

**CONTRACTOR COMPLIANCE WITH THE  
AFFORDABLE  
CARE ACT IN 2016**

**SMACNA COUNCIL OF CHAPTER  
REPRESENTATIVES**

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MONTEREY, CA**

**MICHAEL G. MCNALLY  
FELHABER LARSON  
[MMCNALLY@FELHABER.COM](mailto:MMCNALLY@FELHABER.COM)  
(612) 373-8516**

## **I. APPLICABLE LARGE EMPLOYER**

IN GENERAL, AN APPLICABLE LARGE EMPLOYER (ALE) WITH RESPECT TO A CALENDAR YEAR IS AN EMPLOYER THAT EMPLOYED AN AVERAGE OF AT LEAST 50 FULL-TIME EMPLOYEES, INCLUDING FULL-TIME EQUIVALENTS, ON BUSINESS DAYS DURING THE PRECEDING YEAR.<sup>1</sup> EMPLOYERS THAT ARE PART OF A CONTROLLED GROUP OR AN AFFILIATED SERVICE GROUP UNDER THE CODE ARE TREATED AS A SINGLE EMPLOYER FOR PURPOSES OF DETERMINING LARGE EMPLOYER STATUS.

DETERMINING WHETHER AN EMPLOYER IS AN ALE IS IMPORTANT BECAUSE ONLY ALES ARE SUBJECT TO MOST OF THE ACA'S REQUIREMENTS, INCLUDING THE REQUIREMENT TO OFFER MINIMUM ESSENTIAL COVERAGE (MEC) THAT IS AFFORDABLE, AND THE REPORTING REQUIREMENTS.

### **A. FULL-TIME EMPLOYEE**

A FULL-TIME EMPLOYEE MEANS, "WITH RESPECT TO ANY MONTH, AN EMPLOYEE WHO IS EMPLOYED ON AVERAGE AT LEAST 30 HOURS OF SERVICE PER WEEK."<sup>2</sup>

HOURS OF SERVICE ARE "EACH HOUR AN EMPLOYEE IS PAID OR ENTITLED TO PAYMENT, FOR THE PERFORMANCE OF DUTIES FOR THE EMPLOYER; AND EACH HOUR FOR WHICH AN EMPLOYEE IS PAID, OR ENTITLED TO PAYMENT, BY THE EMPLOYER FOR A PERIOD OF TIME DURING WHICH NO DUTIES ARE PERFORMED DUE TO VACATION, HOLIDAY, ILLNESS, INCAPACITY (INCLUDING DISABILITY), LAYOFF, JURY DUTY, MILITARY DUTY OR LEAVE OF ABSENCE."<sup>3</sup>

FOR THE PURPOSE OF DETERMINING FULL-TIME EMPLOYEE STATUS, HOURS OF SERVICE MUST BE COUNTED ACROSS ALL ALE MEMBERS.<sup>4</sup> THAT IS, IF AN EMPLOYEE RENDERS SERVICES TO MULTIPLE EMPLOYERS, ALL OF WHICH ARE IN THE SAME CONTROLLED GROUP AS DEFINED IN CODE § 414(B), ALL OF THE HOURS OF SERVICE ARE TAKEN TOGETHER IN DETERMINING FULL-TIME EMPLOYEE STATUS.

FOR HOURLY EMPLOYEES, HOURS OF SERVICE ARE CALCULATED FROM RECORDS OF HOURS WORKED AND HOURS FOR WHICH PAYMENT IS MADE OR DUE. THIS IS THE ONLY METHOD FOR CALCULATING HOURS OF SERVICE FOR HOURLY EMPLOYEES.

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<sup>1</sup> § 4980H(C)(2)

<sup>2</sup> § 54.4980H-1(21)(I)

<sup>3</sup> § 54.4980H-1(24)

<sup>4</sup> § 54.4980H-1(24)(III)

FOR NON-HOURLY (SALARIED) EMPLOYEES, HOURS OF SERVICE CAN BE CALCULATED USING 1 OF THE FOLLOWING METHODS:

1. ACTUAL HOURS OF SERVICE FROM RECORDS OF HOURS WORKED AND HOURS FOR WHICH PAYMENT IS DUE OR MADE;
2. DAYS-WORKED EQUIVALENCY, IN WHICH AN EMPLOYEE IS CREDITED WITH 8 HOURS OF SERVICE FOR EACH DAY IN WHICH AT LEAST 1 HOUR OF SERVICE IS RENDERED; OR
3. WEEKS-WORKED EQUIVALENCY, IN WHICH AN EMPLOYEE IS CREDITED WITH 40 HOURS OF SERVICE FOR EACH WEEK IN WHICH AT LEAST 1 HOUR OF SERVICE IS RENDERED.

AN EMPLOYER IS NOT REQUIRED TO USE THE SAME METHOD OF CALCULATING HOURS OF SERVICE FOR ALL NON-HOURLY (SALARIED) EMPLOYEES. BUT IT MUST APPLY THE SAME METHOD TO REASONABLY CATEGORIZED EMPLOYEES. SIMILARLY, AN ALE MEMBER IS NOT REQUIRED TO USE THE SAME METHOD AS ANOTHER ALE MEMBER.

AN EMPLOYER IS PERMITTED TO CHANGE THE METHOD OF CALCULATING HOURS OF SERVICE FOR NON-HOURLY EMPLOYEES, OR FOR CATEGORIES OF NON-HOURLY EMPLOYEES, EACH YEAR.

THE REGULATIONS MAKE CLEAR THAT AN EMPLOYER CANNOT SELECT A METHOD AS A BASIS FOR UNDERSTATING AN EMPLOYEE'S ACTUAL HOURS WORKED. THE EXAMPLE OF AN EMPLOYEE WHO WORKS 3 SHIFTS, EACH 10 HOURS, A WEEK WAS GIVEN; THE REGULATIONS STATE THAT USING THE DAYS-WORKED EQUIVALENCY AND ONLY CREDITING THE EMPLOYEE WITH 24 HOURS OF SERVICE PER WEEK IS PROHIBITED.

130 HOURS OF SERVICE IN A CALENDAR MONTH IS TREATED AS "THE MONTHLY EQUIVALENT OF AT LEAST 30 HOURS OF SERVICE PER WEEK."<sup>5</sup>

## **B. FULL-TIME EQUIVALENTS**

FULL-TIME EQUIVALENTS REFERS TO THE EMPLOYEES, EACH OF WHOM IS NOT A FULL-TIME EMPLOYEE BECAUSE HE OR SHE IS NOT EMPLOYED AT LEAST 30 HOURS OF SERVICE PER WEEK FOR THE EMPLOYER.<sup>6</sup>

TO DETERMINE THE NUMBER OF FULL-TIME EQUIVALENTS IN A MONTH, THE HOURS OF SERVICE FOR ALL NON-FULL-TIME EMPLOYEES, BUT NOT MORE

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<sup>5</sup> § 54.4980H-1(21)(II)

<sup>6</sup> § 54.4980H-1(22)

THAN 120 HOURS OF SERVICE FOR ANY EMPLOYEE, ARE AGGREGATED.<sup>7</sup> THE TOTAL IS DIVIDED BY 120. FRACTIONS ARE ROUNDED TO THE NEAREST ONE HUNDREDTH.

**C. WORKFORCE SIZE = FULL-TIME EMPLOYEES + FULL-TIME EQUIVALENTS**

TO DETERMINE ITS WORKFORCE SIZE FOR A YEAR, THE TOTAL NUMBER OF FULL-TIME EMPLOYEES FOR EACH MONTH OF THE PRIOR CALENDAR YEAR IS ADDED TO THE TOTAL NUMBER OF FULL-TIME EQUIVALENT EMPLOYEES FOR EACH CALENDAR MONTH OF THE PRIOR CALENDAR YEAR.<sup>8</sup> THE TOTAL IS DIVIDED BY 12. THE RESULT, IF NOT A WHOLE NUMBER, IS ROUNDED TO THE NEXT LOWEST WHOLE NUMBER.

IF THE RESULT OF THIS CALCULATION IS LESS THAN 50, THE EMPLOYER IS NOT AN ALE FOR THE CURRENT CALENDAR YEAR. IF THE RESULT OF THIS CALCULATION IS 50 OR MORE, THE EMPLOYER IS AN ALE FOR THE CURRENT CALENDAR YEAR, UNLESS THE SEASONAL WORKER EXCEPTION APPLIES.

THE SEASONAL WORKFORCE OCCUPATION PROVIDES THAT IF THE SUM OF AN EMPLOYER'S FULL-TIME EMPLOYEES AND FULL-TIME EQUIVALENTS EXCEEDS 50 FOR 120 DAYS OR LESS DURING THE PRECEDING CALENDAR YEAR, AND THE EMPLOYEES IN EXCESS OF 50 WHO WERE EMPLOYED DURING THAT PERIOD OF NO MORE THAN 120 DAYS ARE SEASONAL WORKERS, THE EMPLOYER IS NOT AN ALE FOR THE CURRENT CALENDAR YEAR.<sup>9</sup> SEASONAL WORKERS INCLUDE THOSE WHO PERFORM LABOR OR SERVICES ON A SEASONAL BASIS, INCLUDING FARM WORKERS AND RETAIL WORKERS EMPLOYED DURING HOLIDAY SEASONS.

**II. EMPLOYER SHARED RESPONSIBILITY**

THE EMPLOYER SHARED RESPONSIBILITY PROVISIONS IMPOSES PENALTIES ON ALES WHO FAIL TO OFFER MEC, AND WHO FAIL TO OFFER AFFORDABLE MEC TO AT LEAST 95% (OR, IF GREATER, FIVE) OF ITS FULL-TIME EMPLOYEES AND TO THOSE EMPLOYEES' DEPENDENTS, AND ONE OR MORE OF THOSE EMPLOYEES WHO ARE NOT OFFERED COVERAGE, OR AFFORDABLE COVERAGE, RECEIVES A PREMIUM TAX CREDIT OR COST-SHARING REDUCTION WHEN PURCHASING COVERAGE ON THE EXCHANGE.<sup>10</sup>

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<sup>7</sup> § 54.4980H-2(C)(2)

<sup>8</sup> § 54.4980H-2(B)

<sup>9</sup> § 54.4980H-2(B)(2)

<sup>10</sup> § 54.4980H(A) - (B)

## **A. OFFER OF MEC**

AN ALE IS REQUIRED TO OFFER FULL-TIME EMPLOYEES MEC. AN ALE IS LIABLE FOR AN ASSESSABLE PAYMENT IF, FOR ANY MONTH, THE APPLICABLE LARGE EMPLOYER FAILS TO OFFER ITS FULL-TIME EMPLOYEES (AND THEIR DEPENDENTS) THE OPPORTUNITY TO ENROLL IN MEC AND ANY FULL-TIME EMPLOYEE IS CERTIFIED TO RECEIVE AN APPLICABLE PREMIUM TAX CREDIT OR COST-SHARING REDUCTION.

MEC INCLUDES ANY EMPLOYER SPONSORED MAJOR MEDICAL COVERAGE, ALONG WITH CODE § 125 PLANS, EMPLOYER PAYMENT PLANS, HEALTH FSAS, AND HRAS.

VISION OR DENTAL COVERAGE, WORKERS' COMPENSATION, COVERAGE FOR A SPECIFIC DISEASE OR CONDITION, OR PLANS THAT OFFER DISCOUNTS ONLY ON MEDICAL SERVICES DO NOT CONSTITUTE MEC.

THE MULTIEmployer INTERIM RELIEF RULE ADDRESSES ISSUES THAT MAY ARISE WHERE AN EMPLOYEE WHO MEETS THE TEST FOR A FULL-TIME EMPLOYEE UNDER THE ACA IS NOT ELIGIBLE FOR COVERAGE FROM A MULTIEmployer PLAN BECAUSE OF ITS ELIGIBILITY CONDITIONS. THIS MAY ARISE IN THE SCENARIO WHERE AN EMPLOYEE WORKS ON AVERAGE 32 HOURS PER WEEK AND THE EMPLOYER CONTRIBUTIONS TO THE PLAN ON HIS BEHALF FOR ALL THOSE HOURS AS REQUIRED BY THE COLLECTIVE BARGAINING AGREEMENT, BUT THE PLAN ONLY MAKES COVERAGE AVAILABLE TO MEMBERS WHO WORK 35 HOURS PER WEEK. BECAUSE OF THIS DISPARITY, THE EMPLOYER COULD POTENTIALLY BE SUBJECT TO A PENALTY FOR FAILURE TO OFFER MEC. UNDER THE MULTIEmployer INTERIM RELIEF RULE, IF AN EMPLOYER IS REQUIRED BY A COLLECTIVE BARGAINING AGREEMENT (OR PARTICIPATION AGREEMENT) TO MAKE CONTRIBUTIONS FOR AN EMPLOYEE TO A PLAN THAT OFFERS MEC, THAT IS AFFORDABLE, AND COVERS DEPENDENTS, THE EMPLOYER IS TREATED AS OFFERING MEC AND NOT LIABLE FOR A PENALTY.

## **B. OFFER OF AFFORDABLE, MEC**

AN ALE'S IS REQUIRED TO OFFER MEC COVERAGE THAT IS AFFORDABLE. COVERAGE IS NOT AFFORDABLE, AS TO AN EMPLOYEE, IF "THE EMPLOYEE'S REQUIRED CONTRIBUTION WITH RESPECT TO THE PLAN EXCEEDS 9.5% OF THE APPLICABLE TAXPAYER'S HOUSEHOLD INCOME."<sup>11</sup>

### **1. EMPLOYEE REQUIRED CONTRIBUTION**

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<sup>11</sup> § 36(B)(C)(2)(C)(I),

**“EMPLOYEE’S REQUIRED CONTRIBUTION” MEANS THE PORTION OF THE ANNUAL PREMIUM THAT THE EMPLOYEE WOULD PAY FOR THE LOWEST COST SELF-ONLY COVERAGE.<sup>12</sup> THE CONTRIBUTION DOES NOT INCLUDE ANY AMOUNTS REQUIRED TO BE CONTRIBUTED FOR DEPENDENT OR SPOUSAL COVERAGE.**

**AMOUNTS THAT AN EMPLOYER CONTRIBUTES ON AN EMPLOYEE’S BEHALF TO A MULTIEMPLOYER HEALTH AND WELFARE FUND PURSUANT TO THE TERMS OF A COLLECTIVE BARGAINING AGREEMENT, AND WHICH AN EMPLOYEE ACCRUES AS PART OF AN HOUR OR DOLLAR BANK SYSTEM, ARE NOT CONSIDERED EMPLOYEE CONTRIBUTIONS. THUS IF AN EMPLOYER IS REQUIRED TO CONTRIBUTE TO A MULTIEMPLOYER HEALTH AND WELFARE PLAN, AND AN EMPLOYEE MAINTAINS ENROLLMENT AND ELIGIBILITY IN THE PLAN’S COVERAGE BY DRAWING UPON THESE CONTRIBUTIONS, WITHOUT ANY AMOUNTS CONTRIBUTED BY AN EMPLOYEE, THE COVERAGE IS AFFORDABLE. CONVERSELY, IF AN EMPLOYEE IS REQUIRED TO CONTRIBUTE SOME AMOUNT EACH MONTH, WITHOUT REGARD TO THE AMOUNT OF HOURS THEY WORKED OR CONTRIBUTIONS RECEIVED ON THEIR BEHALF, THIS IS CONSIDERED AN EMPLOYEE CONTRIBUTION AND MUST BE ANALYZED TO DETERMINE IF IT MEETS THE AFFORDABILITY REQUIREMENTS.**

## **2. HOUSEHOLD INCOME – SAFE HARBORS**

**HOUSEHOLD INCOME IS DEFINED AS MODIFIED ADJUSTED GROSS INCOME OF THE EMPLOYEE AND ANY MEMBERS OF THE EMPLOYEE’S FAMILY (WHICH WOULD INCLUDE ANY SPOUSE AND DEPENDENTS) WHO ARE REQUIRED TO FILE AN INCOME TAX RETURN.<sup>13</sup>**

**THERE ARE 3 SAFE HARBORS WHICH HAVE BEEN PROPOSED TO ADDRESS THE PRACTICAL DIFFICULTY THAT EMPLOYERS IN MANY CASES WILL NOT HAVE ACCESS TO AN EMPLOYEE’S HOUSEHOLD INCOME INFORMATION.<sup>14</sup> THESE ARE ALL OPTIONAL. AN EMPLOYER MAY CHOOSE TO USE 1 OR ALL 3 FOR ALL ITS EMPLOYEES OR FOR ANY REASONABLE CATEGORY OF EMPLOYEES, PROVIDED IT DOES SO IN A UNIFORM AND CONSISTENT MANNER FOR ALL EMPLOYEES IN A CATEGORY.**

**THE SAFE HARBORS ALSO DO NOT AFFECT AN EMPLOYEE’S ELIGIBILITY FOR A PREMIUM TAX CREDIT. AN EMPLOYER’S OFFER OF COVERAGE COULD BE AFFORDABLE BASED ON THE SAFE HARBOR STANDARDS FOR PURPOSES OF ASSESSING A PENALTY, BUT THE SAME OFFER OF**

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<sup>12</sup> 26 C.F.R. § 1.5000A(E)(1)(B)(I)

<sup>13</sup> § 36B(D)(2)(A).

<sup>14</sup> NOTICE 2012-58

COVERAGE COULD BE TREATED AS UNAFFORDABLE BASED ON HOUSEHOLD INCOME FOR PURPOSES OF ASSESSING WHETHER THE EMPLOYEE IS ELIGIBLE FOR A PREMIUM TAX CREDIT.

IF AN EMPLOYEE SATISFIES ANY SAFE HARBOR, AN EMPLOYER IS NOT SUBJECT TO AN ASSESSABLE PAYMENT.

**A. FORM W-2 SAFE HARBOR**

AFFORDABILITY OF AN EMPLOYER'S COVERAGE IS MEASURED BY REFERENCE TO AN EMPLOYEE'S WAGES FROM THAT EMPLOYER. WAGES IS THE AMOUNT REQUIRED TO BE REPORTED IN BOX 1 OF FORM W-2, WAGE AND TAX STATEMENT.

THE DETERMINATION OF WHETHER AN EMPLOYER SATISFIED THE SAFE HARBOR IS MADE AFTER THE END OF THE CALENDAR YEAR. THIS HOWEVER COULD BE USED PROSPECTIVELY TO SET AN EMPLOYEE CONTRIBUTION RATE SO THAT IT WILL NOT EXCEED 9.5% OF THE FORM W-2 WAGES FOR THAT YEAR.

NOTE THAT BOX 1 OF FORM W-2 DOES NOT INCLUDE EMPLOYEE ELECTIVE DEFERRALS INTO A 401(K) OR 403(B) PLAN, AND EXCLUDES AMOUNTS CONTRIBUTED TO A 125 CAFETERIA PLAN.

FOR EMPLOYEES WHO ARE NOT EMPLOYED FOR AN ENTIRE CALENDAR YEAR, THE APPROPRIATE COMPARISON IS ADJUSTING THE FORM W-2 WAGES TO REFLECT THE PERIOD WHEN THE EMPLOYEE WAS OFFERED COVERAGE AND COMPARING THOSE ADJUSTED WAGES TO THE EMPLOYEE SHARE OF THE PREMIUM DURING THAT TIME.

**B. RATE OF PAY SAFE HARBOR**

THE EMPLOYER SHOULD (1) TAKE THE HOURLY RATE OF PAY FOR EACH EMPLOYEE WHO IS ELIGIBLE TO PARTICIPATE IN THE HEALTH PLAN AS OF THE BEGINNING OF THE YEAR; (2) MULTIPLY THAT RATE BY 130 HOURS PER MONTH (THE BENCHMARK FOR FULL-TIME STATUS UNDER § 4980H) AND (3) DETERMINE AFFORDABILITY BASED ON THE RESULTING MONTHLY WAGE AMOUNT. THE EMPLOYEE'S MONTHLY CONTRIBUTION AMOUNT (FOR THE SELF-ONLY PREMIUM OF THE EMPLOYER'S LOWEST COST COVERAGE THAT PROVIDES MINIMUM VALUE) IS AFFORDABLE IF IT IS EQUAL TO OR LESS THAN 9.5% OF THE MONTHLY COMPUTED WAGES. IF THE EMPLOYEE CONTRIBUTION IS AN HOURLY AMOUNT, THE COMPARISON IS BASED UPON HOURLY WAGES AND HOURLY CONTRIBUTION AMOUNTS.

FOR SALARIED EMPLOYEES, MONTHLY SALARY WOULD BE USED INSTEAD OF MULTIPLYING HOURLY WAGES BY 130.

AN EMPLOYER MAY ONLY USE THIS SAFE HARBOR IF IT DID NOT REDUCE THE HOURLY WAGES OF HOURLY EMPLOYEES OR THE MONTHLY WAGES OF SALARIED EMPLOYEES DURING THE YEAR. IT MAY BE USED IF THE EMPLOYEE WAS GIVEN A RAISE.

FOR PURPOSES OF REVIEWING A GROUP OF EMPLOYEES, RATHER THAN DOING SO ON AN INDIVIDUAL BASIS, THE EMPLOYER MAY UTILIZE THE LOWEST RATE OF PAY. IF THE LOWEST RATE OF PAY CLASS OF EMPLOYEE SATISFIES THE TEST, THE EMPLOYER WILL KNOW ALL OTHER HIGHER WAGES CLASSIFICATIONS WILL TOO.

**C. FEDERAL POVERTY LINE SAFE HARBOR**

PREMIUM TAX CREDITS ARE NOT AVAILABLE TO MEDICAID-ELIGIBLE EMPLOYEES WITH INCOME BELOW 100% OF THE FEDERAL POVERTY LINE. THEREFORE SUCH EMPLOYEES CANNOT TRIGGER LIABILITY FOR A PENALTY.

COVERAGE IS AFFORDABLE IF THE EMPLOYEE'S COST FOR SELF-ONLY COVERAGE UNDER THE PLAN DOES NOT EXCEED 9.5% OF THE FEDERAL POVERTY LINE FOR A SINGLE INDIVIDUAL. THE FEDERAL POVERTY LINE FOR 2015 IS \$11,770.00 AND THUS A MONTHLY EMPLOYEE CONTRIBUTION OF \$93.18, EQUAL TO 9.5% OF WAGES, IS AFFORDABLE UNDER THIS SAFE HARBOR, REGARDLESS OF ACTUAL WAGES EARNED. SOME STATES HAVE EXPANDED MEDICAID TO 138% OF THE FEDERAL POVERTY LINE. IN THOSE STATES, EMPLOYEES WITH A MONTHLY CONTRIBUTION OF \$125.59 OR LESS ARE TREATED AS OFFERING AFFORDABLE COVERAGE.

THE POVERTY GUIDELINES THAT SHOULD BE REFERENCED ARE THE ONES MOST RECENTLY PUBLISHED AS OF THE 1ST DAY OF THE PLAN YEAR.

**D. PENALTIES**

THE ASSESSABLE PAYMENT AMOUNT FOR FAILING TO OFFER AFFORDABLE MEC CANNOT EXCEED THE AMOUNT OF THE ASSESSABLE PAYMENT THAT WOULD HAVE BEEN IMPOSED IF THE EMPLOYER HAD FAILED TO OFFER MEC TO ITS FULL-TIME EMPLOYEES AND THEIR DEPENDENTS.

**I. FAILURE TO OFFER MEC**

FOR AN ALE THAT DOES NOT OFFER COVERAGE TO AT LEAST 95% OF ITS FULL-TIME EMPLOYEES, AND A FULL-TIME EMPLOYEE RECEIVED AN



APPLICABLE PREMIUM TAX CREDIT, THE ASSESSABLE PAYMENT AMOUNT FOR THE YEAR EQUALS THE NUMBER OF FULL-TIME EMPLOYEES THE EMPLOYER EMPLOYED FOR THE MONTH (MINUS UP TO 30), MULTIPLIED BY \$166.67.<sup>15</sup>

## II. FAILURE TO OFFER AFFORDABLE, MEC

FOR AN ALE WHO FAILS TO OFFER AFFORDABLE MEC, AND A FULL-TIME EMPLOYEE RECEIVES AN APPLICABLE PREMIUM TAX CREDIT, THE ASSESSABLE PAYMENT AMOUNT FOR A MONTH EQUALS THE NUMBER OF SUCH FULL-TIME EMPLOYEES MULTIPLIED BY \$250.<sup>16</sup>

### E. NOTICE OF ASSESSMENT OF PENALTY

THE IRS HAS DESCRIBED THAT IT WILL BEGIN PROVIDING CERTIFICATIONS TO EMPLOYERS THAT ONE OR MORE OF ITS EMPLOYEES HAVE RECEIVED A PREMIUM TAX CREDIT. THE IRS WILL INFORM EMPLOYERS OF THE POTENTIAL LIABILITY, AND PROVIDE THEM AN OPPORTUNITY TO RESPOND BEFORE THE ASSESSMENT OF THE PENALTY IS MADE. THE REGULATIONS CONTEMPLATE PROCEDURES THAT WILL ALLOW FOR AN INITIAL RESPONSE BY AN EMPLOYER TO THE IRS TO CONTEST THE ASSESSMENT, OR PROVIDE DOCUMENTS OR INFORMATION IN SUPPORT OF THEIR POSITION. THE CONTACT BY THE IRS WILL NOT OCCUR UNTIL AFTER EMPLOYEES HAVE FILED THEIR INDIVIDUAL TAX RETURNS, AND AFTER THE DUE DATE FOR ALES TO FILE INFORMATION RETURNS IDENTIFYING THEIR FULL-TIME EMPLOYEES.

AN ASSESSABLE PAYMENT WILL BE COLLECTED LIKE OTHER CIVIL PENALTIES ENFORCED BY THE IRS.

### F. TRANSITION RELIEF 2015

EMPLOYERS WITH FEWER THAN 100 FULL-TIME EMPLOYEES (INCLUDING FULL-TIME EQUIVALENTS) ARE ELIGIBLE FOR TRANSITION RELIEF IN 2015.<sup>17</sup> THIS TRANSITION RELIEF PROVIDES THAT AN EMPLOYER SATISFIES ITS OBLIGATION OF OFFERING MEC IF IT OFFERS MEC TO AT LEAST 70% OF ITS FULL-TIME EMPLOYEES.

NOTE THAT THIS TRANSITION RELIEF DOES NOT APPLY TO THE REQUIREMENT TO OFFER AFFORDABLE MEC; HOWEVER, THE PENALTY FOR

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<sup>15</sup> § 4980H(a)

<sup>16</sup> § 4980H(b)

<sup>17</sup> FED REG. VOL. 79, NO. 29, FEBRUARY 12, 2014

**FAILING TO OFFER AFFORDABLE MEC CANNOT BE LARGER THAN WHAT WOULD BE ASSESSED FOR FAILING TO OFFER MEC.**

### **III. EMPLOYER REPORTING**

**THE ACA ADDED §§ 6055 AND 6056 TO THE INTERNAL REVENUE CODE REQUIRING HEALTH PLANS AND ALES TO REPORT CERTAIN INFORMATION RELATING TO THE COVERAGE THEY PROVIDE. SECTION 6055 REQUIRES HEALTH PLANS TO REPORT INFORMATION REGARDING AN INDIVIDUAL'S HEALTH COVERAGE DURING THE PRECEDING TAXABLE YEAR, IN ORDER TO DETERMINE WHETHER THAT INDIVIDUAL HAD MEC. SECTION 6056 REQUIRES ALES TO REPORT INFORMATION CONCERNING WHETHER THEY OFFERED AFFORDABLE AND MINIMUM VALUE MEC TO FULL-TIME EMPLOYEES.**

**THE FORM THAT GROUP HEALTH PLANS, INCLUDING MULTIEmployer PLANS, USE TO REPORT TO PLAN PARTICIPANTS' INFORMATION ABOUT THEIR COVERAGE UNDER THE TERMS OF THE PLAN IS FORM 1095-B; A TRANSMITTAL FORM, FORM 1094-B, GOES ALONG WITH FORM 1095-B TO THE IRS.**

**THE FORM THAT ALES USE TO REPORT TO FULL-TIME EMPLOYEES WHETHER THEY WERE OFFERED MEC THAT PROVIDED MINIMUM VALUE AND WAS AFFORDABLE IS FORM 1095-C; THE TRANSMITTAL FORM THAT GOES ALONG WITH THIS TO THE IRS IS FORM 1094-C. A FORM 1095-C IS COMPLETED AND FILED FOR ALL FULL-TIME EMPLOYEES.**

**THE REPORTING REQUIREMENTS ARE EFFECTIVE FOR 2016 USING 2015 DATA. THAT IS, PLANS AND EMPLOYERS MUST REPORT INFORMATION ON THE COVERAGE PROVIDED DURING 2015 ON THE APPROPRIATE FORM TO BE FILED IN 2016.**

#### **A. REASONS UNDERLYING REQUIREMENTS**

**THE INFORMATION REPORTED ON THESE FORMS IS USED BY THE IRS TO ADMINISTER, AND INDIVIDUALS AND EMPLOYERS TO SHOW COMPLIANCE WITH, THE INDIVIDUAL SHARED RESPONSIBILITY AND THE EMPLOYER SHARED RESPONSIBILITY PROVISIONS.**

#### **B. TIMING**

**THE FORMS MUST BE FILED WITH THE IRS ON OR BEFORE FEBRUARY 28 (MARCH 31 IF FILED ELECTRONICALLY) OF THE YEAR FOLLOWING THE CALENDAR YEAR OF COVERAGE.**

THE FIRST FORMS REPORTING INFORMATION ABOUT COVERAGE PROVIDED IN 2015 MUST BE FILED NO LATER THAN FEBRUARY 29, 2016 (FEBRUARY 28, 2016 IS A SUNDAY, AND THE FORMS MUST BE FILED BY THE NEXT BUSINESS DAY, FEBRUARY 29<sup>TH</sup>), OR MARCH 31, 2016 IF FILING ELECTRONICALLY.

**C. FORM 1095-C**

PART I (EMPLOYEE INFORMATION AND EMPLOYER INFORMATION) IS SELF-EXPLANATORY. IT ASKS FOR INFORMATION ABOUT THE EMPLOYER AND THE EMPLOYEE.

COMPLETING PART II (EMPLOYEE OFFER AND COVERAGE) IS MORE DIFFICULT, AND THE INSTRUCTIONS VARY BASED UPON WHETHER THE EMPLOYEE IS ONE ON WHOSE BEHALF AN EMPLOYER CONTRIBUTES TO A MULTIEMPLOYER PLAN - I.E. A BARGAINING UNIT MEMBER – OR NOT.

1. EMPLOYEES ON WHOSE BEHALF AN EMPLOYER CONTRIBUTES TO A MULTIEMPLOYER PLAN

FOR EMPLOYERS THAT CONTRIBUTE TO PLANS WHICH PROVIDE MINIMUM VALUE, OFFER DEPENDENT COVERAGE, AND ARE AFFORDABLE MEC, THEY WILL ENTER CODE 1H ON LINE 14 (“NO OFFER OF COVERAGE”) AND 2E ON LINE 16 (“MULTIEMPLOYER INTERIM RULE RELIEF”). NO CODE IS REQUIRED FOR LINE 15.

PART III IS ONLY COMPLETED BY EMPLOYERS WHO OFFER EMPLOYER-SPONSORED SELF-INSURED COVERAGE, NOT MULTIEMPLOYER PLAN COVERAGE; THEREFORE THIS SECTION DOES NOT NEED TO BE COMPLETED ON BEHALF OF THE BARGAINING UNIT EMPLOYEES WHO ARE COVERED BY A MULTIEMPLOYER HEALTH AND WELFARE PLAN.

2. EMPLOYEES NOT COVERED BY A MULTIEMPLOYER PLAN

FOR LINES 14 AND 16, THERE ARE 2 SETS OF INDICATOR CODES; LINE 15 REQUIRES A DOLLAR AMOUNT REFLECTING THE EMPLOYEE SHARE OF THE LOWEST COST, SELF-ONLY COVERAGE.

A. LINE 14

LINE 14 CALLS FOR AN INDICATOR CODE DESCRIBING THE OFFER OF COVERAGE.

THERE ARE 9 POSSIBLE CODES FOR EACH MONTH OF THE YEAR; IF THE CODE IS THE SAME FOR ALL 12 MONTHS IT CAN BE ENTERED INTO THE “ALL 12 MONTHS” BOX.

THE MOST COMMON CODES THAT EMPLOYERS WILL USE ARE AS FOLLOWS:

- 1A - QUALIFYING OFFER: MINIMUM ESSENTIAL COVERAGE PROVIDING MINIMUM VALUE OFFERED TO FULL-TIME EMPLOYEE WITH EMPLOYEE CONTRIBUTION FOR SELF-ONLY COVERAGE EQUAL TO OR LESS THAN 9.5% MAINLAND SINGLE FEDERAL POVERTY LINE AND AT LEAST MINIMUM ESSENTIAL COVERAGE OFFERED TO SPOUSE AND DEPENDENT(S).
  - IN ORDER TO MEET THE MAINLAND FPL AFFORDABILITY TEST THE EMPLOYEE'S MONTHLY COST OF COVERAGE FOR THE EMPLOYER'S LOWEST COST MV/MEC PLAN CAN BE NO MORE THAN \$93.17 PER MONTH IN 2015.
- 1B - MINIMUM ESSENTIAL COVERAGE PROVIDING MINIMUM VALUE OFFERED TO EMPLOYEE ONLY.
- 1C - MINIMUM ESSENTIAL COVERAGE PROVIDING MINIMUM VALUE OFFERED TO EMPLOYEE AND AT LEAST MINIMUM ESSENTIAL COVERAGE OFFERED TO DEPENDENT(S) (NOT SPOUSE).
- 1E - MINIMUM ESSENTIAL COVERAGE PROVIDING MINIMUM VALUE OFFERED TO EMPLOYEE AND AT LEAST MINIMUM ESSENTIAL COVERAGE OFFERED TO DEPENDENT(S) AND SPOUSE.
  - FOR MOST EMPLOYERS THAT OFFER COVERAGE – THIS WILL BE THE MOST COMMON CODE USED.

**B. LINE 15**

LINE 15 ASKS FOR INFORMATION ON THE EMPLOYEE SHARE OF THE LOWEST COST, MONTHLY PREMIUM FOR SELF-ONLY COVERAGE. THIS IS REPORTED IN DOLLARS.

IF THE EMPLOYEE COST IS THE SAME FOR ALL 12 MONTHS OF THE YEAR THE AMOUNT MAY BE ENTERED IN THE "ALL 12 MONTHS" BOX.

FOR ANY MONTHS WHERE NO OFFER OF COVERAGE IS MADE THE BOX SHOULD BE LEFT BLANK.

**C. LINE 16**

LINE 14 CALLS FOR AN INDICATOR CODE DESCRIBING THE OFFER OF COVERAGE AND WHY THE EMPLOYER SHOULD NOT BE SUBJECT TO A PENALTY FOR THAT MONTH.

THE MOST COMMON CODES THAT EMPLOYERS WILL USE ARE AS FOLLOWS:

- 2A - EMPLOYEE NOT EMPLOYED DURING THE MONTH.
- 2B - EMPLOYEE NOT A FULL-TIME EMPLOYEE.
- 2C - EMPLOYEE ENROLLED IN COVERAGE OFFERED.

THE IRS HAS ISSUED "ORDERING RULES" THAT DICTATE WHICH CODE SHOULD TAKE PRECEDENCE OVER OTHERS. CODE 2C SHOULD BE USED, EVEN IF OTHER SAFE HARBORS (E.G. 2F. SECTION 4980H AFFORDABILITY FORM W-2 SAFE HARBOR; 2G. SECTION 4980H AFFORDABILITY FEDERAL POVERTY LINE SAFE HARBOR; 2H. SECTION 4980H AFFORDABILITY RATE OF PAY SAFE HARBOR) WOULD APPLY.

PART III IS ONLY COMPLETED BY EMPLOYERS WHO OFFER EMPLOYER-SPONSORED SELF-INSURED COVERAGE.

#### **D. PENALTIES**

THE PENALTY FOR FAILURE TO FILE A FORM 1095-C IS \$250 PER EMPLOYEE. THE TOTAL PENALTY FOR A CALENDAR YEAR CANNOT EXCEED \$3,000,000.

#### **IV. EXCISE TAX ON HIGH COST EMPLOYER SPONSORED COVERAGE**

THE EXCISE TAX ON HIGH COST EMPLOYER-SPONSORED COVERAGE, COMMONLY REFERRED TO AS THE "CADILLAC TAX", IS A NON-DEDUCTIBLE, 40% EXCISE TAX IMPOSED ON THE VALUE OF CERTAIN EXCESS BENEFITS OFFERED UNDER HEALTH INSURANCE POLICIES.<sup>18</sup> THE TAX FIRST TAKES EFFECT IN THE 2018 CALENDAR YEAR.

##### **A. POLICY**

A MAJOR POLICY REASON UNDERPINNING THE TAX IS TO LIMIT HEALTH CARE COST HEADWINDS THAT HAMPER WAGE GROWTH AND REDUCE FEDERAL TAX REVENUE LOST THROUGH EMPLOYER PROVIDED HEALTH COVERAGE. ALLOWING EMPLOYERS AND EMPLOYEES TO FINANCE GENEROUS HEALTH CARE COVERAGE ON A PRE-TAX BASIS HAD RESULTED IN OVERUTILIZATION OF THE HEALTH CARE SYSTEM AND EXCESSIVE TAX-

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<sup>18</sup> §4980L

FREE COMPENSATION THAT SUPPRESSES REAL WAGE GROWTH AND LIMITS DISPOSABLE INCOME THAT WOULD FUEL THE EXPANSION.

IN FIRST 8 YEARS, THE IRS EXPECTS \$87 BILLION IN TAX REVENUE. THE IRS EXPECTS ONLY 25% OF THIS TO COME FROM THE ACTUAL EXCISE TAX; THE REMAINING 75% WILL COME FROM TAXES ON ADDITIONAL WAGES TO MAKE-UP FOR BENEFIT CUTS THAT RESULT FROM THE EXCONOMIC TAX.

## B. CALCULATION

THE TAX IS IMPOSED ON "EXCESS BENEFITS", WHICH MEANS THE DIFFERENCE BETWEEN THE COST OF COVERAGE AND THE STATUTORY THRESHOLD, IF ANY (TAX = (COST-THRESHOLD) X .40).<sup>19</sup>

### 1. THRESHOLD

FOR MULTIEMPLOYER PLANS THE THRESHOLD IS \$27,500 FOR ANY COVERAGE (SELF-ONLY OR OTHER THAN SELF-ONLY).<sup>20</sup> PLANS THAT COVER "QUALIFIED RETIREES" OR WHICH PRIMARILY COVER THOSE IN A "HIGH-RISK PROFESSION" ARE ALLOWED AN ADDITIONAL \$3,450 PER YEAR FOR THE OTHER THAN SELF-ONLY LEVEL OF COVERAGE.<sup>21</sup> "HIGH-RISK PROFESSION" MEANS LAW ENFORCEMENT OFFICERS, FIREFIGHTERS, EMERGENCY MEDICAL TECHNICIANS, PARAMEDICS, FIRST-RESPONDERS, LONGSHOREMEN; INDIVIDUALS IN THE CONSTRUCTION, MINING, AGRICULTURE (BUT NOT FOOD-PROCESSING), FORESTRY, AND FISHING INDUSTRIES; THOSE WHO INSTALL OR REPAIR ELECTRICAL OR TELECOMMUNICATIONS LINES, AND EMPLOYEES WHO RETIRED FROM A HIGH-RISK PROFESSION IF THE EMPLOYEE WAS IN A HIGH-RISK PROFESSION FOR AT LEAST 20 YEARS.

THE ADDITIONAL ALLOWANCE FOR HIGH-RISK PROFESSIONS WILL BE AVAILABLE ONLY IF THE PLAN PRIMARILY COVERS THOSE IN A HIGH-RISK PROFESSION; IN THAT CASE, THE ADDITIONAL ALLOWANCE WILL BE AVAILABLE TO ALL PLAN PARTICIPANTS. THE ANALYSIS FOR WHETHER THESE UPWARD ADJUSTMENTS WILL APPLY FOR RETIREES AND HIGH-RISK PROFESSIONS LOOKS TO THE POPULATION COVERED BY THE PLAN AS A WHOLE, NOT ON A CONTRIBUTING EMPLOYER-BY-CONTRIBUTING EMPLOYER BASIS.

IN THE CASE OF PLANS COVERING WORKERS IN THE "CONSTRUCTION" INDUSTRY, THE THRESHOLD WILL BE \$30,950.

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<sup>19</sup> §4980L(A)-(B)

<sup>20</sup> §4980L(B)(3)(B)(II)

<sup>21</sup> §4980L(B)(3)(C)(IV)

THE THRESHOLD RATE IS INDEXED ANNUALLY BY MULTIPLYING IT BY THE HEALTH-COST ADJUSTMENT PERCENTAGE (HCAP).<sup>22</sup> HCAP IS GENERALLY A MEASURE OF HEALTH PREMIUM INFLATION. HCAP IS DETERMINED BY THE PERCENTAGE BY WHICH THE COST OF THE BLUE CROSS/BLUE SHIELD FEDERAL EMPLOYEES HEALTH BENEFIT PLAN (FEHBP) INCREASES FROM 2010 TO 2018. HCAP IS THE AMOUNT BY WHICH THAT GROWTH RATE EXCEEDS 55% (I.E. HCAP = CHANGE IN COST OF BC/BS FEHBP – 55%). IT IS DIFFICULT TO PREDICT WHAT HCAP-ADJUSTED LIMITS WILL BE BY 2018. THERE IS A STRONG LIKELIHOOD THAT THE HCAP WILL BE GREATER THAN 0.

IMPORTANTLY, THERE ARE NO GEOGRAPHICAL ADJUSTMENTS TO ACCOUNT FOR THE DIFFERENCES IN COSTS FOR MEDICAL SERVICES. THE THRESHOLD IN MAJOR METROPOLITAN AREAS IS THE SAME AS IN RURAL AREAS.

## 2. COST OF COVERAGE

SELF-INSURED PLANS WILL USE THE COBRA METHODOLOGY TO CALCULATE THE COST OF THE COVERAGE.<sup>23</sup> UNDER THIS APPROACH, THE COST OF COVERAGE IS THE APPLICABLE COBRA PREMIUM COMPUTED ON A MONTHLY BASIS. BECAUSE THE PLAN IS A SELF-INSURED MULTIEMPLOYER PLAN, THE COBRA PREMIUM WHICH SHOULD BE USED IS THE COMPOSITE RATE (FAMILY). IN ADDITION TO THE COBRA PREMIUM, ANY AMOUNTS CONTRIBUTED TO HRAS WILL BE INCLUDED IN COMPUTING THE COST OF COVERAGE.

### C. PROJECTING FOR THE TAX

DETERMINING WHETHER A PLAN WILL BE SUBJECT TO THE TAX WHEN IT TAKES EFFECT IN 2018 REQUIRES PREDICTING WHAT FUTURE COBRA PREMIUMS WILL BE AND INCLUDING ANY AMOUNTS SCHEDULED PURSUANT TO COLLECTIVE BARGAINING AGREEMENTS TO CONTRIBUTION TO HRA. A THOUGHTFUL PREDICTION SHOULD CONSIDER DIFFERENT COST TREND PROJECTIONS, SUCH AS 6%, 8%, 10%, 12%, AND MAYBE EVEN 20%. ALTHOUGH A PLAN MAY NOT EXCEED THE THRESHOLD IN THE FIRST YEAR THE TAX TAKES EFFECT, CONSIDERATION SHOULD BE GIVEN TO WHETHER THE PLAN'S COST TREND WILL OUTPACE ANY ADJUSTMENTS IN THE THRESHOLD DUE TO HCAP.

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<sup>22</sup> §4980L(B)(3)(C)(II)

<sup>23</sup> §4980L(D)(2)(A)

#### **D. PAYMENT OF THE TAX**

THERE IS NO CLEAR GUIDANCE ON WHO, IN THE CASE OF A MULTIEMPLOYER PLAN, WILL BE RESPONSIBLE FOR PAYMENT OF THE TAX.<sup>24</sup> GENERALLY, IN THE CASE OF RETIREMENT PLANS, EXCISE TAXES ARE NOT PERMITTED TO BE PAID FOR WITH PLAN ASSETS. GIVEN THAT, IT IS LIKELY THAT CONTRIBUTING EMPLOYERS WILL BE LIABLE FOR THEIR ALLOCABLE SHARE OF THE TAX ASSESSED ON THE PLAN. ON THE OTHER HAND, THE OTHER ACA FEES – PATIENT-CENTERED OUTCOMES RESEARCH INSTITUTE (PCORI) AND TRANSITIONAL REINSURANCE – ARE PAID FOR OUT OF PLAN ASSETS.

#### **E. PLANNING FOR THE TAX**

AFTER ANALYZING THEIR POTENTIAL TAX EXPOSURE, PLAN SPONSORS SHOULD WORK WITH THEIR PLAN PROFESSIONALS TO DEVELOP OPTIONS TO LOWER PLAN COSTS AND LONG-TERM TRENDS.

IN ORDER TO DO SO, PLANS SHOULD CONSIDER DESIGN ELEMENTS WHICH WILL REDUCE THE AMOUNT OF AVOIDABLE SERVICES AND VISITS TO HIGH-COST SETTINGS. FOR EXAMPLE, A PLAN CAN INCREASE COPAYS FOR EMERGENCY ROOM VISITS AND ELECTIVE SURGERIES. IN ORDER TO STEER MEMBERS TO MORE COST EFFECTIVE TREATMENTS, PLANS CAN LOWER COPAYS ON PRIMARY CARE VISITS, RETAIL CLINICS, GENERIC DRUGS, TELEMEDICINE AND OUTPATIENT IMAGING FACILITIES.

PLANS SHOULD BE MINDFUL THAT IN RAISING DEDUCTIBLES AND OUT-OF-POCKET EXPENSES TO LOWER COSTS, THIS WILL LIKELY CAUSE ANY GRANDFATHERED PLANS TO LOSE THAT STATUS, WHICH CAN ITSELF HAVE SIGNIFICANT FINANCIAL IMPLICATIONS FOR A PLAN.

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<sup>24</sup> §4980L(C)(4)(B)