during 2017 to determine if it is an ALE for 2018.

To be an ALE for a calendar year, an employer must have employed an average of **at least 50 full-time employees (including full-time equivalent employees, or FTEs)** during the preceding calendar year. To determine its workforce size for a calendar year, an employer adds its total number of full-time employees for each month of the prior calendar year to the total number of FTEs for each month of the prior calendar year and divides by 12.

12/12; BR 9/19

In general, for this purpose:

- An employer determines its number of full-time employees for a month by counting individuals employed on average for at least **30 hours of service per week** during the month (or at least **130 hours of service during the month**).
- An employer determines its number of FTEs for a month by combining the number of hours of service of all non-full-time employees for the month (but not including more than 120 hours of service per employee), and dividing the total by 120. For example, an employer that employs 40 full-time employees and 20 employees each with 60 hours of service in a month has the equivalent of 50 full-time employees in the month (40 full-time employees plus 10 FTEs (20 X 60 = 1200, and 1200/120 =10)).

For Section 4980H purposes, the number of an employer's FTEs is relevant only to determine if the employer is an ALE; FTEs are not taken into account in determining the amount of an employer shared responsibility penalty, if any, that an ALE may owe.

6. Are all employees of an employer taken into account in determining whether the employer is an ALE?

Generally, all employees are counted (either as full-time employees or FTEs) when an employer is determining whether it is an ALE, but there are some exceptions.

- **Seasonal workers:** An employer is not an ALE if both of the following apply:
  - The employer's workforce exceeds 50 full-time employees (including FTEs) for 120 days or fewer during the preceding calendar year; and
  - All of the employees in excess of 50 employed during that period of no more than 120 days are seasonal workers.

  "Seasonal workers" are workers who perform labor or services on a seasonal basis (as defined by the DOL) and retail workers employed exclusively during holiday seasons. For this purpose, employers may apply a reasonable, good faith interpretation of the term "seasonal worker" and a reasonable, good faith interpretation of the DOL's definition of seasonal worker.
- **TRICARE/Department of Veterans Affairs (VA) Coverage:** Employees who have coverage under TRICARE or a VA health program are not taken into account in determining if an employer is an ALE.

These exceptions apply solely for purposes of determining whether an employer is an ALE. For additional information, see Section 4980H(c)(2)(F) and Section 54.4980H-2(b) of the regulations.

12/12; BR 9/19

7. How does an employer that was not in existence on any business day in the prior calendar year determine if it employs enough employees to be an ALE in the current calendar year?

An employer that was not in existence on any business day in the prior calendar year is considered to be an ALE in the current calendar year if the employer is reasonably expected to employ, and actually does employ, an average of at least 50 full-time employees (including FTEs) on business days during the current calendar year. For this purpose, an employer does not take into account employees who have coverage under TRICARE or a VA health program. See Section 54.4980H-2(b) of the regulations for how the seasonal worker exception applies in this case.

In contrast, for the next calendar year (the year after the first year the employer was in existence), the employer determines its status as an ALE under the general rules.

8. If an employer hires additional employees, including some part-time employees, how does it determine if it has become large enough to be an ALE?

An employer determines if it is an ALE for a current calendar year based on its number of full-time employees (including FTEs) during the prior calendar year. If an employer hires additional employees, including some part-time employees, during the current calendar year, the employer will take those employees into account when determining if it is an ALE for the next calendar year.

9. Do the employer shared responsibility rules apply only to large employers that are for-profit businesses or to other large employers as well?

All employers that are ALEs are subject to the employer shared responsibility rules, including for-profit, non-profit (whether or not a tax-exempt organization) and government entity employers.

10. Do the employer shared responsibility rules apply to government entities?

Yes. There is no exclusion from the employer shared responsibility rules for government entities. All employers that are ALEs are subject to the employer shared responsibility rules, including federal, state, local and Indian tribal government employers.

11. If two or more businesses have a certain level of common or related ownership, are they combined for purposes of determining whether they employ enough employees to be an ALE?

Yes. The employer shared responsibility rules include a rule that also applies for certain other tax and employee benefit purposes (Section 414). Under this rule, two or more businesses that have a certain level of common or related ownership generally are treated as a single employer, and are combined for purposes of determining whether or not they collectively employ at least 50 full-time employees (including FTEs). If the combined total meets the ALE threshold, then each separate business is considered to be part of an ALE, and is therefore subject to the employer shared responsibility rules. This includes any business that does not employ enough employees to meet the ALE threshold on its

12/12; BR 9/19

own. Under this rule, an ALE may be a single employer or a group of related employers treated as an Aggregated ALE Group, which is a group of employers treated as a single employer under Section 414(b), (c), (m) or (o). Each employer that is a member of an Aggregated ALE Group is called an ALE Member.

For example, if an individual owns 80% or more of two businesses that are separate legal entities, the total number of full-time employees of that employer is based on the full-time employees (including FTEs) in both businesses combined together. If the employees in the combined businesses add up to fewer than 50 full-time employees (including FTEs) in a calendar year, the employer shared responsibility rules will not apply to those businesses for the following calendar year.

12. Does common or related ownership affect an ALE's liability for an employer shared responsibility penalty, or only the determination of whether an employer is subject to the employer shared responsibility rules?

Common or related ownership affects only whether an employer is an ALE Member and, therefore, subject to the employer shared responsibility rules. Employers with a certain level of common or related ownership are treated as a single employer for determining whether an employer is an ALE. The rules for combining employers do not apply for purposes of determining whether any particular ALE Member owes an employer shared responsibility penalty or the amount of any penalty. That is determined separately for each related ALE Member.

13. Do the rules that require combining employers with a certain level of common or related ownership for purposes of determining whether they employ enough employees to be an ALE apply for government entity employers?

Yes, but a special standard applies to government entity employers in applying the rules for combining employers under Section 414 for purposes of the employer shared responsibility rules. Because specific rules under Section 414 have not yet been developed for government entities, and because Section 414 relates to a certain level of common or related ownership and government entities are not typically "owned" by other entities, government entities may apply a good faith reasonable interpretation of Section 414 to determine whether they should be combined with other entities.

14. If an employer buys or starts a new business with a new group of employees and the new business is separate from the employer's existing business(es), are the employees in the new business combined with employees in the existing business(es) for purposes of determining whether the business(es) employ enough employees to be an ALE?

Under the Section 414 rules for combining employers that apply for purposes of determining which employers are ALEs under the employer shared responsibility rules, the employees of employers that have a certain level of common or related ownership are added together to determine if an employer employs at least 50 full-time employees (including FTEs). The rules under Section 414 for combining

12/12; BR 9/19

employers have applied for purposes of applying the federal tax rules for 401(k) and other retirement plans to employers with certain common or related ownership for years.

15. To determine if an employer is an ALE, does the employer count its employees who are eligible for health coverage through another source, such as Medicare, Medicaid or a spouse's employer?

Yes. For purposes of determining if an employer is an ALE, all employees are counted (subject to limited exceptions for certain seasonal workers and employees who have coverage under TRICARE or a VA health program), regardless of whether the employees are eligible for coverage from other sources.

16. To determine if an employer is an ALE, does the employer count its employees who are exempt from the individual mandate, such as members of a health care sharing ministry or members of a federally-recognized Indian tribe?

Yes. For purposes of determining if an employer is an ALE, all employees are counted (subject to limited exceptions for certain seasonal workers and employees who have coverage under TRICARE or a VA health program), regardless of whether the employees are exempt from the individual mandate.

17. Do the employer shared responsibility rules apply to employers with employees (U.S. citizens or non-citizens) working outside the United States?

Generally, the employer shared responsibility rules apply to an employer with employees (U.S. citizens or non-citizens) working abroad only if the employer has at least 50 full-time employees (including FTEs), **determined by taking into account only work performed in the United States**. For this purpose, the hours of service that an employee works does not include an hour of service to the extent the compensation for services performed constitutes income from sources outside the United States. (The term "United States" refers only to the 50 States and the District of Columbia, and does not include the U.S. territories.) Thus, employees (U.S. citizens or non-citizens) working only abroad generally are not taken into account for purposes of determining whether an employer is an ALE, or for purposes of determining whether the employer owes an employer shared responsibility penalty or the amount of any penalty.

18. Do the employer shared responsibility rules apply if an employer that is not otherwise an ALE offers coverage through an Association Health Plan (AHP)?

No. Whether an employer member of an association that offers coverage through an AHP is an ALE that is subject to the employer shared responsibility rules depends on the number of full-time employees (and FTEs) the member employer employed in the prior calendar year, and is unrelated to whether the employer offers coverage through an AHP. An employer that is not an ALE under the employer shared responsibility rules does not become an ALE due to participation in an AHP, and an employer that is an ALE under the employer shared responsibility rules continues to be an ALE regardless of its participation

12/12; BR 9/19

in an AHP. (The only circumstances in which multiple employers are treated as a single employer for purposes of determining whether the employer is an ALE is if the employers have a certain level of common or related ownership. For more information, see the questions about common or related ownership in this section.)

For more information on AHPs, see DOL regulations issued on June 21, 2018.

IDENTIFICATION OF FULL-TIME EMPLOYEES

19. What is the definition of "employee" for purposes of the employer shared responsibility rules?

For purposes of the employer shared responsibility rules, an employee is an individual who is an employee under the **common-law standard** for determining employer-employee relationships. An employee does not include a sole proprietor, a partner in a partnership, an S corporation shareholder who owns at least 2% of the S corporation, a leased employee (within the meaning of Section 414(n)) or a worker that is a qualified real estate agent or direct seller. See Publication 15-A, *Employer's Supplemental Tax Guide*, for more information on determining who is an employee.

20. What is the definition of "full-time employee" for purposes of the employer shared responsibility rules?

An employee is considered "full-time" if he or she has sufficient hours of service. For purposes of the employer shared responsibility rules, an employee is a full-time employee for a calendar month if he or she averages at least **30 hours of service per week** or has **130 hours of service in the month** (130 hours of service in a month is treated as the monthly equivalent of at least 30 hours of service per week).

There are two methods for determining whether an employee is a full-time employee:

- **Monthly measurement method:** Under the monthly measurement method, an employer determines whether an employee is a full-time employee by counting the employee's hours of service for each month.
- **Look-back measurement method:** Under the look-back measurement method, an employer determines whether an employee is a full-time employee for a future period (referred to as the **stability period**), based upon the employee's hours of service in a prior period (referred to as the **measurement period**). The look-back measurement method for identifying full-time employees is available only for purposes of determining and calculating liability for an employer shared responsibility penalty, and not for purposes of determining if the employer is an ALE. The look-back measurement method provides special rules that apply in various circumstances, such as for variable-hour employees, seasonal employees and employees of educational organizations.

For rules on when an employer may use different methods of determining full-time employee status for different categories of employees, see Section 54.4980H-3(e) of the regulations.

12/12; BR 9/19

These methods are used to determine full-time employee status for purposes of the employer shared responsibility rules; these rules do not affect whether an employer may offer coverage to part-time employees. Employers always may make additional employees eligible for coverage, or otherwise offer coverage more expansively than would be required to avoid an employer shared responsibility penalty.

21. Is a full-time equivalent employee (FTE) different than a full-time employee?

Yes. FTEs are counted by combining the hours of part-time employees, each of whom individually is not a full-time employee, but who, in combination, count as one or more full-time employees. For purposes of the employer shared responsibility rules, the number of an employer's FTEs is only relevant for purposes of determining whether the employer is an ALE.

An ALE need not offer coverage to its part-time employees to avoid an employer shared responsibility penalty, and a part-time employee's receipt of a premium tax credit for purchasing coverage through an Exchange cannot be the basis for liability for an employer shared responsibility penalty.

22. For purposes of the employer shared responsibility rules, what is an hour of service?

Generally, an hour of service means: (1) each hour for which an employee is paid, or entitled to payment, for the performance of duties for the employer; and (2) each hour for which an employee is paid, or entitled to payment, 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.

For more information on the interaction of the rules relating to the "hour of service" definition in the employer shared responsibility rules with the definition in the DOL regulations, which is incorporated into the Section 4980H regulations, see Notice 2015-87 (question 14).

23. Are any types of hours excluded from the definition of hour of service?

Yes. Hours for services performed in certain capacities are excluded from the definition of "hour of service" and not counted as hours of service for purposes of the employer shared responsibility rules:

- **Volunteer employees:** Hours of service do not include hours of bona fide volunteer service for a government entity or tax-exempt organization, even if certain compensation is received for those hours.
- **Students performing work-study:** Hours of service do not include hours performed by students as part of a Federal Work Study Program or a substantially similar program of a state or political subdivision.
- **Compensation that is not U.S. source income:** Hours of service do not include hours for which an employee receives compensation that is taxed as income from sources outside the United States (generally meaning certain work overseas). For this purpose, the term "United States" refers to only the 50 States and the District of Columbia, and does not include the U.S. territories.

12/12; BR 9/19

- **Certain members of religious orders:** Until further guidance is issued, under certain circumstances, a religious order is permitted to not count as an "hour of service" work performed by an individual who is subject to a vow of poverty. For this exclusion to apply, the employee must be a member of the religious order and must be performing tasks that are usually required of active members of that order.

24. Are there special rules for hours of service that are particularly challenging to identify or track or for employees for whom the general rules for determining hours of service may present special difficulties?

The IRS continues to consider additional rules for the determination of hours of service:

- For certain categories of employees whose hours of service are particularly challenging to identify or track, or for whom the general rules for determining hours of service may present special difficulties (including adjunct faculty, commissioned sales people and airline employees); and
- For certain categories of work hours associated with some positions of employment, including layover hours (for example for airline employees) and on-call hours.

Until further guidance is issued, **employers must use a reasonable method of crediting hours of service that is consistent with the employer shared responsibility rules**. The preamble to the final regulations includes examples of methods of crediting these hours that are reasonable (or not reasonable), including a reasonable method for crediting hours of service for adjunct faculty members.

25. How does an employer count a particular employee's hours of service if that employee works for two employers that are treated as one ALE under the employer shared responsibility rules (for example, different subsidiaries under a parent corporation that, together, form an Aggregated ALE Group)?

In general, for purposes of the employer shared responsibility rules, the Section 414 rules for combining employers that have a certain level of common or related ownership apply for purposes of determining whether an employer employs at least 50 full-time employees (including FTEs). Under these rules, the employers that are members of an Aggregated ALE Group are treated as a single employer, so that all of an employee's hours of service for any of the different employers in the group are added together to count the employee's total hours of service.

However, for purposes of determining any potential employer shared responsibility penalty and applying the related information reporting requirements:

- If, during a calendar month, an employee is an employee of more than one member of an Aggregated ALE Group, the employee is treated as an employee of the ALE member for whom the employee has the greatest number of hours of service for that calendar month.

12/12; BR 9/19

- If the employee has an equal number of hours of service for two or more employer members of the same Aggregated ALE Group for the calendar month, those employers must treat one of the employers as the employer of that employee for that calendar month.

For more information, see the instructions for the Forms 1094-C and 1095-C.

26. I own a business that is subject to the employer shared responsibility rules. How do I count a particular employee's hours of service if that employee works both for my business and another unrelated business?

If an employee is employed by two employers that are unrelated and, therefore, are not treated as a single employer for purposes of the employer shared responsibility rules, an employee's hours of service for one of the employers are not treated as hours of service for the other employer.

27. Guidance under the employer shared responsibility rules refers in some places to "seasonal employees" and in some places to "seasonal workers." Is a seasonal employee the same as a seasonal worker under these rules?

The terms "seasonal employee" and "seasonal worker" have different, but overlapping, meanings for purposes of the employer shared responsibility rules.

- The term **"seasonal employee"** is relevant for determining whether an employee is a full-time employee under the look-back measurement method. The look-back measurement method includes special rules that apply to new employees who are seasonal employees. For this purpose, a "seasonal employee" means an employee who is hired into a position for which the customary annual employment is six months or less and for which the period of employment begins each calendar year in approximately the same part of the year (such as summer or winter). The look-back measurement method is not available for purposes of determining whether the employer is an ALE.
- The term **"seasonal worker"** is relevant for determining whether an employer is an ALE subject to the employer shared responsibility rules. To be an ALE, an employer must have employed at least 50 full-time employees, including FTEs, during the previous calendar year. However, if an employer's workforce exceeds 50 full-time employees, including FTEs, for 120 days or fewer during the preceding calendar year, and all of the employees in excess of 50 who were employed during that period of no more than 120 days were seasonal workers, the employer is not considered an ALE. "Seasonal workers" are workers who perform labor or services on a seasonal basis, including seasonal workers as defined by the DOL, and retail workers employed exclusively during holiday seasons. For this purpose, employers may apply a reasonable, good faith interpretation of the term "seasonal worker" and of the DOL's definition of the term "seasonal worker." For more information about the DOL definition, see 29 CFR 500.20(s)(1).

12/12; BR 9/19

28. How do employers count the hours of interns (both paid and unpaid) to determine if their business is subject to the employer shared responsibility rules?

For purposes of determining hours of service, interns are treated like all other employees. Therefore, under the general rule, an employee (including an intern) who receives no payment from an employer will not have any hours of service.

An employee (including an intern) who is paid, or entitled to payment, for the performance of duties (or for a period of time during which no duties are performed) will have hours of service. However, an hour of service does not include any hour of service performed as a bona fide volunteer (as defined in the regulations) for a government entity or tax-exempt entity, as part of a Federal Work-Study Program (or a substantially similar program of a state or political subdivision thereof), or to the extent the compensation for services performed constitutes income from sources without the United States. See section 54.4980H-1(a)(24) of the regulations.

OFFERS OF COVERAGE

29. What counts as an "offer of coverage" under the employer shared responsibility rules?

In general, an ALE makes an offer of coverage to an employee if it provides the employee an effective opportunity to enroll in the coverage (or to decline that coverage) at least once for each plan year. Whether an employee has an effective opportunity to enroll is based on all the relevant facts and circumstances. An ALE offers coverage for a month only if the coverage would be provided for every day of that calendar month.

For purposes of the employer shared responsibility rules and these FAQs, "coverage" refers to minimum essential coverage that is health coverage under an eligible employer-sponsored plan. For more details on minimum essential coverage, see Pub. 974, Premium Tax Credit.

30. If an ALE provides mandatory coverage, does that coverage count as an offer of coverage for purposes of the employer shared responsibility rules?

Mandatory coverage that an ALE provides to employees only counts as an offer of coverage if that coverage meets certain requirements. If an ALE provides mandatory coverage and does not provide the employee an effective opportunity to waive or otherwise decline the coverage, the ALE is treated as having made an offer of coverage to the employee only if that mandatory coverage:

- Provides minimum value; and
- Does not require an employee contribution for any calendar month of more than 9.5% (as adjusted) of a monthly amount determined as the mainland federal poverty line for a single individual for the applicable calendar year, divided by 12.

12/12; BR 9/19

31. Does an ALE's offer to a full-time employee count as an offer of coverage for purposes of the employer shared responsibility rules if the ALE states that it will terminate the employee's employment if the employee attempts to enroll in the coverage?

No. An ALE is not considered to have made an offer of coverage to a full-time employee unless it provides the employee an effective opportunity to enroll in the coverage (or to decline that coverage) at least once for each plan year. Whether an employee has an effective opportunity to enroll is based on all the relevant facts and circumstances. If an ALE would terminate a full-time employee's employment if the employee attempted to enroll in the coverage, the employee would not have an effective opportunity to enroll in the coverage.

For more information about offers of coverage, see Section 54.4980H-4(b) and -5(b) of the regulations.

32. Does an ALE's offer count as an offer of coverage to a full-time employee's dependents for purposes of the employer shared responsibility rules if the ALE makes an offer to a full-time employee and the full-time employee's dependents, but states that, if the full-time employee attempts to enroll his or her dependents in the coverage, the ALE will terminate the full-time employee's employment?

No. An ALE is not considered to have made an offer of coverage to a full-time employee's dependents unless it provides the employee an effective opportunity to enroll the dependents in the coverage (or to decline that coverage) at least once for each plan year. Whether an employee has an effective opportunity to enroll his or her dependents is based on all the relevant facts and circumstances. If an ALE would terminate a full-time employee's employment if the employee attempted to enroll his or her dependents in the coverage, the dependents would not have an effective opportunity to enroll in the coverage.

For more information about offers of coverage, see Section 54.4980H-4(b) and -5(b) of the regulations.

33. If another entity makes an offer of coverage on behalf of an ALE, does it count as an offer of coverage by the ALE?

Sometimes, yes. An ALE is considered to offer coverage to an employee if coverage is offered on behalf of the ALE by:

1. Another employer in the Aggregated ALE Group of employers treated as a single employer;
2. A multiemployer or single employer Taft-Hartley plan;
3. A multiple employer welfare arrangement (MEWA); or
4. In certain cases, a staffing firm.

12/12; BR 9/19

34. Are there special rules about what counts as an offer of coverage for an ALE contributing to a multiemployer plan?

Yes. The IRS has provided a special rule for multiemployer arrangements. An ALE is treated as offering coverage to an employee if the ALE is required by a collective bargaining agreement or related participation agreement to make contributions for that employee to a multiemployer plan that:

- Offers, to individuals who satisfy the plan's eligibility conditions, coverage that is affordable and provides minimum value; and also
- Offers coverage to those individuals' dependents.

For more information, see Section XV.E of the preamble to the final regulations.

35. For purposes of the employer shared responsibility rules, in determining what counts as an offer of coverage to at least 95% of an ALE's full-time employees (and their dependents), does an ALE have to take into account full-time employees (and their dependents) that are eligible for coverage through another source, such as Medicare, Medicaid or a spouse's employer?

Yes. The employer shared responsibility rules apply to ALEs regardless of whether their full-time employees have coverage from another source (such as Medicare, Medicaid or a spouse's employer). If an ALE does not offer coverage to its full-time employees (and their dependents), or offers coverage to less than 95% of its full-time employees (and their dependents), and one or more of its full-time employees receives a premium tax credit, the ALE may be liable for an employer shared responsibility penalty. The amount of the penalty will be based on the number of the ALE's full-time employees, including full-time employees who are eligible for coverage from another source.

However, certain employees are not eligible for a premium tax credit, including employees who are eligible for Medicare or Medicaid. If no full-time employee receives a premium tax credit (for example, because all of an ALE's full-time employees are eligible for Medicare or Medicaid), the ALE will not be liable for an employer shared responsibility penalty.

36. For purposes of the employer shared responsibility rules, in determining what counts as an offer of coverage to at least 95% of an ALE's full-time employees (and their dependents), must an ALE take into account full-time employees (and their dependents) that have coverage under TRICARE or a VA health program?

Yes. Employees who have coverage under TRICARE or a VA health program (as described in Section 4980H(c)(2)(F)) are not taken into account when determining if an employer is an ALE. However, if the employer had at least 50 full-time employees (including FTEs) in the preceding calendar year even after excluding employees that had coverage under TRICARE or a VA health program, the employer is subject to the employer shared responsibility rules, and all full-time employees (including those covered by

12/12; BR 9/19

TRICARE or a VA health program) are taken into account for purposes of determining and calculating liability for an employer shared responsibility penalty, if any.

For example, Employer had 150 full-time employees (including FTEs) on business days in the preceding calendar year, and 50 of those employees had coverage under TRICARE or a VA health program.

Employer is an ALE because, even after excluding employees with coverage under TRICARE or a VA health program, Employer had 100 full-time employees (including FTEs) in the preceding calendar year. Employer is subject to the employer shared responsibility rules, and all full-time employees (including those with coverage under TRICARE or a VA health program) are taken into account for purposes of determining and calculating liability for an employer shared responsibility penalty, if any.

37. For purposes of the employer shared responsibility rules, in determining what counts as an offer of coverage to at least 95% of an ALE's full-time employee's (and their dependents), must an ALE take into account full-time employees (and their dependents) that are exempt from the individual mandate, such as members of a health care sharing ministry or members of a federally-recognized Indian tribe?

Yes. The employer shared responsibility rules apply to ALEs with full-time employees who are exempt from the individual mandate, such as members of a health care sharing ministry or members of a federally-recognized Indian tribe. If an ALE does not offer coverage to its full-time employees (and their dependents), or offers coverage to less than 95% of its full-time employees (and their dependents), and a full-time employee receives a premium tax credit, the ALE will be liable for an employer shared responsibility penalty, which will be calculated based on the number of the ALE's full-time employees. For this purpose, the number of full-time employees includes full-time employees who are exempt from the individual mandate.

Employees who are exempt from the individual mandate may or may not be eligible for a premium tax credit. If no full-time employee receives a premium tax credit, the ALE will not be liable for an employer shared responsibility penalty.

38. For purposes of the employer shared responsibility rules, in determining what counts as an offer of coverage to at least 95% of an ALE's full-time employees (and their dependents), must an ALE take into account whether it offered coverage to a full-time employee's spouse?

No. To avoid a potential employer shared responsibility penalty, an ALE must offer coverage that is affordable and provides minimum value to its full-time employees, and must offer coverage to the dependents of those employees. However, for this purpose, a spouse is not a dependent.

12/12; BR 9/19

AFFORDABILITY AND MINIMUM VALUE

39. When is coverage offered by an ALE considered "affordable" for purposes of the employer shared responsibility rules?

Employer-provided coverage is considered affordable for an employee if the employee required contribution is no more than 9.5% (as adjusted) of that employee's household income. In general, the "employee required contribution" is the employee's cost of enrolling in the least expensive coverage offered by the ALE that provides minimum value. The employee required contribution:

- Includes amounts paid through salary reduction or otherwise; and
- Takes into account the effects of employer arrangements such as health reimbursement arrangements (HRAs), wellness incentives, flex credits and opt-out payments.

In addition, because ALEs generally do not know their employees' household incomes, there are **three affordability safe harbors** ALEs can take advantage of that are based on information the ALE does have available (such as the employee's Form W-2 wages or the employee's rate of pay). If an ALE's offer of coverage is affordable using any of these safe harbors—that is, the employee's required contribution is no more than 9.5% (as adjusted) of the baseline in the applicable safe harbor—then the offer of coverage is deemed "affordable" for purposes of the employer shared responsibility rules, regardless of whether it was affordable based on the employee's household income (which is the test that applies for purposes of the premium tax credit).

The three affordability safe harbors are:

The **Form W-2 wages safe harbor**	The **rate of pay safe harbor**	The **federal poverty line (FPL) safe harbor**

An ALE may use one or more of the safe harbors at its option, but only if the ALE offers 95% of its full-time employees (and their dependents) the opportunity to enroll in coverage that provides minimum value for the self-only coverage offered to the employee. An ALE may choose to use one safe harbor for all of its employees, or use different safe harbors for employees in different categories, provided that the categories used are reasonable and the ALE uses one safe harbor on a uniform and consistent basis for all employees in a particular category. If an ALE offers multiple health care coverage options, the affordability test for a particular employee applies to the lowest-cost self-only coverage option that provides minimum value and that is available to that employee.

- The **Form W-2 wages safe harbor** generally is based on the amount of wages paid to the employee that the ALE reports in Box 1 of that employee's Form W-2.
- The **rate of pay safe harbor** generally is based on the employee's rate of pay at the beginning of the coverage period (with adjustments permitted, for an hourly employee, if the rate of pay is decreased, but not if the rate of pay is increased).

12/12; BR 9/19

- The **FPL safe harbor** generally treats coverage as affordable for a month if the employee required contribution for the month does not exceed 9.5% (adjusted annually) of the FPL for a single individual for the applicable calendar year, divided by 12.

The final regulations provide additional information on these affordability safe harbors.

The premium tax credit and individual mandate regulations generally contain the rules for determining the amount of the employee required contribution. For more information about affordability—including information on certain HRA contributions, wellness program incentives, flex credits and opt-out payments—see Notice 2015-87 (questions 7-12) and the proposed premium tax credit regulation.

40. How has the 9.5% affordability threshold amount been adjusted over time?

The 9.5% affordability threshold (which applies for purposes of both the premium tax credit rules and the employer shared responsibility affordability safe harbors) is adjusted in accordance with the threshold that applies with respect to the premium tax credit. The IRS releases the adjusted percentage each year in a revenue procedure.

- For plan years beginning in 2015, the threshold is 9.56% (see Rev. Proc. 2014-37).
- For plans years beginning in 2016, the threshold is 9.66% (see Rev. Proc. 2014-62).
- For plan years beginning in 2017, the threshold is 9.69% (see Rev. Proc. 2016-24).
- For plan years beginning in 2018, the threshold is 9.56% (see Rev. Proc. 2017-36).
- For plan years beginning in 2019, the threshold is 9.86% (see Rev. Proc. 2018-34).
- For plan years beginning in 2020, the threshold is 9.78% (see Rev. Proc. 2019-29).

For more information, including on other purposes for which the 9.5% threshold (as adjusted) applies, see Notice 2015-87 (question 12).

41. Is the employee required contribution the same as the premium the employee pays?

Not necessarily. The employee required contribution may not be the same amount as the premium the employee pays for coverage if, for example:

- The employee chooses to enroll in more expensive coverage such as family coverage; or
- The ALE, in addition to or in conjunction with the coverage, offers other arrangements that could affect the employee's cost of coverage, including certain HRA contributions, wellness program incentives, flex credits and opt-out payments.

For additional rules on determining the amount of the employee required contribution, see Notice 2015-87 (questions 7-12) and the proposed premium tax credit regulation.

12/12; BR 9/19

42. When does coverage offered by an ALE provide minimum value?

A plan provides minimum value if it covers at least 60% of the total allowed cost of benefits that are expected to be incurred under the plan and provides substantial coverage of inpatient hospitalization services and physician services. On May 3, 2013, the IRS issued proposed regulations regarding how to determine minimum value, and on Sept. 1, 2015, the IRS issued proposed regulations on the requirement to provide substantial coverage of inpatient hospitalization and physician services.

LIABILITY FOR THE EMPLOYER SHARED RESPONSIBILITY PENALTY

43. Under what circumstances will an ALE owe an employer shared responsibility penalty?

There are two different circumstances in which an ALE may owe an employer shared responsibility penalty. An ALE is liable for an employer shared responsibility penalty only if:

- The ALE does not offer coverage, or offers coverage to less than 95% of its full-time employees (and their dependents), and at least one full-time employee receives a premium tax credit to help pay for coverage through an Exchange; or
- The ALE offers coverage to at least 95% of its full-time employees (and their dependents), but at least one full-time employee receives a premium tax credit to help pay for coverage through an Exchange, which may occur because the ALE did not offer coverage to that particular employee, or because the coverage that the ALE offered to that employee was either unaffordable or did not provide minimum value.

However, under a special rule, if an ALE offered coverage to all but five of its full-time employees (and their dependents), and five is greater than 5% of the ALE's full-time employees, the ALE will not owe the employer shared responsibility penalty that would otherwise apply under the rule for an ALE that offers coverage to less than 95% of its full-time employees (and their dependents). Also, see "Limited Transition Relief in 2016" below for information about related transition relief.

If an employer is part of an Aggregated ALE Group, liability under the employer shared responsibility rules (including the rules described in this section, "Liability for the Employer Shared Responsibility Penalty") apply separately for each ALE Member in the Aggregated ALE Group.

44. Who is an employee's dependent for purposes the employer shared responsibility rules?

For purposes of the employer shared responsibility rules, a dependent is an employee's child—including a child who has been legally adopted or legally placed for adoption with the employee—who has not reached age 26. A child reaches age 26 on the 26th anniversary of the date the child was born, and is treated as a dependent for the entire calendar month during which he or she reaches age 26. For this purpose, a dependent does not include a stepchild, a foster child or a child who does not reside in the United States or a country contiguous to the United States, and who is not a United States citizen or national. For this purpose, a dependent does not include a spouse.

12/12; BR 9/19

45. If an ALE is made up of multiple employers (called ALE Members), is each separate ALE Member liable for its own employer shared responsibility penalty, if any?

Yes. If an ALE is made up of multiple ALE Members, each separate ALE Member is liable for its own employer shared responsibility penalty, if any. As a very simple example, one ALE Member may fail to offer coverage and may owe an employer shared responsibility penalty, while another ALE Member may offer coverage and not owe an employer shared responsibility penalty.

46. Are there any circumstances under which certain full-time employees are not considered in determining liability under the employer shared responsibility rules?

Yes. In general, an employee in a "limited non-assessment period" is not considered in determining whether an ALE has offered coverage sufficient to avoid an employer shared responsibility penalty, and an ALE will not be liable for a penalty for such an employee. For example, in general, an employee who is in a waiting period for coverage or who is in their first month of employment (if their first day isn't the first day of the calendar month) would be in a limited non-assessment period. Limited non-assessment periods can apply with respect to one or both kinds of employer shared responsibility penalties, depending on the coverage the employee is offered at the end of the period. For more information on these circumstances, see the definition of "limited non-assessment period" for certain employees under Section 54.4980H-1(a)(26) of the regulations, and see the definition of "full-time employee" in the instructions for Forms 1094-C and 1095-C.

In addition, employees who are not full-time employees are not considered in determining whether an employer has offered coverage sufficient to avoid an employer shared responsibility penalty, and an employer will not be liable for a penalty for such an employee.

47. If an Exchange notifies an ALE that one or more of its employees have been determined to be eligible for the premium tax credit and have enrolled in coverage through the Exchange, will that Exchange notice affect an ALE's potential liability for the employer shared responsibility penalty?

No. The Exchange may notify certain ALEs whose employees enroll in coverage and are determined eligible for the premium tax credit (because the employee has attested that he or she is not enrolled in employer-sponsored coverage and is not eligible for affordable employer-sponsored coverage that provides minimum value). The employer notice from the Exchange does not determine an ALE's potential liability under the employer shared responsibility rules, and an appeal to the Exchange does not affect the employer shared responsibility rules in any way. The Exchange employer notice only serves as an indicator to ALEs about potential liability for an employer shared responsibility penalty. The IRS independently will determine any liability for the employer shared responsibility penalty.

12/12; BR 9/19

48. I own a business that is not an ALE. One of my employees goes to the Exchange for insurance and gets the premium tax credit, and later claims a premium tax credit on his or her tax return. Could I owe an employer shared responsibility penalty?

No. An employer that is not an ALE is not subject to the employer shared responsibility rules and will not owe an employer shared responsibility penalty, regardless of whether one, some or all of its employees receive a premium tax credit for coverage through the Exchange.

49. I offered coverage that is affordable and that provides minimum value to all of my full-time employees, and offered coverage to the dependents of those employees. May I be liable for an employer shared responsibility penalty?

No. An ALE that offers coverage that is affordable and that provides minimum value to all its full-time employees, and offers coverage to the dependents of those employees, will not be subject to an employer shared responsibility penalty.

In general, an employee will not be eligible for a premium tax credit if the ALE has offered that employee coverage that is affordable and provides minimum value, even if that employee does not take the offer of coverage and, instead, enrolls in coverage through an Exchange. If no full-time employee receives a premium tax credit, the ALE will not be liable for an employer shared responsibility penalty.

Further, as a result of differences in the meaning of "affordability" for purposes of the premium tax credit and the employer shared responsibility rules, it is possible that an employee may be eligible for a premium tax credit, but the ALE is not liable for an employer shared responsibility penalty for that employee. As long as the ALE made the employee an offer of minimum value coverage that was affordable (within the meaning of the employer shared responsibility rules), the ALE will not be liable for an employer shared responsibility penalty for the employee.

50. I offered coverage to my full-time employees, and offered coverage to the dependents of those employees, but I did not offer coverage to my employees' spouses. May I be liable for an employer shared responsibility penalty as a result of not offering coverage to my employees' spouses?

No. To avoid a potential employer shared responsibility penalty, an ALE must generally offer coverage to the dependents of full-time employees (among other requirements). For this purpose, a spouse is not a dependent. An ALE will not be subject to an employer shared responsibility penalty solely because it does not offer coverage to an employee's spouse. This is the case regardless of whether the spouse purchases health insurance coverage through an Exchange and receives the financial assistance, such as the premium tax credit.

For more information about eligibility for the premium tax credit, see the premium tax credit final regulations and IRS' Q&As on the premium tax credit.

51. I offered coverage to 95% of my full-time employees, and offered coverage to the dependents of those employees. May I be liable for an employer shared responsibility penalty if the spouses or dependents of some of my employees purchase health insurance coverage through an Exchange?

No. Although an ALE must generally offer coverage to the dependents of its full-time employees to avoid an employer shared responsibility penalty, an ALE will not be liable for an employer shared responsibility penalty solely because one or more of its employees' spouses or dependents purchase coverage through an Exchange.

An ALE will not be potentially liable for an employer shared responsibility penalty unless a full-time employee receives a premium tax credit for the employee's coverage. If no full-time employee receives a premium tax credit, the ALE will not be subject to an employer shared responsibility penalty.

For more information about eligibility for a premium tax credit, see the premium tax credit final regulations and IRS' Q&As on the premium tax credit.

52. I offered coverage to 95% of my full-time employees, and offered coverage to the dependents of those employees. May I be liable for an employer shared responsibility penalty if some of my full-time employees (or their spouses or dependents) enroll in Medicare or Medicaid?

No. An ALE will not be subject to an employer shared responsibility penalty solely because one or more of its employees (or their spouses or dependents) enroll in Medicare or Medicaid. **An ALE will not be potentially liable for an employer shared responsibility penalty unless at least one full-time employee enrolls in Marketplace coverage and receives financial assistance, such as the premium tax credit**.

CALCULATION OF THE EMPLOYER SHARED RESPONSIBILITY PENALTY

53. If an ALE that does not offer coverage, or that offers coverage to less than 95% of its full-time employees (and their dependents), owes an employer shared responsibility penalty, how is the amount of the penalty calculated?

- If an ALE does not offer coverage, or offers coverage to less than 95% of its full-time employees (and their dependents) for **an entire calendar year**, and at least one full-time employee receives a premium tax credit, the ALE owes an employer shared responsibility penalty equal to **the number of full-time employees the ALE employed for the calendar year (minus up to 30) multiplied by $2,000 (as adjusted)**.
- For an ALE that offers coverage to at least 95% of its full-time employees (and their dependents) **for some months, but not others, during the calendar year**, the penalty is calculated separately for each month it does not offer coverage to at least 95% of its full-time employees (and their

12/12; BR 9/19

dependents). The amount of the penalty for each month equals **the number of full-time employees the ALE employed for the month (minus up to 30) multiplied by 1/12 of $2,000 (as adjusted)**.

If the ALE is related to other ALE Members in an Aggregated ALE Group (see "Employers Subject to the Employer Shared Responsibility Rules," above), the 30-employee reduction is allocated among all the ALE Members in the group, in proportion to the number of full-time employees each ALE Member has. Also, if the ALE is part of an Aggregated ALE Group, the penalty is calculated based only on the number of full-time employees of the particular ALE Member.

Part-time employees and FTEs are not counted for this calculation. Also, certain full-time employees are not included in this penalty calculation (for example, very generally, a full-time employee in a waiting period). For more information on the circumstances in which a full-time employee is not counted for this penalty, see the definition of "limited non-assessment period" for certain employees under Section 54.4980H-1(a)(26) of the regulations, and see the definition of "full-time employee" in the instructions for Forms 1094-C and 1095-C.

See "Limited Transition Relief in 2016" below for information on related transition relief. For examples of a penalty calculation, see the IRS' Types of Employer Payments and How They Are Calculated page.

54. If an ALE offers coverage to at least 95% of its full-time employees (and their dependents), but nevertheless owes the employer shared responsibility penalty, how is the amount of the penalty calculated?

For an ALE that offers coverage to at least 95% of its full-time employees (and their dependents), but has one or more full-time employees who receive a premium tax credit, the penalty is calculated separately for each month. The amount of the penalty for the month equals **the number of full-time employees who receive a premium tax credit for that month multiplied by 1/12 of $3,000 (as adjusted)**. The amount of the penalty for any calendar month is capped at the number of the ALE's full-time employees for the month (minus up to 30) multiplied by 1/12 of $2,000 (as adjusted). The cap ensures that the penalty for an ALE that offers coverage can never exceed the penalty that ALE would owe if it did not offer coverage.

If an employer is a member of an Aggregated ALE Group, the penalty is calculated based only on the number of full-time employees of the particular ALE Member.

Part-time employees and FTEs are not counted for this calculation. Also, certain full-time employees are not included in this penalty calculation (for example, very generally, a full-time employee in a waiting period).

For more information on the circumstances in which a full-time employee is not counted for this penalty, see the definition of "limited non-assessment period" for certain employees under Section 54.4980H-1(a)(26) of the regulations, and see the definition of "full-time employee" in the instructions

for Forms 1094-C and 1095-C. For detailed examples of a penalty calculation, see the IRS' Types of Employer Payments and How They Are Calculated page.

55. Does the per-employee amount of the employer shared responsibility penalty increase over time?

Yes. The employer shared responsibility rules provide for an inflation adjustment beginning in calendar years after 2014.

In the case of any calendar year after 2014, the applicable per-employee dollar amounts of $2,000 and $3,000 are increased based on the premium adjustment percentage for the year, rounded to the next lowest multiple of $10.

- For 2015, the adjusted $2,000 amount is **$2,080**, and the adjusted $3,000 amount is **$3,120**.
- For 2016, the adjusted $2,000 amount is **$2,160**, and the adjusted $3,000 amount is **$3,240**.
- For 2017, the adjusted $2,000 amount is **$2,260**, and the adjusted $3,000 amount is **$3,390**.
- For 2018, the adjusted $2,000 amount is **$2,320**, and the adjusted $3,000 amount is **$3,480**.
- For 2019, the adjusted $2,000 amount is **$2,500** and the adjusted $3,000 amount is **$3,750**.
- For 2020, the adjusted $2,000 amount is **$2,570** and the adjusted $3,000 amount is **$3,860**.

For more details see Notice 2015-87 (question 13).

PAYING AN EMPLOYER SHARED RESPONSIBILITY PENALTY

56. How does an ALE know that it owes an employer shared responsibility penalty?

The general procedures the IRS will use to propose and assess the employer shared responsibility penalty are described in Letter 226-J. The IRS will issue Letter 226-J to an ALE if it determines that, for at least one month in the year, one or more of the ALE's full-time employees was enrolled in a qualified health plan for which a premium tax credit was allowed (and the ALE did not qualify for an affordability safe harbor or other relief for the employee). Letter 226-J includes:

- A brief explanation of Section 4980H;
- An employer shared responsibility penalty summary table itemizing the proposed penalty by month, and indicating for each month if the liability is under Section 4980H(a) or Section 4980H(b) (or neither);
- An explanation of the employer shared responsibility penalty summary table;
- Form 14764, Employer Shared Responsibility Penalty Response, an employer response form;
- Form 14765, Employee Premium Tax Credit (PTC) List, which lists, by month, the ALE's assessable full-time employees (individuals who, for at least one month in the year, were full-time

employees allowed a premium tax credit and for whom the ALE did not qualify for an affordability safe harbor or other relief—see instructions for Forms 1094-C and 1095-C, line 16), and the indicator codes, if any, the ALE reported on lines 14 and 16 of each assessable full-time employee's Form 1095-C;

- A description of the actions the ALE should take if it agrees or disagrees with the proposed employer shared responsibility penalty in Letter 226-J; and
- A description of the actions the IRS will take if the ALE does not respond to Letter 226-J on time.

The response to Letter 226-J is due by the response date shown on Letter 226-J, which generally will be 30 days from the date of Letter 226-J. Letter 226-J will contain the name and contact information of a specific IRS employee that the ALE should contact if the ALE has questions about the letter. The IRS maintains a web page on understanding Letter 226-J, and has provided a sample letter.

57. Does an ALE that receives a Letter 226-J proposing an employer shared responsibility penalty have an opportunity to respond to the IRS about the proposed penalty, including requesting a pre-assessment conference with the IRS Office of Appeals?

Yes. ALEs will have an opportunity to respond to Letter 226-J before any employer shared responsibility liability is assessed and notice and demand for payment is made. Letter 226-J provides instructions for how the ALE should respond in writing, either agreeing with the proposed employer shared responsibility penalty or disagreeing with part or all of the proposed amount.

If the ALE responds to Letter 226-J, the IRS will acknowledge the ALE's response to Letter 226-J with an appropriate version of Letter 227 (a series of five different letters that, in general, acknowledge the ALE's response to Letter 226-J and describe further actions the ALE may need to take). If, after receipt of Letter 227, the ALE disagrees with the proposed or revised employer shared responsibility penalty, the ALE may request a pre-assessment conference with the IRS Office of Appeals. The ALE should follow the instructions provided in Letter 227 and Publication 5, Your Appeal Rights and How To Prepare a Protest if You Don't Agree, for requesting a conference with the IRS Office of Appeals. A conference should be requested in writing by the response date shown on Letter 227, which generally will be 30 days from the date of Letter 227.

If the ALE does not respond to either Letter 226-J or Letter 227, the IRS will assess the amount of the proposed employer shared responsibility penalty and issue a notice and demand for payment, Notice CP 220-J.

58. How does an ALE pay an employer shared responsibility penalty?

If, after correspondence between the ALE and the IRS or a conference with the IRS Office of Appeals, the IRS or IRS Office of Appeals determines that an ALE is liable for an employer shared responsibility penalty, the IRS will assess the employer shared responsibility penalty and issue a notice and demand for payment, Notice CP 220-J. Notice CP 220-J will include a summary of the employer shared

responsibility penalty and will reflect payments made, credits applied and the balance due, if any. That notice will instruct the ALE how to make a payment, if any. ALEs will not be required to include the employer shared responsibility penalty on any tax return that they file or to make a payment before notice and demand for payment. For payment options, such as entering into an installment agreement, refer to Publication 594, The IRS Collection Process.

59. When does the IRS expect to begin notifying ALEs that filed Forms 1094-C and 1095-C of potential employer shared responsibility penalties?

In late 2017, the IRS began issuing Letter 226-J for the 2015 calendar year informing ALEs of their potential liability for an employer shared responsibility penalty, if any. For the 2016 calendar year, the IRS began issuing these enforcement letters in late 2018. For purposes of Letter 226-J, the IRS determination of whether an employer may be liable for an employer shared responsibility penalty and the amount of the potential penalty are based on information reported to the IRS on Forms 1094-C and 1095-C and information about full-time employees of the ALE that were allowed the premium tax credit.

LIMITED TRANSITION RELIEF IN 2016—EXPIRED

60. For 2016, was transition relief available under the employer shared responsibility rules?

Yes, but only with respect to employer coverage with a plan year that was different than the calendar year (referred to as a non-calendar-year plan), and only for ALEs that met the other requirements for the applicable relief. Several forms of transition relief under the employer shared responsibility rules were available for calendar year 2015. Because ALEs generally offer coverage for a 12-month plan year, and some plan years are different than the calendar year, certain forms of transition relief were available to plan years that began in calendar year 2015 and ended in calendar year 2016 (the 2015 plan year). For additional information on the transition relief that applied in calendar 2015, see Section XV of the preamble to the final regulations. For 2014, transition relief was available such that no penalties under the employer shared responsibility rules are assessed, see Notice 2013-45.

61. Was transition relief available in 2016 with respect to offering coverage to dependents?

Yes, but only for certain employers that offered non-calendar-year plans. In particular, for calendar months in the 2015 plan year that fell within 2016, an ALE (or ALE Member, if part of an Aggregated ALE Group) could treat an offer of coverage to a full-time employee, but not his or her dependents, as an offer of coverage to both the full-time employee and his or her dependents, but only if certain requirements were met. Specifically, this transition relief applied only if:

- An employee was not offered dependent coverage during the 2013 or 2014 plan year; and
- The ALE took steps during the 2014 or 2015 plan year (or both) to extend coverage under the plan to dependents not offered coverage during the 2013 or 2014 plan years (or both).

This rule applied solely for purposes of the employer shared responsibility rules.

12/12; BR 9/19

62. For 2016, was transition relief available for ALEs that had at least 50, but fewer than 100, full-time employees (including FTEs) on business days during 2014?

Yes, but only for certain ALEs that offered non-calendar-year plans, and only for calendar months in the 2015 plan year that fell within 2016. To qualify for this relief, an ALE must have certified that it met the following conditions:

1. **Limited Workforce Size:** The ALE must have employed, on average, at least 50 full-time employees (including FTEs), but fewer than 100 full-time employees (including FTEs), on business days during 2014. The number of full-time employees (including FTEs) is determined in accordance with the otherwise applicable rules for determining status as an ALE.
2. **Maintenance of Workforce and Aggregate Hours of Service:** During the period beginning on Feb. 9, 2014, and ending on Dec. 31, 2014, the ALE did not reduce the size of its workforce or the overall hours of service of its employees in order to qualify for the transition relief. However, an ALE that reduces workforce size or overall hours of service for bona fide business reasons is still eligible for the relief.
3. **Maintenance of Previously Offered Coverage:** During the period beginning on Feb. 9, 2014, and ending on the last day of the 2015 plan year, the ALE did not eliminate or materially reduce the coverage, if any, it offered as of Feb. 9, 2014.

For more details see Section XV.D.6 of the preamble to the final regulations.

An ALE Member that is part of an Aggregated ALE Group that met these criteria would not be subject to a penalty for any calendar month in 2016 that fell within the 2015 plan year of a plan offered by either the ALE Member or another member of the Aggregated ALE Group, if applicable. If any ALE Member (or different members in an Aggregated ALE Group) offered coverage under more than one health plan with different plan years, the transition relief applied through the last day of the latest of those plan years, for all ALE Members in the Aggregated ALE Group, if applicable.

63. For 2016, was there transition relief available for the number of full-time employees to whom an ALE must have offered coverage to avoid an employer shared responsibility penalty?

Yes, but only for ALEs that offered non-calendar-year plans, and only for calendar months in 2016 that fell within the 2015 plan year.

- In particular, for calendar months in 2016 that fell within the 2015 plan year, an ALE could avoid the (generally larger) $2,000-per-full-time-employee penalty (as adjusted) under Section 4980H(a) by offering coverage to at least than 70% of its full-time employees (and their dependents).
- The ALE could still be liable for a penalty under Section 4980H(b) of $3,000 (as adjusted) for each full-time employee who received a premium tax credit for coverage through an Exchange. This

12/12; BR 9/19

penalty is generally smaller in aggregate than the $2,000 per-full-time-employee penalty under Section 4980H(a) (and can never be larger).

If the ALE offered coverage under more than one health plan with different plan years, this transition relief applied through the last day of the latest of those plan years.

64. For 2016, was there any transition relief available with respect to the calculation of an employer shared responsibility penalty for an ALE that had at least 100 full-time employees (including FTEs) on business days in 2014?

Yes, but only for certain ALEs that offered non-calendar-year plans and only for calendar months in 2016 that fell within the 2015 plan year, as described below.

For the months described below, if an ALE (or an ALE Member that is part of an Aggregated ALE Group) that had at least 100 full-time employees (including FTEs) on business days in 2014 did not offer coverage to at least 95% (or 70%, if applicable) of its full-time employees (and their dependents), it could be liable for an employer shared responsibility penalty equal to the number of full-time employees the ALE employed for the month, minus up to 80, multiplied by 1/12 of $2,000 (as adjusted), if at least one full-time employee received a premium tax credit for that month. Under the normal rules, ALEs subtract 30 from the number of full-time employees in this calculation, but the transition relief allowed subtraction of 80.

For 2016, this relief applied for an ALE with at least one non-calendar-year plan (and for an ALE Member that is part of an Aggregated ALE Group with at least one non-calendar-year plan) for the months in 2016 that fell within the 2015 plan year. If an ALE, or different members in an Aggregated ALE Group, offered coverage under more than one health plan with different plan years, the transition relief applied through the last day of the latest of those plan years, for all ALE Members in the Aggregated ALE Group, if applicable. For the rules on how the 80-employee-reduction is allocated among the ALE Members in an Aggregated ALE Group, see Section 54.4980H-4(e) of the regulations.

RELATED RULES

65. What are the eligibility requirements for an individual to receive the premium tax credit?

The premium tax credit generally is available to help pay for coverage for individuals who:

- Have household income of at least 100%, but not more than 400%, of FPL and enroll in coverage through an Exchange;
- Are not eligible for government-sponsored coverage (like Medicaid or CHIP); and
- Are not eligible for coverage offered by an employer, or are eligible only for employer coverage that is unaffordable or that does not provide minimum value.

12/12; BR 9/19

66. If an employer does not employ enough employees to be subject to the employer shared responsibility rules, does that affect an employee's eligibility for the premium tax credit?

No. The rules for determining an employee's eligibility for the premium tax credit, including whether the employee was offered employer-sponsored coverage, apply regardless of whether the employer is subject to the employer shared responsibility rules.

67. Where can employees get more information about the Exchange?

HHS administers the requirements for Exchanges and the health plans offered through Exchanges. For more information about coverage options, financial assistance and the Exchange, visit Healthcare.gov.

Source: Internal Revenue Service

12/12; BR 9/19