THE COUNTDOWN BEGINS:
PREPARING FOR THE AFFORDABLE CARE ACT’S EMPLOYER MANDATE

Ten Questions Employers Should be Asking Now

Third Annual Gilpin Givhan Labor & Employment Seminar
Birmingham, Alabama
April 8, 2014

D. Brent Wills, Esq.
Gilpin Givhan, PC
www.gilpingivhan.com
@GG_HealthLaw
@GG_LaborLaw
Overview

- 2010 – Patient Affordable Care Act (“ACA”) created §4980H and §§6055-56 of the Internal Revenue Code (“IRC”) – initially, to be effective beginning in 2014 (collectively, the “Employer Mandate”)
- §4980H – Penalties
- §6055-56 – Reporting requirements
- January, 2013 – IRS published proposed regulations for §4980H
- July, 2013 – IRS delayed enforcement for one year (Notice 2013 – 45)
- September, 2013 – IRS published proposed regulations for §§6055-56
- February / March, 2014 – IRS published final regulations for §4980H and §§6055-56

Heads Up! §4980H final regulation delayed §4980H (i.e., the penalties) for “large” employers < 100 employees until 2016 – but all “large” employers (even if < 100 employees) must report for 2015.
Key Concepts / Issues

- “Large” employer – 50+ employees ("full-time" + "full-time equivalents")
- “Full-time” employee – average 30+ hours of service per week
- IRS will impose §4980H penalties on a month-to-month basis
- Two “look back” periods:
  (i) “Large” employer status determined each calendar year based on 12 month (prior calendar year) look-back period (2014 transition relief)
  (ii) Optional look-back / “measurement period” (3-12 months) to identify “full-time” employees
- “Minimum essential coverage” / “Affordability” / “Minimum value” / “Essential health benefits”
- What are your priorities (e.g., control costs vs. provide valuable benefit)?
1. What are the “aggregation” rules, and do they apply to me?

- Aggregation – IRS will treat certain related entities (i.e., “controlled group,” per IRS rules) as one employer (i.e., combine employees) to count employees.

- Attribution – IRS may treat stock / ownership interest of one person as owned by another.

Heads Up! “Members” of a controlled group may each be subject to §4980H penalties and may each be required to satisfy §6055-56 reporting requirements (i.e., even if < 50 employees by itself).
2. **What are the “transition” rules, and do they apply to me?**

- **Large employer with 100+ employees** – §4980H penalties apply next year

- **Large employer with < 100 employees** – §4980H n/a until 2016
  - Subject to conditions – e.g., must not reduce workforce (to < 100) during 2014, nor reduce benefits prior to end of 2015 plan year

- **Non-calendar year plans** – §4980H does not apply until *2015 / 2016 plan year*
  - Subject to conditions – No change to plan year on or after December 27, 2012 (100+ employees) / during 2014 (< 100 employees)

*Heads Up!* Be sure you meet the conditions for transition relief.
3. Will I be subject to the Employer Mandate?

- 2015 (and after) – §6055-66 apply if 50+ monthly average employees during 2014 (prior calendar year)
- 2015 – §4980H applies if 100+ monthly average employees during 2014
- 2016 (and after) – §4980H applies if 50+ monthly average employees during 2015 (prior calendar year)
- Special issues – independent contractors; temporary employees / staffing agencies; owners; leased employees
- Calculate number of employees each month by adding together:
  (i) “Full-time” employees – 30+ h/o/s per week during month (headcount); and
  (ii) “Full time employee equivalents” – Total h/o/s for non-full time / 120
- Seasonal worker exception – not large employer (even if 50+ employees) / not subject to §4980H for 2015 only (even if 100+ employees in 2014) if:
  (i) 50+ / 100+ employees (including seasonal workers) for not more than 120 days (or four calendar months); and
  (ii) Did not exceed 50 / 100 but for seasonal workers

Heads Up! This year only, may use shorter look-back period – any period of at least six consecutive calendar months.
4. **Who are my “full-time” employees?**
   - Average 30 *hours of service* per week (including paid time off).
   - §4980H penalties only take into account *full-time* employees.
   - §6056 reporting requirements focused on *full-time* employees.
   - May utilize “look back,” *measurement period* (3-12 months) with respect to variable hour / seasonal employees → If employee is “full-time” (or not) during *measurement period*, treat as full-time (or not) during subsequent *stability period*. See Attachment 1.
   - Not required to offer variable hour / seasonal employees coverage (if at all) until end of measurement period (e.g., 12+ months later).
   - Special issues – commission, rehires / extended leave, temporary employees / staffing agencies, education.

**Heads Up!** First measurement period must begin not later than July 1, 2014.
5. What are “minimum essential” health coverage, “affordable coverage,” “essential health benefits,” and “minimum value”?

- **Minimum essential coverage** – Minimum coverage required for employer (and individual) mandate(s); very low threshold.

- **Minimum value** – Coverage must fund 60%+ benefit costs (i.e., ACA “bronze” plan) to avoid §4980H(b) penalty.

- **Affordable coverage** – Coverage must be “affordable” to avoid §4980H(b) penalty.

- **Essential health benefits** – Package of benefits that must be offered in small group market to comply with ACA; **not** required to avoid §4980H penalty.
6. What are my risks? (See Attachment 2.)

- Failure to **offer** minimum essential coverage to full-time employees (and children under 26) → §4980H(a) Penalty = $2,000 ($167/mo) x **all** full-time employees, above 30 (above 80 in 2015).
  - **Safe harbor**: Must **offer** 95% full-time employees (70% in 2015).
  - Not required to offer to children in 2015 if taking steps to offer in 2016.

- If **minimum essential coverage** is not **affordable** for a full-time employee **OR** does not provide **minimum value** → §4980H(b) penalty = $3,000 ($250/mo) x **each** such employee who obtains premium tax credit.
  - **Safe harbor**: Self-only premium (lowest cost option) not > 9.5% of individual’s income (W-2, rate of pay, FPL).

- Failure to comply with §§6055-56 reporting requirements – “failure to file” penalties apply.

**Heads Up!** Each controlled “member” may be subject to penalties – and 30/80 FTE carve-out must be allocated among members.

**Double Heads Up!** Penalties are **not** tax deductible.
7. What alternatives may be available? *(See Attachment 3.)*

- Low-cost / “skinny” plans – provide minimum essential coverage (problem: minimum value).

- High deductible plans – better benefits, but still minimum value issues.

- Self-insurance – Avoids certain ACA requirements (e.g., essential health benefits), but *not* Section 4980H.

- Limit employee hours – i.e., to ensure < 30+ hours of service / week (vs. recruiting / retention).

- Staffing agencies – Stay away from abusive arrangements.
8. **What do I have to report?**

- *All “large” employers (including < 100 employees) must report for 2015.*
- §6056: all large employers (health insurance offered to full-time employees); §6055: self-insured plans (verify minimum essential coverage)
- Form 1095-C (not yet published) – may be used to satisfy §6055 and §6056 reporting requirements.
- First information returns must be filed with IRS not later than March 31, 2016.
- First statements must be delivered to full-time employees (§6056) / covered employees (§6055) not later than January 31, 2016.
- §6056: “General” / alternative reporting methods – available:
  - Qualifying offer for all months during year – to full-time employees (and dependents and spouse)
  - Offer 98% of employees (and dependents and spouse)

*Heads Up!* Special certification rule for 2015 if employer makes qualifying offer to 95%+ full-time employees (*and* dependents *and* spouses).
9. **What are the unknowns?**

- What will Blue Cross / health insurers do?
- What will the IRS / government do?
- How will other ACA provisions play out (e.g., HealthCare.gov / individual mandate / health insurance marketplace)?
- What will employers do?
- What will employees do (e.g., “family glitch”)?
10. Who is my trusted advisor?

- Fluid legislative and regulatory (and executive) process(es).
- Changes will continue even after ACA provisions take effect.
- Recommend one source.
Additional Resources

- IRS Q&A on Employer Shared Responsibility Under ACA
- IRS Final Rule – §4980H
- IRS Final Rule – §6055 (self-insured) / IRS Final Rule - §6056 (all large employers)
- HealthCare.gov / Health Insurance Marketplace (federal “exchange”)
- Blue Cross / Blue Shield of Alabama
- Kaiser Family Foundation
- Alabama Department of Insurance
- Gilpin Givhan – DBW email list / Twitter: Labor & Employment / Health Care
Any Questions?
Thank you!

D. Brent Wills, Esq.
Gilpin Givhan, PC
bwills@gilpingivhan.com
@GG_HealthLaw
@GG_LaborLaw

2660 EastChase Lane
Suite 300
Montgomery, Alabama 36117
(334) 244-1111 (phone)
(334) 244-1969 (fax)

3595 Grandview Parkway
Suite 400
Birmingham, Alabama 35243
(205) 547-5540 (phone)
(205) 547-5621 (fax)
ATTACHMENT 1

Measurement Period / Stability Period
6 mo. Measurement Period (determines FTs for 2014) *Must begin by July 1, 2014
90 day Administrative Period
12 mo. Stability Period (FT / not FT for each month)

FT = "Full-Time" Employee (30+ hours of service per week)

*Assuming calendar year (12 mos.) measurement period, and maximum (90 days) administrative period
ATTACHMENT 2

Employer Mandate Flowchart
### Are you part of a controlled group?
- Parent/subsidiary
- 80% control test / 50% identical interest test
- Attribution rules apply
*If yes, (i) combine employees to determine whether 50+ / 100+ (below); and (ii) §6056 and §4980H apply to each “member” in the group.*

### Do you have 50+ employees?
- Monthly average for any six (or more) consecutive calendar months during 2014
- Combine (i) full time [30+ h/o/s per week] and (ii) equivalents [h/o/s for non-full time / 120]
- Combine employees of controlled group

### Do you have 100+ employees?
- Monthly average for any six (or more) consecutive calendar months during 2014
- Combine (i) full time [30+ h/o/s per week] and (ii) equivalents [h/o/s for non-full time / 120]
- Combine employees of controlled group

### Does the seasonal worker exception apply?
- 50+ employees for not more than 120 days / four months
- Not 50+ but for seasonal workers
- Based on full calendar year (2014)

### Do you have 100+ employees?
- Monthly average for any six (or more) consecutive calendar months during 2014
- Combine (i) full time [30+ h/o/s per week] and (ii) equivalents [h/o/s for non-full time / 120]
- Combine employees of controlled group

### Does the seasonal worker exception apply?
- 100+ employees for not more than 120 days / four months
- Not 100+ but for seasonal workers
- Based on full calendar year (2014)

### Do you have 80 or more full-time employees?
- “Full-Time” = 30 h/o/s per week (in a month / during measurement period)
- Controlled group: Allocate 80 pro rata among members

### Do you offer minimum essential health coverage to 70%+ of your full-time employees?
- Must offer MEC to full-time employees, but not required to pay for it (but see below re: affordability).
- No penalty if employee refuses coverage. (Document!)
- Most any major medical plan = MEC (low threshold).
- Must take steps to offer MEC to dependents.
- Controlled group: Each member must meet 70%+ threshold.

### Does your health plan cover 60% of the costs of plan benefits? ("Minimum value" test)
- May confirm using M/V calculator (better: ask your plan rep / administrator)

### Is your plan affordable to your full-time employees?
- Is (lowest cost) self-only premium < 9.5% of full-time employee’s household income?
- Same test for every full-time employee. Does not take into account family coverage.
- Safe harbors – W2, Rate of Pay, FPL

### Are you a “large” employer - not subject to §4980H or §6056.
- Not subject to §4980H or §6056.
- Not subject to §4980H.
- Not subject to §4980H.
- No penalty under §4980H.
- §4980H(a) penalty = $167 each month ($2,000 annual) x all full-time employees (-80)
- Same penalty if employer offers 69% or 0%
- Controlled group: Each member that offers < 70% is subject to penalty
- §4980H(b) penalty = $250 each month ($3,000 annual) x each full-time employee who obtains a premium tax credit
- Full-time employee-by-employee
- Controlled group: Each member may be subject to penalty

### Must comply with reporting requirements under §6056 (and §6055, if self-insured) for 2015.
- Statements to full-time employees by January 31, 2016.
- Return to IRS by March 31, 2016.

### Summary:
- **Yes**: Must comply with reporting requirements under §6056 (and §6055, if self-insured) for 2015.
  - Statements to full-time employees by January 31, 2016.
  - Return to IRS by March 31, 2016.
- **No**: Not a “large” employer - not subject to §4980H or §6056.
Additional Information Regarding
“Low Cost” / “Skinny” / “Bare Bones” and Self-Insured Plans
and Other Alternative Health Insurance Plan Models
Will Companies Stop Offering Health Insurance Because of the Affordable Care Act?

By SCOTT THURM
Updated June 16, 2013 7:22 p.m. ET

Major provisions of the 2010 health-care-overhaul law will take effect in January. That's when employers with 50 or more full-time workers must offer them health insurance or pay penalties. Likewise, individuals must obtain insurance or pay penalties.

Analysts say they expect some employers to stop offering insurance, because the penalties will be less expensive. Other employers already are moving to reduce the law's impact by limiting hiring or reducing some workers' hours.

We asked a panel to tackle the question: Will the Affordable Care Act, as the law is formally known, lead many employers to stop offering health insurance? Our panelists are Kevin Kuhlman, a manager of legislative affairs at the National Federation of Independent Business, a research and lobbying group for small business; Christine Eibner, an economist at RAND Corp. who has studied the possible effects of the law on health-insurance markets; and David Marini, managing director, strategic advisory services, at Automatic Data Processing Inc., who also has studied the law's effects. Here are edited excerpts of their email discussion.

Employers' Calculations

WSJ: Will the health-insurance law lead many employers to stop offering health insurance?

Mr. Kuhlman: The decision by employers to stop offering health insurance to employees as a result of the health-insurance law is far from certain. We do know that the cost of health insurance continues to be the No. 1 problem for small-business owners, as it has been for over 25 years. We also know that erosion of employer-sponsored health insurance predates the law, but increased health-insurance costs from the law may exacerbate the erosion.

Health-insurance premiums have increased by over 100% in the past 10 years. During that same time
period, the percentage of Americans with employer-sponsored health-insurance coverage has dropped by 10 percentage points.

The law is structured in a way that may make it advantageous for certain employers to drop coverage, and advantageous for certain employees to have their coverage dropped. We hear from NFIB members just above the 50-employee threshold that they do plan to discontinue health-insurance coverage or make other personnel decisions to avoid the employer mandate. Some smaller NFIB members are concerned that their offer of coverage to employees will restrict certain employees from accessing generous tax credits and cost-sharing subsidies in the individual exchanges.

If the law is unable to contain health-insurance costs, or worse, increases health-insurance costs significantly, we believe it will lead many employers to stop offering health insurance.

Ms. Eibner: I agree that employer decisions in the face of the complex policy changes introduced by the Affordable Care Act are far from certain. Our model predicts that the number of individuals enrolled in employer-sponsored coverage will increase as a result of the law, with our most recent estimates showing an increase of about four million people enrolled on employer-sponsored insurance.

In Massachusetts, which implemented health-insurance reforms similar to the Affordable Care Act in 2006, the share of employers offering health-insurance coverage rose from 70% in 2005 to 76% in 2011.

Mr. Marini: In the larger market, we are not seeing clients looking to stop offering health-insurance benefits. We are, however, seeing them react to how they offer benefits.

For example, in a May 2012 ADP survey we found that more employers are offering wellness programs, health savings accounts and high-deductible health plans.

There are specific types of employers where the ACA impacts can be sufficiently large enough to materially impact financial performance. This is particularly true for industries with workforces that have a high proportion of nonexempt, full-time employees who do not elect health benefits today but may do so rather than pay tax penalties beginning in 2014, and workforces with a high proportion of part-time employees who could be reclassified as eligible for health coverage beginning in 2014.

A number of companies that fit the above profile may be looking at carefully managing their part-time population so employees do not get classified as eligible for health coverage.
**Workforce Implications**

**WSJ:** The law requires employers with 50 or more employees to offer insurance to employees who work an average of 30 hours per week. We’ve reported that some retailers and restaurant operators are hiring more part-time workers, or limiting part-timers to 29 hours per week, to avoid the insurance mandate. How prevalent will these sorts of changes be?

Ms. Eibner: There is some evidence from past health-insurance reforms to suggest that firms do make these types of structural changes to avoid requirements such as mandates.

For example, economist Thomas Buchmueller and colleagues found that Hawaii—a state that implemented an employer mandate in the 1970s—experienced a shift toward part-time employment after the mandate became fully effective.

However, coverage in employer-sponsored plans also rose during the same time period, suggesting that the shift to part-time work was not large enough to fully counteract the effect of the mandate.

Mr. Marini: There are organizations that are looking to limit the number of hours to below 30. This is most prevalent in organizations that fit the criteria that I discussed earlier, which would include the retail, hospitality, and food and beverage industries.

I have talked with a number of clients that are not trying to limit the hours. For example, I have talked to a specialty retail organization that is conducting studies of sales associates to understand if a more experienced worker produces more sales. Ultimately, this could lead them to hire more full-time employees with benefits.

Mr. Kuhlman: NFIB members have been expressing their concerns with the new federal full-time employee definition of 30 hours per week created by the ACA. We hear from members taking steps to reduce employee hours from full-time to part-time status, or at least considering the decision.

The good news is there is a simple solution to this problem. In mid-April, an NFIB member from Richmond, Va., testified before the House Small Business Committee advocating for a simple solution: increase the hourly threshold of the statutory definition of full-time employee.

**Impact on Part-Timers**

**WSJ:** What will happen to part-time employees whose hours are reduced? Will they be able to obtain coverage at the exchanges? Or will they go without insurance?
MS. EIBNER: Individuals are eligible for federal tax credits on the exchanges if they have incomes between 100% and 400% of the federal poverty level (up to $45,960 for a single person and $94,200 for a family of four in 2013), they are not eligible for Medicaid, and they do not have an affordable offer of coverage from an employer.

If the company offers coverage, low-income workers will generally not be eligible for federal tax credits available on the exchanges. If the company drops its health-insurance coverage, higher-income workers will not be eligible for the tax advantages provided by employer coverage.

Shifting some segment of the workforce to part-time status would provide a way to allow lower-income workers to take advantage of federal exchange tax credits, while continuing to enable higher-income workers to benefit from the tax advantages associated with employer coverage. But, clearly, reducing workers’ hours introduces other challenges, both for workers and their employers.

Mr. Marini: There are many companies that I am talking to that believe, at least in 2014, many of their low-income employees will elect to pay the $95 penalty rather than purchase health-care insurance. In subsequent years, the penalties for not acquiring insurance get higher and we may see more people electing to acquire insurance as the penalties increase.

The Massachusetts Model

WSJ: Christine said earlier that the percentage of employers offering health insurance in Massachusetts increased after that state adopted a regime similar to the ACA. Why was that? How likely is it to be replicated nationally beginning next year?

Mr. Marini: One of the reasons we may be seeing employer coverage increase when exchanges are introduced is because the employer plan may offer richer benefits.

We found that individual employees earning between $22,340 and $45,000 per year will likely be able to obtain cheaper coverage through their large-employer plan. Single employees earning less than $22,340 per year will likely find a public exchange is less expensive than group health benefits for self-only coverage.

Ms. Eibner: First, both the ACA and the Massachusetts law impose penalties on mid- to large-size employers that do not offer coverage. Second, and perhaps more important, workers face penalties if they fail to enroll in insurance, due to the individual mandate. Under the Affordable Care Act, these penalties will eventually be more than $2,000 a year for many families, making health insurance more valuable to workers. The combination of increased worker demand for insurance, employer penalties and tax advantages associated with employer-sponsored coverage may cause some employers to begin offering health insurance as a result of the law.

Mr. Kuhlman: Massachusetts already had nearly all of their citizens covered by insurance, around 92%, suggesting Bay State residents value health insurance. After passage of the state coverage-expansion law, Massachusetts was able to expand coverage to 98% to 99% of the population.

The real obstacle to expansion of employer-sponsored health insurance is the cost of the coverage. Businesses in Massachusetts are intimately aware of cost challenges. Small-group health-insurance premiums are the highest in the country and continue to increase.

There is much uncertainty on how much these provisions and other requirements in the law will impact health-insurance premiums, but small-business owners are expecting costs to increase.
Mr. Thurm is a senior editor in The Wall Street Journal's San Francisco bureau. He can be reached at scott.thurm@wsj.com.

Corrections & Amplifications
The main headline on the charts has been revised. An earlier version of the graphic had a headline, "Diagnosing a Shortage," intended for a different chart.
As businesses cast about for ways to minimize new costs related to the federal health law, health insurers are stepping up. Among their latest offerings: allowing ever-smaller companies to switch to a riskier form of coverage traditionally favored by big employers.

UnitedHealth Group Inc. and Humana Inc. will begin offering smaller employers—including firms with as few as 10 members in UnitedHealth's case—the option of so-called self-insurance in some markets later this year. Self-insured businesses pay their workers' medical costs directly, instead of joining a traditional managed-care plan. Usually, they hire benefits firms or insurance companies just to administer their plans.

Most big companies choose the approach, because it gives them more control over benefits and can lower costs.

For small businesses, being self-insured would let them avoid new requirements under the law that call for traditional small group plans to include richer benefits, such as mental-health and maternity care. Self-insured companies can also avoid changes to pricing rules that could increase costs for groups of healthy workers.

It comes with risks: A car accident or cancer case can leave small businesses on the hook for big medical bills. That is why most large insurers have generally offered such services to companies that have 100 or more workers and can spread the costs around.

Now, the health law is changing the risk-benefit calculation for smaller businesses such as Buckno Lisicky & Co., an 85-person accounting firm in Allentown, Pa. The company switched from a traditional health plan to a self-insured plan run by benefits-manager WellNet Inc. this year, in part because of the law's small-business rules, said Jack Lisicky, a founder.
"The big guys have a lot more flexibility and that's what we're trying to get," Mr. Lisicky said.

The approach is part of a growing playbook of strategies to minimize the effects—and potential costs—of the health law. Insurers are also letting small companies renew their yearlong health-benefit plans early, before the end of 2013. That would delay the impact of health-law provisions that broadly kick in on Jan. 1, but would only affect plans once they renew after that date.

Some regulators worry the tactics, if they catch on widely, could undermine the exchanges—online insurance marketplaces for small businesses and individuals that are a centerpiece of the law. Starting next year, the law will block insurers from setting rates for businesses with fewer than 50 or 100 workers, depending on the state, based on how healthy they are. The exchanges are supposed to help spread around the risk, and cost, of coverage.

But strategies like self-insurance would tend to most benefit employers with younger, healthier workers who have lower costs, such as Serenic Corp., an Alberta, Canada-based maker of nonprofit accounting software. The firm will move its 40 U.S.-based workers to a self-insured plan in June, in part to avoid the health law's risk-spreading provisions that could raise its costs, said CEO Randy Keith.

"It was a good option because we do have a relatively healthy company," Mr. Keith said. Under an existing UnitedHealth plan, the company would have seen a 30% premium increase next year. Serenic's Denver-based broker, Roper Insurance & Financial Services, said UnitedHealth has been closely tracking the business it has lost to self-insured arrangements.

If more healthy companies like Serenic effectively opt out of the exchanges, that leaves their less-healthy counterparts on the exchanges. And that could push up premiums in the marketplaces, regulators say.

"You could have a result where the rest of the market...is left with employees that are older and sicker, and as a consequence, rates would go up," said Dave Jones, California's insurance commissioner.

Officials in several states are seeking to stem the strategy by limiting so-called stop-loss insurance, which covers unexpected, large health-care bills for self-insured companies. Lawmakers in California and Rhode Island are considering bills that would impose new rules on such coverage when offered to small employers, who otherwise would find self-insurance too risky. Some states, including New York, bar stop-loss insurers from covering small groups.

Still, self-insurance by small companies "is growing because of its ability to circumvent some of the" federal health law's provisions, said Tanji Northrup, assistant insurance commissioner in the Utah Insurance Department.

Federal health officials said they haven't seen evidence that these strategies are gaining momentum among small employers. "We think it would be unlikely that there'd be a significant change in the volume of" self-insurance for small firms, said one official with the Department of Health and Human Services.

Regulators "remain very confident that the implementation of the new reforms will create a competitive marketplace that offers choices to [small] groups and individuals that they didn't have before," the official said.

Only about 15% of firms with fewer than 200 workers were self-insured in 2012, compared with
81% of larger firms, according to a Kaiser Family Foundation survey.

But, insurers appear to anticipate that at least some small groups—particularly healthy ones—will want to give the self-insured tactic a test drive, brokers and analysts said.

UnitedHealth, the nation’s largest insurer, is lowering the threshold for administering self-funded plans to as few as 10 workers, from 100, in at least some markets, according to emails from UnitedHealth sales executives to an insurance broker.

Humana also plans to offer self-insurance to companies enrolling as few as 26 workers in some markets where it previously restricted such services to larger companies, according to an email from a Humana sales executive to a broker.

The insurers said they were being responsive to their customers. UnitedHealth said it "has always provided our customers with the flexibility to manage the value and affordability of their health plans."

Humana said it is aiming to provide "coverage that is affordable and of high quality" and meets regulatory requirements, and it is "exploring a variety of coverage arrangements in the commercial market for individuals, small employers and large employers."

Cigna Corp. said it has offered self-funding options to businesses with as few as 25 employees in 26 states and the District of Columbia. "Employers want choices," the company said.

Software Advice Inc., a consulting firm for software buyers that has many male employees in their 20s, is likely to move to self-insurance when the law’s effects kick in for employers of its size, currently 60 workers. The company’s broker has warned the law could mean a rate hike of 30% to 40%, and "that's not something I want to pay," said Don Fornes, chief executive of Software Advice, based in Austin, Texas. He said his firm is financially solid enough to bear the risk of self-insurance.

—Sarah E. Needleman contributed to this article.

Write to Christopher Weaver at christopher.weaver@wsj.com and Anna Wilde Mathews at anna.mathews@wsj.com

Employers are increasingly recognizing they may be able to avoid certain penalties under the federal health law by offering very limited plans that can lack key benefits such as hospital coverage.

Benefits advisers and insurance brokers—bucking a commonly held expectation that the law would broadly enrich benefits—are pitching these low-benefit plans around the country. They cover minimal requirements such as preventive services, but often little more. Some of the plans wouldn't cover surgery, X-rays or prenatal care at all. Others will be paired with limited packages to cover additional services, for instance, $100 a day for a hospital visit.

Federal officials say this type of plan, in concept, would appear to qualify as acceptable minimum coverage under the law, and let most employers avoid an across-the-workforce $2,000-per-worker penalty for firms that offer nothing. Employers could still face other penalties they anticipate would be far less costly.

It is unclear how many employers will adopt the strategy, but a handful of companies have signed on and an industry is sprouting around the tactic. More than a dozen brokers and benefit-administrators in 10 states said they were discussing the strategy with their clients.

"There had to be a way out" of the penalty for employers with low-wage workers, said Todd Dorton, a consultant and broker for Gallagher Benefit Services Inc., a unit of Arthur J. Gallagher & Co., who has enrolled several employers in the limited plans.

Pan-American Life Insurance Group Inc. has promoted a package including bare-bones plans,
But a close reading of the rules makes it clear that those mandates affect only plans sponsored by insurers that are sold to small businesses and individuals, federal officials confirm. That affects only about 30 million of the more than 160 million people with private insurance, including 19 million people covered by employers, according to a Citigroup Inc. report. Larger employers, generally with more than 50 workers, need cover only preventive services, without a lifetime or annual dollar-value limit, in order to avoid the across-the-workforce penalty.

Such policies would generally cost far less to provide than paying the penalty or providing more comprehensive benefits, say benefit-services firms. Some low-benefit plans would cost employers between $40 and $100 monthly per employee, according to benefit firms’ estimates.

"For certain organizations, it may be an ideal solution to minimize the cost of opting out," said David Ellis, chief executive of Youngtown, Ariz.-based LifeStream Complete Senior Living, which employs about 350 workers, including low-wage housekeepers and kitchen staff. Mr. Ellis, who was recently pitched a low-benefit plan, said it is one option the firm may consider to lower costs and still comply with the law, he said.

Administration officials confirmed in interviews that the skinny plans, in concept, would be sufficient to avoid the across-the-workforce penalty. Several expressed surprise that employers would consider the approach.

"We wouldn't have anticipated that there'd be demand for these types of band-aid plans in 2014," said Robert Kocher, a former White House health adviser who helped shepherd the law. "Our expectation was that employers would offer high quality insurance." Part of the problem: lawmakers left vague the definition of employer-sponsored coverage, opening the door to unexpected interpretations, say people involved in drafting the law.

The low-benefit plans are just one strategy companies are exploring. Major insurers, including UnitedHealth Group Inc., Aetna Inc. and Humana Inc., are offering small
A new study by PricewaterhouseCoopers and the Health Research Institute shows it will be cheaper for employers and employees alike for companies to offer health coverage. (Photo: Getty Images)

Companies a chance to renew yearlong contracts toward the end of 2013. Early renewals of plans, particularly for small employers with healthy workforces, could yield significant savings because plans typically don't need to comply with some health law provisions that could raise costs until their first renewal after Jan. 1, 2014.

Insurers and health-benefits administrators are also offering small companies a chance to switch to self-insurance, a form of coverage traditionally used by bigger employers that will face fewer changes under the law. Employers are also considering limiting workers' hours to avoid the coverage requirements that apply only to full-time employees.

"You're looking at ways to avoid being subject to the law," said Christopher F. Koller, health insurance commissioner of Rhode Island.

Regulators worry that some of these strategies, if widely employed, could pose challenges to the new online health-insurance exchanges that are a centerpiece of the health law. Among employees offered low-benefit plans, sicker workers who need more coverage may be most likely to opt out of employer coverage and join the exchanges. That could drive up costs in the marketplaces.

"The whole idea is to get healthy people in and not-so-healthy people in" the marketplaces, said Linda Sheppard, special counsel for the Kansas Insurance Department.

Experts worried that plans lacking hospital or other major benefits could leave workers vulnerable to major accidents and illnesses. "A plan that just covers some doctor visits and preventive care, I wouldn't say that's real health-insurance protection," said Karen Pollitz, a senior fellow at the Kaiser Family Foundation and former federal health official.

Officials at the Department of Health and Human Services said they haven't seen widespread evidence of such strategies. They said the health law would bring new options, including the subsidized exchange plans, to low-income workers, and that most employers who offer coverage now choose to provide much more robust benefits.

"Any activities that take place on the margins by a small number of employers would not have a significant impact on the small group or the individual market," said Mike Hash, director of the department's Office of Health Reform.

Limited plans may not appeal to all workers, and while employers would avoid the broader $2,000-per-worker penalty for all employees not offered coverage, they could still face a $3,000 individual fee for any employee who opts out and gets a subsidized policy on the exchanges.
But the approach could appeal to companies with a lot of low-wage workers such as retailers and restaurant operators, who are willing to bet that those fees would add up slowly because even with subsidies, many workers won't want to pay the cost of the richer exchange coverage.

A full-time worker earning $9 an hour would have to pay as much as $70 a month for a midlevel exchange plan, even with the subsidies, according to Kaiser. At $12 an hour, the workers' share of the premium would rise to as much as $140 a month.

Firms now offering low-cost policies known as mini-meds, generally plans that cap benefits at low levels, could favor the tactic. Companies sought federal health department waivers to cover nearly four million with mini-meds and other similar plans, which will be barred next year. Some employers are "thinking of this as a replacement for the mini-med plan," said Tracy Watts, national leader for health-care reform at Mercer, a consulting unit of Marsh & McLennan Cos.

San Antonio-based Bill Miller Bar-B-Q, a 4,200-worker chain, will replace its own mini-med with a new, skinny plan in July and will aim to price the plan at less than $50 a month, about the same as the current policy, said Barbara Newman, the chain's controller. The new plan will have no dollar limits on benefits, but will cover only preventive services, six annual doctors' visits and generic drugs. X-rays and tests at a local urgent care chain will also be covered. It wouldn't cover surgeries or hospital stays.

Because the coverage is limited, workers who need richer benefits can still go to the exchanges, where plans would likely be cheaper than a more robust plan Bill Miller has historically offered to management and that costs more than $200 per month. The chain plans to pay the $3,000 penalty for each worker who gets an exchange-plan subsidy.

But, "those are going to be the people who will be ill and need a more robust plan," and insuring them directly could cost even more, Ms. Newman said.

Many more workers, she expects, will continue to go without insurance, despite the exchanges and the limited plan. Currently, only one-quarter of workers eligible for the mini-med plan take it. Ms. Newman said, "We really feel like the people who are not taking it now will not take it then."

Tex-Mex restaurant chain El Fenix also said it would offer limited plans to its 1,200 workers, covering doctors visits, preventive care and drugs, but not hospital stays or surgery. "What our goal was all along was to make [offering coverage] financially palatable for the company as a whole, so we didn't do damage and have to let people go or slow down our growth," said Brian Livingston, chief financial officer of Dallas-based Firebird Restaurant Group LLC, owner of El Fenix.

Some benefits advisers worry that since the idea of the low-benefit plans is so new, they could yet invite scrutiny from regulators, and may run afoul of other health law requirements.

John Owens, a broker for the Lewer Agency in Kansas City, Mo., said a large Midwestern convenience store chain is considering signing up for such a policy and is awaiting guidance from regulators.

"What I'm telling people is, this may work, but you better have a plan B," said Andrew Ky Haynes, a Kansas City, Mo.-based benefits lawyer.
Street Journal, with the headline: Employers Eye Bare-Bones Health Plans Under New Law.
ATTACHMENT 4

Gilpin Givhan Client Alerts
Key Takeaways from ACA “Employer Mandate” Final Rule

Part 1: Key Changes in the Final Rule

Earlier this month, the Internal Revenue Service (the “IRS”) published highly anticipated final regulations (the “Final Rule,” or the “Rule”) 1 regarding Section 4980H of the Internal Revenue Code (“Section 4980H”), the so-called “Employer Mandate” enacted by the Patient Protection and Affordable Care Act in 2010. 2 As you may be aware, under Section 4980H, certain “large” employers (generally, an employer with 50 or more employees, calculated pursuant to Section 4980H) will be required to offer minimum essential health insurance coverage to their full-time employees or pay a penalty (the “4980H Penalties”). This Client Alert (Part 1) is the first of two addressing the Final Rule. It explains certain provisions in the Final Rule that modify or supplement prior IRS proposed regulations 3 and other guidance. Part 2 of this Client Alert, to follow soon, will identify certain steps employers may take now to prepare for the 4980H Penalties.

1. “Large” employers with fewer than 100 employees

Last year, the IRS announced that the 4980H Penalties, previously scheduled to take effect this year, would not be effective until 2015. 4 The one-year delay applied with respect to all “large” employers – generally, employers with 50 or more full-time employees (including full-time equivalent employees). 5 The Final Rule further postponed the 4980H Penalties in regard to employers with fewer than 100 employees; such employers (i.e., employers with 50 to 99 employees) will not be subject to the 4980H Penalties until 2016. 6 Moreover, if the employer has a non-calendar

2 See Patient Protection and Affordable Care Act, Public Law 111-148 (Mar. 23, 2010).
4 See Treasury Notice 2013-45 (July 9, 2013).
5 For purposes of determining whether an employer is a “large” employer subject to the 4980H Penalties, the term “full time” employee takes into account both “full time” employees (i.e., employees with 130 or more hours of service during a given calendar month) and full-time “equivalents,” measured based on their collective hours of service.
6 Note, however, that all large employers (i.e., all employers with 50 or more employees, as provided in Section 4980H) will be required to comply with the reporting requirements in Section 6055 (if the large employer has a self-
year health plan (i.e., a health plan with a plan year that begins other than on January 1), and certain
other conditions are satisfied, the employer will not be subject to the 4980H Penalties until the
beginning of the plan year that begins in 2016 (i.e., the 2016 plan year). The conditions include that
the employer (i) may not modify its plan year (i.e., prior to the 2016 plan year) to begin on a later
calendar date; (ii) may not reduce the size of its workforce (i.e., to fewer than 100 employees) or the
overall hours of service of its employees prior to December 31, 2014 other than for bona fide
business purposes; and (iii) may not eliminate or materially reduce the health coverage it offers, if
any, during the period prior to the onset of the 4980H Penalties (i.e., prior to the employer’s 2016
plan year).

2. “Large” employers with 100 or more employees

The Final Rule confirms that employers with 100 or more employees will be subject to the
4980H Penalties beginning in 2015. Here again, however, the Final Rule provides these larger
employers with transitional relief and other special rules to phase in certain of the 4980H Penalties’
provisions. Significantly:

- **Non-calendar year plans.** Like the transition relief afforded to large employers with fewer
  than 100 employees, the Final Rule further postpones the 4980H Penalties, beyond January 1,
  2015, for large employers with 100 or more employees that do not have calendar year plans
  until the beginning of the employer’s 2015 plan year, subject to conditions. In this case,
  among other conditions, the employer must not have modified its plan year since December
  27, 2012 to begin on a later calendar date.

- **Coverage penalty safe harbor.** The 4980H Penalties requires that large employers offer
  minimum essential health insurance coverage to at least 95 percent of their “full-time”
  employees⁷ or pay a penalty under Section 4980H(a). The Final Rule lowers this “safe
  harbor” threshold to 70 percent with respect to a large employer’s 2015 plan year only.

- **Coverage penalty floor.** The 4980H Penalties specifies that the amount of the monthly
  penalty under Section 4980H(a) will be calculated by multiplying $167 (i.e., $2,000 annual
  amount divided by 12 months) by the large employer’s total number of full-time employees,
  not taking into account the first 30 such employees. The Final Rule increases the 30 full-
  time-employee carve-out to 80 full-time employees with respect to a large employer’s 2015
  plan year only.

- **Determining large employer status.** For purposes of Section 4980H, whether an employer is
  a “large” employer subject to the 4980H Penalties will be determined each calendar year
  based on the employer’s average monthly number of employees during the preceding
  calendar year. The Final Rule, however, permits an employer to utilize a shorter period (not
  less than six consecutive calendar months) during 2014 only to determine whether it will be a
  large employer subject to the 4980H Penalties in 2015 (i.e., whether its average monthly
  number of employees during 2014 is 100 or more). Employers should note that the Final

---

⁷ For this purpose, “full time” employee means, generally, an employee who averages 30 or more hours of service
per week during the employer’s applicable (i.e., initial or standard) measurement period.
Rule permits them flexibility to select any six consecutive calendar months (i.e., the employer will not be limited to the six-month period from July through December, 2014) for this purpose.

First measurement period. The 4980H Penalties permits a large employer to utilize a look back, “measurement period,” in lieu of a month-by-month approach, to identify the “full-time” employees to whom it must offer affordable, minimum essential health insurance coverage during the subsequent, corresponding “stability period” to avoid penalties under Section 4980H(a) and (b). Large employers desiring to utilize a 12 month stability period, the maximum permitted, are also required to utilize a 12 month measurement period. The Final Rule, however, permits large employers with 100 or more employees to utilize a shorter first measurement period and still maintain the maximum 12 months for its first stability period (i.e., the stability period beginning in 2015). For certain employers, the first measurement period may be as short as six consecutive months; provided, however, that the first measurement period for every large employer with 100 or more employers (including, for example, employers that have plan years that begin later in the calendar year) (i) must begin not later than July 1, 2014; and (ii) must end not less than 90 days prior to the beginning of the employer’s 2015 plan year. The 90-day window at the end of the first measurement period permits the employer to utilize the maximum permitted administrative period prior to the first stability period.

3. Conclusion

Apart from the transitional relief that may apply to postpone the 4980H Penalties for any large employer with a non-calendar year plan (i.e., regardless of whether the employer has 100 or more employees) with respect to its first plan year, the transition relief described above is generally limited to 2015 (or the duration of the employer’s 2015 plan year, in the case of an employer with a non-calendar year plan). Thus, for example, in 2015, all large employers (including large employers with fewer than 100 employees) will determine whether they will be treated as large employers during 2016 by calculating their monthly average number of employees for all 12 months during 2015 (i.e., during the entire calendar year) rather than using the shorter look back period allowed in 2014. Similarly, with respect to a stability period that begins in 2016, if an employer (including a large employer that has fewer than 100 employees) elects to utilize the maximum 12 month stability period, the employer must also utilize a corresponding 12 month measurement period (i.e., beginning with the measurement period that begins in 2015), and not the shorter measurement period available to employers with more than 100 employees with respect to their 2015 plan year.

8 Even if a large employer is not subject to a penalty under Section 4980H(a), Section 4980H(b) imposes a penalty on the large employer if the health insurance coverage it offers to its full-time employees (i) is not affordable (i.e., a full-time employee’s cost for single coverage under the employer’s lowest cost plan exceeds 9.5% of the employee’s household income); or (ii) does not provide “minimum value” (i.e., does not cover at least 60 percent of the cost of the benefits offered under the plan, similar to a “bronze” plan offered on the federal or a state health insurance marketplace).

9 A large employer may elect to implement an administrative period of up to 90 days between the end of a measurement period and the ensuring stability period. The administrative period will permit a large employer to, for example, take the steps needed to ensure that it is in position to offer affordable, minimum essential health insurance coverage to its full-time employees during the stability period.
Once again, this Client Alert is the first of two addressing the Final Rule. Our firm will soon circulate Part 2 of the Client Alert, discussing the implications of the Final Rule more broadly, and identifying steps employers should be taking to prepare for the 4980H Penalties.

*This Client Alert provides an overview of the issues addressed herein; it is not intended to be, nor should it be interpreted as, legal advice. If you have specific questions about the legal issues addressed in this Client Alert, please contact appropriate legal counsel.*
Key Takeaways from ACA “Employer Mandate” Final Rule

Part 2: Key Questions Employers Should be Asking Now

As indicated in my firm’s prior Client Alert, Key Changes in the Employer Mandate Final Rule, dated February 26, 2014, the Internal Revenue Service recently published final regulations (the “Employer Mandate Final Rule”)1 to implement Section 4980H of the Internal Revenue Code (“Section 4980H,” and the “Code,” respectively), the so-called “Employer Mandate,” established pursuant to the Patient Protection and Affordable Care Act (the “ACA,” or the “Act”).2 In general, the Employer Mandate consists of Section 4980H as well as Sections 6055 and 6056 of the Code (“Section 6055” and “Section 6056”), also established by the ACA. As you are no doubt aware, at this point, Section 4980H will impose certain penalties on “large” employers (generally, employers with 50 or more employees) that do not offer certain health insurance coverage to their “full-time” employees. Sections 6055 and 6066 will require large employers to report certain information to the IRS, and to certain of their employees, to support the IRS’s regulation and enforcement efforts with respect to the Employer Mandate and other key ACA components – namely, the so-called “Individual Mandate” and the state and federal health insurance marketplaces (or “exchanges”), including the premium tax credits (the “premium tax credits”) that may be available to help certain individuals and families purchase health insurance on an exchange. The reporting requirements under Section 6056 will apply with respect to all large employers; Section 6055 will apply with respect to large employers with self-insured health plans. Since the date of my firm’s prior Client Alert, the IRS published final regulations in respect to Sections 6055 and 6056 (collectively, the “Reporting Final Rules,” and, together with the Employer Mandate Final Rule, the “Final Rules”).3 The Final Rules update and finalize proposed regulations published last

---

year with respect to Section 4980H (the “Employer Mandate Proposed Rule”) and Sections 6055 and 6056 (the “Reporting Proposed Rules”) (collectively, the “Proposed Rules”).

The ACA and the Proposed Rules anticipated that the Employer Mandate would be effective with respect to all large employers (that is, any employer with 50 or more employees) beginning this year. In July, 2013, however, the IRS published Notice 2013-45 (“Notice 2013-45”) that delayed enforcement of the Employer Mandate until 2015. As discussed further below, the Final Rules include certain transition relief that further delays the imposition of penalties under Section 4980H until 2016 for large employers with fewer than 100 employees. However, all large employers (including large employers with fewer than 100 employees) are required to comply with the reporting provisions under Section 6055 (if self-insured) and Section 6056 beginning next year.

Bottom line: With the Final Rules, the IRS has confirmed the regulatory framework that will take effect, for better or worse, when it begins enforcement of the Employer Mandate next year. This Client Alert identifies key questions employers should be asking (and, hopefully, getting answered) now, in planning for the onset of the Employer Mandate, taking into account the Final Rules.

1. What are the “aggregation rules,” and do they apply to me?

As indicated above, the Employer Mandate will apply to “large” employers – that is, generally, any employer that has 50 or more employees. Even if an employer has fewer than 50 employees, however, but is part of a related group of business entities, such as a parent-subsidiary-type structure, or another group of closely held entities, in which a small group of shareholders or owners collectively own most or all of the stock or other ownership interest in the various entities in the group, the Employer Mandate may require that the group be treated as a single employer – specifically, if the entities together constitute a “controlled group,” under applicable IRS rules. Entities that are part of a controlled group must combine their employees to determine whether the group, collectively, has 50 or more employees. If so, each entity in the controlled group (i.e., a “large employer member,” or “member”) must comply with the reporting requirements under Section 6055 (if self-insured) and Section 6056, and each entity in the controlled group may be subject to the penalties imposed under Section 4980H - again, even if the entity, on its own, has fewer than 50 employees.

With this in mind, any employer that is part of a related group of entities should, as the first steps in analysis with respect to the Employer Mandate, determine whether any two or more entities within the group form a controlled group, within the meaning of the IRS rules, and, if so, identify the member entities within the group. In particular, an employer that has fewer than 50 employees, but is part of a controlled group, should determine whether the group, collectively, has 50 or more employees. If so, each member entity within the group will be deemed to be a large employer, as explained above. On the

---

7 The IRS rules that define “controlled group” are set forth in Section 414(b) and (c) in the Code. Also, a group of entities that together constitute an “affiliated service group,” within the meaning of Section 414(m) of the Code, will also be deemed to be a controlled group, for Employer Mandate purposes. The entity and attribution rules under Section 1563 of the Code may also apply.
other hand, even if the group collectively has more than 50 employees, if the number of employees is less than 100, none of the member entities will be subject to the penalty provisions in Section 4980H until 2016.

2. **What are the “transition rules,” and do they apply to me?**

   As referenced above, the Final Rules include certain transition relief that may postpone the Employer Mandate, in whole or in part, for certain employers, even beyond the one year delay provided for in Notice 2013-45. This transition relief includes the following:

   - **Large employers with fewer than 50 employees**

     As indicated above, any employer with 50 or more employees will be deemed to be a large employer. However, in the Final Rules, the IRS delayed enforcement of the penalty provisions in Section 4980H until 2016 with respect to large employers with fewer than 100 employees; provided, however, that a large employer may not reduce its workforce (i.e., below 100 employees) to qualify for the relief. A large employer also may not qualify for the relief if it eliminates or materially reduces the health benefits it provides, if any, to take advantage of the transition relief (i.e., before the penalty provisions in Section 4980H take effect in 2016).

   - **Non-calendar year health plans**

     The Final Rules also provide transition relief for large employers of all sizes that have non-calendar year health plans – that is, health plans that have plan years that begin on a date other than January 1. For a large employer that has 100 or more employees and a non-calendar year health plan, the Final Rules provide that the employer will not be subject to the penalty provisions of Section 4980H until the beginning of its plan year that begins in 2015 (i.e., its 2015 plan year), so long as, on or after December 27, 2012, the employer has not changed (and does not change) its plan year to begin on a later date. Similarly, for a large employer that has fewer than 100 employees, the Final Rules provide that the employer will not be subject to the penalty provisions in Section 4980H until the beginning of its 2016 plan year, so long as the employer does not, in the interim, change its plan year to begin at a later date, or eliminate or materially reduce the health benefits it provides, if any.

     The Final Rules provide an unexpected opportunity for large employers with fewer than 100 employees to avoid the penalty provisions of Section 4980H for another year and for large employers of all sizes with non-calendar year health plans to avoid such penalties for additional time. Large employers should not rely on this transition relief for planning purposes, however, without first confirming that they meet (or will meet) the conditions on such relief.

3. **How do I know if I will be subject to the Employer Mandate?**

   Whether an employer is a large employer subject to the Employer Mandate will be determined on an annual basis – specifically, at the end of each calendar year. At the end of each calendar year, employers must “look-back” and calculate their *monthly average* number of employees during the

---

8 The Final Rules permit a large employer to reduce its workforce, even below 100 employees, for bona fide business purposes. The Final Rules include several “safe harbor” workforce reduction scenarios that would be deemed to be for bona fide business purposes. See 79 Fed. Reg. at 8574.
calendar year. In other words, Section 4980H requires employers to count their employees each month. For this purpose, Section 4980H requires that an employer take into account not only its “full-time” employees (i.e., an employee to whom the employer credits 30 or more hours of service per week during the month), but also its “full-time employee equivalents.” To determine the number of its full-time employee equivalents, an employer must add together the hours of service credited to its non-full time employees during the month (the number of non – full time employees is not taken into account), and divide the total hours of service by 120. The employer must add the resulting number of full-time employee equivalents, including any fraction, to the number of its full-time employees to determine its total number of employees for the month, for Section 4980H purposes. To determine its monthly average number of employees at the end of the calendar year, the employer must add together the total number of employees for each month during the year, calculated as provided above, and divide by 12. If the resulting monthly average number of employees is 50 or greater, the employer will be deemed to be a large employer during the following calendar year (i.e., for all months during 2015, even if the employer’s number of employees decreases during the year); provided, however, that, as discussed above, in the case of calendar year 2014, if the monthly average number of employees is less than 100, the employer will not be subject to the penalty provisions under Section 4980H until 2016.

The following is an example of the calculation of an employer’s total employees for a particular month.

**Example:**

In a particular month, Employer A credits 90 employees with a average of 30 or more hours of service per week. Employer A also credits 900 total hours of service to its non-full time employees during the month. To calculate the number of Employer A’s employees for the month, for Section 4980H purposes, Employer A must add together (i) its 90 “full-time” employees (i.e., the employees to whom Employer A credited 30 or hours or service or more per week during the month); and (ii) 7.5 \( \frac{900 \text{ total hours of service credited to Employer A’s non-full time employees}}{120} \). Employer A will be deemed to have 97.5 employees during the month, for Section 4980H purposes.

In addition to the rules under Section 4980H, employers need to confirm that they have identified all their employees. By way of example, many large employers (and would-be large employers) hire individuals to work, or to do particular tasks, from time to time, as independent contractors. Applicable IRS rules, however, indicate that if the employer is “in control” of the arrangement – for example, if the employer dictates whether and when, or how, the worker does the job, or provides the facilities and tools or other means to perform the work, or if the worker does most or all the worker’s work for the employer – the IRS may reclassify the worker as an employee, even if the employer issues the worker IRS Form 1099. Likewise, although the guidance is not entirely clear, there may be at least some circumstances in which a temporary worker hired through a staffing agency may be deemed to be employed by an employers that is the client of the staffing agency – i.e., if the employees uses the worker to do more than merely short-term, temporary work. Employers should give consideration to these and other, similar type arrangements when identifying and counting their employees, for Section 4980H (and other IRS) purposes.
Based on the information above, employers should consider conducting the following analysis:

(i) **What is (or will be) my monthly average number of employees during calendar year 2014?**

At the end of this year (i.e., calendar year 2014), all employers must determine their monthly average number of employees for the year, as set forth above. If the monthly average is 50 or more, the employer will be deemed to be a large employer during calendar year 2015, unless the seasonal worker exception (see below) applies. All large employers (including those with fewer than 100 employees) must comply with the reporting requirements under Section 6055 (if self-insured) and Section 6056 next year. However, the Final Rules provide that, if the employer’s monthly average number of employees is 50 or more, but less than 100, the employer will not be subject to penalties under Section 4980H until 2016. On the other hand, if the employer’s monthly average number of employees is 100 or more, the employer will be subject to Section 4980H in 2015, unless the seasonal worker exception (see below) applies.

This year only, for purposes of determining its monthly average number of employees, the Final Rules permit employers to use a look-back period shorter than the calendar year; specifically, employers may use any period of at least six consecutive calendar months. With this in mind, an employer that may otherwise have more than 50 employees may be able to avoid the Employer Mandate (at least for another year) if it there is any period of at least six consecutive calendar months during 2014 during which the employer’s monthly average number of employees is less than 50. Likewise, a large employer that may otherwise have more than 100 employees may be able to avoid the penalty provisions in Section 4980H until 2016 if there is any period of at least six consecutive calendar months during 2014 during which the employer’s monthly average number of employees is less than 100.

(ii) **What will be my monthly average number of employees during calendar year 2015?**

All employers must again calculate their average number of employees at the end of 2015 to determine large employer status for calendar year 2016. Next year, however, employers will not have the benefit of the transition relief provided in the Final Rules for 2014. That is, first of all, employers will be required to use the full calendar year (i.e., all 12 months) look-back period beginning next year. Moreover, any employer that has a monthly average number of employees during calendar year 2015 that is 50 or greater will be subject to the reporting requirements of Section 6055 (if self-insured) and Section 6066 and the penalty provisions of Section 4980H for 2016, unless the seasonal worker exception (see below) applies.

(iii) **Does the seasonal worker exception apply?**

As indicated above, if an employer’s monthly average number of employees during a calendar year, calculated as provided in Section 4980H, is 50 or more, the employer will be deemed to be a large employer during the following calendar year, unless the seasonal worker exception applies. In addition, the Final Rules provide that if a large employer’s monthly average number of employees during calendar year 2014 is 100 or more, the employer will be subject to the penalty provisions in Section 4980H during 2015, unless the seasonal worker exception applies. The seasonal worker exception will apply, however, for a calendar year only if the two following requirements are met:
(a) The employer’s monthly average number of employees during the calendar year, including seasonal workers, is 50 or more (or 100 or more, as indicated above, for 2014 only) for not more than 120 days (or four calendar months) during the year, which days (or months) may be consecutive or non-consecutive; and

(b) The employer’s total number of non-seasonal employees is less than 50 (or less than 100, as indicated above, for 2014 only) at all times during the calendar year.

The example below illustrates the mechanics of the seasonal worker exception, as discussed above.

Example:

During 2015, Employer X employs 45 non-seasonal employees (i.e., full-time and full-time equivalents) throughout the year. During three months during the year, however, the employer employs 20 seasonal workers. The employer’s average monthly number of employees for the year is 50 \(\frac{(45 \times 9) + (45 + 20) \times 3}{12}\). However, because (a) the employer’s total number of employees, including seasonal workers, did not equal or exceed 50 for more than 120 days (or four calendar months) during the year and (b) the employer’s number of non-seasonal workers did not equal or exceed 50 at any time during the year, the employer may be able to avoid being deemed a large employer in 2016 by invoking the seasonal worker exception.

4. Who are my “full-time” employees?

Both the ACA and the Proposed Rules indicated that, for Employer Mandate purposes, a “full-time” employee is an employee to whom a large employer credits an average of 30 or more hours of service per week. For this purpose, “hours of service” includes not only the hours an employee actually works, but also any paid vacation, other paid time off, and any other hours for which the employee is paid or entitled to be paid. Notwithstanding significant controversy and debate that arose in regard to the 30 hour per week threshold for “full-time” status, the IRS confirmed it in the Final Rules.

It is critical that a large employer identify its “full-time” employees, for reasons including the following, all discussed further below:

- In order to avoid a penalty under Section 4980H, a large employer must offer certain health insurance coverage to its full-time employees.

- Penalties imposed under Section 4980H will be calculated based on a large employer’s full-time employees.

---

9 In general, “seasonal worker” means an employee employed on a seasonal basis. The Final Rules provides certain general guidelines (e.g., Department of Labor standards) regarding who may be considered a seasonal employee, but ultimately the Rules permit an employer to rely on a good faith application of the term seasonal worker.

10 For purposes of applying the seasonal worker exception in 2014, the employer must take into account the entire calendar year (i.e., the shortened look-back period provided for in the Final Rules may not be used).

Section 6056 requires that a large employer report information to the IRS regarding its full-time employees and furnish individual statements each year to each of its full-time employees.

In many instances, identifying “full time” employees will be relatively straightforward. If an employee is hired to work 40 hours per week, for example, the employee is a full-time employee. By contrast, if an employee is hired to work 20 hours per week, the employee is not a full-time employee. In some cases, however, a large employer may not be able to predict whether an employee (a “variable hour” employee) will be credited with 30 or more hours of service per week. This creates problems for employers, potentially, because Section 4980H provides that the IRS will impose penalties on a month-by-month basis. Recognizing that tracking employee’s full-time status (i.e., whether the employer must offer the employee health insurance coverage to avoid a penalty under Section 4980H) from month to month might create significant administrative burdens for employers, the IRS will permit a large employer to utilize a(nother) “look-back” period, called a “measurement period,” to determine whether such variable hour employees are full-time employees. In this case, the look-back period may be between three (3) months and twelve (12) months in duration, at the employer’s election. Variable hour employees to whom a large employer credits an average of 30 or more hours of service per week during the look-back / measurement period (rather than during a particular month), will be deemed to be full-time during a subsequent, corresponding stability period that, in most cases, will be the same duration as the measurement period. As discussed further below, to avoid a penalty under Section 4980H, large employers must offer health insurance coverage to their full-time variable hour employees during the stability period.

A large employer may also utilize a measurement period with respect to seasonal employees – that is, employees in positions for which the customary annual employment is six months or less. Even though a seasonal employee may be credited with an average of 30 or more hours of service per week during the period the employee is employed (i.e., six months or less), if the employee is not credited with 30 hours of service or more per week during the employer’s measurement period (for example, if the employer utilizes the maximum, 12 month measurement period), the employee will not be deemed to be full-time, and the employer will not be obligated to offer the employee health insurance coverage during the corresponding stability period to avoid a penalty under Section 4980H.

The Final Rules also include guidance regarding whether and when certain employees should be deemed to be separated from service and/or rehired following a period of absence. Specifically, the Final Rules provide that if an employee of a large employer is not credited with hours of service for a period of 26 consecutive weeks or longer, in the event the employee is subsequently credited with hours of service, the employer may treat the employee as having been rehired – that is, hours of service credited to the employer prior to the break in service will not be taken into account in determining whether the employee is full-time, such that the employer must offer the employee health insurance coverage to avoid a penalty under Section 4980H. Alternatively, the IRS provides a “rule of parity”

---

12 The stability period need not be the same duration as the related measurement period; provided, however, that the stability period (i) must be at least six (6) months in duration (even if the measurement period is a shorter period); and (ii) must not be shorter than the related measurement period. As a practical matter, it is expected that, at least initially, many, if not most or substantially all, employers will utilize measurement periods and stability periods of the same duration.

13 The Final Rules stipulate that a large employer may use different measurement periods for different categories of employees, such as hourly and salaried employees, but it must use the same measurement period for all employees within a particular category.
whereby an employee may be similarly deemed to be rehired following a shorter absence – specifically, if (i) the employee is not credited with hours of service for at least four consecutive weeks; and (ii) the period during which the employee is not credited with hours of service is longer than the period of time immediately preceding it during which the employee was credited with hours of service.

Moreover, the Final Rules include specific guidance in regard to specific types of employment arrangements that do not fit squarely within the measurement period / stability period, break in service rules, and other concepts for determining “full-time” status under Section 4980H. For example, in the Final Rules, the IRS specifically declined to adopt a presumption that staffing firms should treat the temporary workers they employ as variable hour employees, although it seems to concede that this will be the case in most instances. It also specifically declined to adopt special break in service or separation from service rules for staffing agencies. Similarly, the Final Rules provide guidance regarding whether and how employees of educational organizations, such as adjunct faculty, and certain commissioned salespeople may be classified as full-time employees under Section 4980H.

5. What are “minimum essential” health coverage, “affordable coverage,” “essential health benefits,” and “minimum value?”

As discussed further below, in order to avoid a penalty under Section 4980H, a large employer must offer its full-time employees minimum essential health coverage that is affordable and that provides minimum value. Understanding what these terms mean (and do not mean) is critical to a proper assessment of a large employer’s risks under the Employer Mandate.

- **Minimum essential health coverage.** As discussed further below, to avoid the Coverage Penalty (defined below) under Section 4980H, a large employer must offer minimum essential health coverage to its full-time employees. This is a very low threshold; most any major medical plan should meet it.

- **Minimum value.** A large employer’s health plan provides minimum value if it pays at least 60 percent of the costs of the plan’s benefits. Conversely, a large employer’s health plan does not provide minimum value if employees are required to bear more than 40 percent of the cost of the plan’s benefits, in the form of deductibles, co-pays and other out-of-pocket expenses.

- **Affordable.** As discussed further below, the Final Rules provide that health insurance coverage (again, specifically minimum essential coverage) offered by a large employer to its full-time employees will be deemed to be affordable so long as the full-time employee’s cost to obtain the coverage is not greater than 9.5 percent of the employee’s household income.

- **Essential health benefits.** The ACA requires that any health insurance plan offered in the individual small group market (currently defined as groups that include two to fifty employees), whether through a health insurance exchange or through other means, must include certain types of coverage, such as mental health, wellness and preventive care, and maternity coverage. However, health insurance coverage offered by a large employer is not required to include essential health benefits to avoid a penalty under Section 4980H.

Confusion (and lack of clear guidance) regarding the definition and application of the above terms is a major reason why the Employer Mandate is widely misunderstood. Notwithstanding that the
terms are sometimes used interchangeably, they have substantially different meanings, and substituting one term for another may distort an employer’s understanding and analysis of the risks and obligations associated with Section 4980H.

6. What are my risks?

Section 4980H requires that a large employer offer all or substantially all its full-time employees minimum essential health insurance coverage that is affordable and provides minimum value or pay a penalty. More specifically, Section 4980H requires that the employer offer such coverage to (all or substantially all) its full-time employees and their dependents. For this purpose, the IRS has defined “dependents” as a full-time employee’s children under 26 years of age; the term does not include the employee’s spouse.

Also, as noted above, the IRS will impose penalties under Section 4980H on a month-to-month basis. In any month, then, a large employer may be subject to any one of three penalties: the Coverage Penalty, the Minimum Value Penalty or the Affordability Penalty (all defined below).

(i) Section 4980H(a): The Coverage Penalty

If a large employer does not offer minimum essential health coverage to all or substantially all of its full-time employees and their children under 26 years of age, Section 4980H imposes a penalty in the amount of $167 per month (or $2,000 per year, if the employer does not offer the coverage for any of the 12 months during the year) multiplied by the large employer’s total number of full-time employees, not taking into account the first 30. Thus, for example, if a large employer has 200 full-time employees, the (annual) amount of the potential Coverage Penalty for the employer would be $340,000 [(200-30) x $2,000].

- **Offer.** A large employer is only required to offer the opportunity to enroll in minimum essential coverage to its full-time employees (and their dependents) to avoid the Coverage Penalty; the employer is not required to pay all or any portion of the cost for such coverage. (On the other hand, as a practical matter, a large employer may be required to pay some portion of the cost of coverage offered to one or more full-time employees in order to avoid the Affordability Penalty, as discussed below.)

- **Minimum essential health coverage.** Again, a large employer is only required to offer minimum essential health coverage to its full-time employees to avoid the Coverage Penalty. Most any major medical health insurance will satisfy this standard. A large employer is not required to offer essential health benefits (or any other specific type or level of benefits) to avoid the Coverage Penalty.

- **All or substantially all.** Recognizing that Section 4980H(a) provides for very significant penalties, and that even diligent large employers may, from month to month, fail to account for (i.e., identify and offer minimum essential health coverage to) a particular “full-time” employee(s), the IRS has provided a safe harbor that generally precludes the IRS from imposing the Coverage Penalty on a large employer that offers minimum essential coverage to at least 95
percent of its full-time employees (and their children under age 26) in a given month.\textsuperscript{14} In addition, the Final Rules include transition relief that reduces the 95 percent safe harbor threshold to 70 percent for 2015 only. An effect of this transition relief is to permit large employers that historically have not offered health coverage to the majority of their full-time employees a two-step path to meeting the safe harbor: such employers must offer minimum essential coverage to 70 percent of their full-time employees in 2015, and 95 percent in 2016.

Notwithstanding the safe harbor provision(s), however, large employers should appreciate the substantial risk involved with the Coverage Penalty. If a large employer fails to meet the safe harbor(s), the amount of the Coverage Penalty is the same, regardless of whether the employer offers (and even offers to pay for) minimum essential coverage to some, most (though not substantially all), or none of its employees. To continue the example from above, for a large employer with 200 full-time employees, even if the employer offers (and pays for) coverage for 189 of its 200 full-time employees (i.e., less than 95 percent), the amount of the potential Coverage Penalty is $340,000 – the same penalty that would apply if the employer did not offer coverage at all.

\textbf{Not taking into account the first 30 full-time employees.} As indicated above, Section 4980H allows for a large employer to reduce its total number of full-time employees by 30 to calculate the amount of the Coverage Penalty. In the case of a controlled group of entities, this 30-full time employee carve out must be allocated ratably among the member entities in the group (i.e., based on the number of the members’ full-time employees). On the other hand, this provision would appear to preclude the IRS from imposing the Coverage Penalty on a large employer with not more than 30 full-time employees. Moreover, the Final Rules include transition relief that increases the 30-full time employee carve out to 80 for 2015 only. Thus, even if a large employer’s monthly average number of employees during calendar year 2014 is greater than 100, the employer still will not be subject to the Coverage Penalty in 2015 if it has not more than 80 full-time employees.\textsuperscript{15}

The foregoing is illustrated in the following example:

\textbf{Example:}

If a large employer that has 200 full-time employees fails to offer minimum essential health coverage to at least 70 percent of its full-time employees during 2015, the employer would be subject to the Coverage Penalty in the amount of $240,000 [$2,000 x (200 – 80)]. In 2016, if the employer fails to offer minimum essential health coverage to at least 95 percent of its full-time employees and their children under 26, the employer would be subject to a Coverage Penalty in the amount of $340,000 [$2,000 x (200-30)].

\textsuperscript{14} For a large employer that has fewer than 100 employees, the employer will be deemed to have offered minimum essential health coverage to substantially all its full-time employees if the employer offers such coverage to all but five (or less) of the employer’s full-time employees.

\textsuperscript{15} The Final Rules specify, moreover, that the amount of the penalty, if any, that may be assessed against a large employer under Section 4980H(b) (see below) may not exceed the maximum penalty that may be assessed under Section 4980H(a). In other words, it appears that a large employer that has not more than 30 full-time employees (or not more than 80 full-time employees during 2015) is not subject to any penalty under Section 4980H.
(ii) Section 4980H(b): The Affordability Penalty / Minimum Value Penalty

Even if a large employer avoids the Coverage Penalty, however, the employer may still be subject to either of two penalties under Section 4980H(b): the Minimum Value Penalty or the Affordability Penalty.

- **Minimum Value Penalty.** Section 4980H(b) imposes a penalty on a large employer if the employer does not offer its full-time employees minimum essential coverage that provides minimum value (the “Minimum Value Penalty”). As indicated above, under Section 4980H(b), minimum essential coverage does not provide minimum value unless it covers at least 60 percent of the costs associated with the relevant benefits. In the event a large employer offers minimum essential coverage that does not provide minimum value, the amount of the Minimum Value Penalty is $250 per month (or $3,000 annually) for each of the employer’s full-time employees who qualifies for and obtains a premium tax credit.

Presumably, most or all commercial insurers will not issue a plan that does not provide minimum value, unless the large employer that sponsors the plan anticipates paying the Minimum Value Penalty. Section 7 below discusses this scenario, but the balance of this Section will focus on the Affordability Penalty.

- **Affordability Penalty.** Section 4980H(b) also imposes a penalty (the “Affordability Penalty”) on a large employer with respect to any full-time employee (i) to whom the employer offers minimum essential coverage that is not affordable; and (ii) who qualifies for and obtains a premium tax credit. For this purpose, Section 4980H(b) provides that minimum essential coverage offered by a large employer will be deemed to be affordable to each of the employer’s full-time employees unless the premium for self-only coverage under the employer’s lowest cost plan option is greater than 9.5 percent of the employee’s household income. The affordability test must be applied with respect to each of a large employer’s full-time employees, regardless of whether the employee takes coverage. Moreover, in each case, the standard is the cost for self-only coverage, regardless of whether the employee is eligible for family coverage, and regardless of whether the employee takes any coverage. The cost of family coverage is not taken into account. A large employer typically will not know its full-time employees’ household income. With this in mind, Section 4980H(b) permits a large employer to rely on a full-time employee’s individual income (based on the employee’s W-2 income or rate of pay, or the applicable federal poverty line) as a safe harbor to apply the affordability test. While obviously not a reliable predictor of household income, this limited safe harbor nonetheless may enable a large employer to rule out the Affordability Penalty with respect to many, if not most or all, of its full-time employees, as illustrated in the following example:

**Example:**

Employer X offers minimum essential health insurance coverage to its full-time employees. Each full-time employee is required to pay $200 to obtain self-only coverage under Employer X’s health plan. The coverage will be deemed to be affordable for any full-time employee whose individual income (using the employee’s W-2 income or rate of pay, or the applicable federal poverty line) is greater than (approximately) $2,105.26 ($200 / .095) per month. Moreover, even with respect to the full-time employees, if any, whose individual income is less than $2,105.26 per month, Employer X still
will only be subject to the Affordability Penalty if (i) the employee’s household income is less than $2,105.26 per month; and (ii) the employee qualifies for and obtains a premium tax credit. Thus, for example, if the employee is eligible for coverage under a government health care program, such as Medicaid, or if the employee is covered (or is offered coverage) under a health plan sponsored by the employee’s spouse’s employer that is affordable and provides minimum value, the ACA would preclude the employee from obtaining a premium subsidy (regardless of the employee’s individual or household income), and the employer would thus not be subject to the Affordability Penalty with respect to the employee.

7. What alternatives may be available?

Not surprisingly, in view of the potential risks and the myriad rules and exceptions associated with the Employer Mandate, many in the health insurance industry are promoting various alternative approaches to existing health insurance plans. In particular, some employers reportedly are considering various types of high deductible, and so-called “skinny” (or “bare bones,” or “low cost” plans), and high-deductible plans, as well as self-insurance.16 In regard to these, and other potential alternatives:

- **“Skinny” / “Bare Bones” / “Low Cost” plans**

  Skinny, bare bones or low cost plans (i.e., “low cost plans”), as the name(s) would suggest, can be obtained at very low cost, but also provide only minimal health benefits. Many do not cover hospital stays or doctor visits, for example. The value of a skinny or low cost plan is that it provides a large employer with a health plan that (presumably) provides minimum essential health coverage. That is, the plan enables a large employer to, for comparatively low cost, avoid the Coverage Penalty under §4980H(a). Also, for some employees, it may be more affordable to purchase coverage through the employer’s low cost plan than to purchase coverage through an insurance exchange, even if the employee qualifies for a premium tax credit, since exchange plans must include essential health benefits.

  On the other hand, such low cost plans may not provide minimum value. Presumably, then, a large employer would only offer a low cost plan to its employees as an alternative to a more robust, but costlier plan, or if the employer has determined that is less costly to offer the low cost plan and pay the Minimum Value Penalty for each full-time employee who qualifies for and obtains a subsidy than to offer a plan with more or better benefits.

- **High deductible plans**

  Likewise, while high deductible plans may provide more benefits than a skinny or low cost plan, such plans require employees to pay a larger (sometimes much larger) portion of the costs of the plan benefits, in the form of out-of-pocket expenses (deductibles, copays, etc.), in lieu of a higher premium. Here again, while such a plan may be favorable in that it provides comparatively more benefits, at lower cost to the employee, and thus may be attractive to an employer with a younger, healthier workforce, for example, the plan may be hard-pressed to avoid the Minimum Value Penalty.

---

In any event, the bottom line is that a large employer that is considering some form of low cost or high-deductible health plan, or some other plan alternative, should be aware of any potential exposure under Section 4980H(b).

- **Self-insured health plans**

  Self-insured plans are exempt from many requirements of the ACA, including certain taxes and fees, as well as the requirement to provide essential health benefits. Consequently, some employers are reportedly considering self insurance as an ACA planning strategy.\(^\text{17}\) Whether this is an appropriate strategy, in particular circumstances, is beyond the scope of this Client Alert; however, it should be pointed out that self-insured plans are *not* exempt from the Employer Mandate.

- **Limiting hours to avoid “full-time” designation**

  Perhaps an unintended consequence (one among many, potentially) of the Employer Mandate is that, by setting the “full-time” employee threshold at 30 hours of service per week – that is, lower than more traditional “full-time” thresholds for employee benefits, and other purposes – the Mandate invites large employers (or at least large employers that may be particularly cost conscious) to decrease hours of service for individual employees in order to limit the number of full-time employees to whom the employer must offer health coverage to avoid a penalty under Section 4980H. With this in mind, perhaps it is not surprising that many employers that in the past have not offered health coverage to certain classes of employees (e.g., restaurants, hotels, agricultural businesses) are reportedly considering cutting employees hours to keep them under the 30-hour per week threshold.\(^\text{18}\) These and other employers considering such action must of course, weigh the potential costs savings against other, more intangible factors, such as whether or to what extent offering health coverage promotes employee loyalty or provides the employer an advantage in attracting quality personnel.

- **Temporary employees / staffing agencies**

  While the IRS specifically declined, in the Final Rules, to adopt any presumption that temporary employees provided by staffing agencies are employed by the staffing agency, in most cases, this will presumably be the case. Consequently, large employers may be considering using temporary staff to limit their total number of employees or their number of full-time employees. Large employers considering such an approach, however, should exercise caution in structuring temporary staffing engagements and arrangements. In the Final Rules, the IRS has made it clear that it intends to scrutinize arrangements that utilize staffing agencies to circumvent the Employer Mandate. The IRS also anticipates issuing additional guidance in regard to potentially abusive arrangements involving staffing agencies.\(^\text{19}\)

---


\(^\text{19}\) See 79 Fed. Reg. at 8556-57.
8. What do I have to report?

Section 6056 requires that, for each calendar year beginning with 2015, large employers must file an annual information return with the IRS and deliver an individual statement to each of its full-time employees. Likewise, Section 6055 requires that, each year, large employers that maintain self-insured health plans must file an information return with the IRS and deliver an individual statement to each employee covered under the employer’s plan. The IRS has indicated that it will publish a specific form, Form 1095-C, that large employers may use to meet the reporting requirements under both Section 6055 (if applicable) and Section 6056. As of the date of this Client Alert, however, the new form has not been published.

The annual information returns required by Section 6055 and Section 6056 must be filed not later than March 31 of the year following the calendar year to which the return relates. The required individual statements must be delivered not later than January 31 each year.

- **Section 6055: Large employers with self-insured health plans**

  According to the Final Rules, the information that a large employer with a self-insured health plan will be required to include in Form 1095-C to comply with Section 6055 will include the name, address and taxpayer identification number (“TIN”) for every employee covered under the plan (regardless of whether the employee is a full-time employee under Section 4980H), and for any of the employee’s dependents covered under the employer’s plan, and the calendar months in which each of them was covered under the employer’s plan. According to the IRS, the information it gathers pursuant to Section 6055 will be used to regulate and enforce the Individual Mandate and to police the issuance of premium tax credits.

- **Section 6056: All large employers**

  The Final Rules indicate that Form 1095-C will require large employers to provide information including the following to meet their obligations under Section 6056:

  (i) A certification, with respect to each calendar month, during the year that the employer offered (or did not offer) its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under the employer’s health plan; and

  (ii) For each calendar month during the year, the number of the employer’s full-time employees and the months during the year for which the employer offered each such employee (even an employee who was not a full-time employee in some months) minimum essential health coverage; and

  (iii) For each calendar month during the year, the cost for a full-time employee to enroll in self-only coverage under the employer’s health plan; and

---

20 The March 31 filing deadline is for large employers that file information returns electronically. For any large employer that does not file electronically, the deadline is the last day of February. The Final Rules require that large employers filed information returns electronically if they file 250 or fewer returns pursuant to Section 6055 and Section 6056.

21 A large employer that is not able to obtain the TIN for a dependent covered under its plan after making three (3) separate attempts will not be required to provide the dependent’s TIN.
(iv) The name, address and TIN for each full-time employee covered (at any time) during the year under the employer’s health plan.

Section 6056 will also require a large employer to report additional information using certain indicator codes. The codes will indicate, for example, the employer’s total number of employees (full-time and non-full time) for each month during the year, whether an employee’s spouse was eligible to enroll in the employer’s plan, and, with respect to each month during the calendar year, whether an employee (full-time or non-full time) not offered coverage was not covered due to an applicable waiting period or because the employee was not a full-time employee.

To help alleviate the reporting burden under Section 6056 for certain employers, the Reporting Final Rules provide two simplified alternatives to the “general” method described above. Specifically:

- The Final Rules permit a large employer to provide limited information with respect to any full-time employee (and the employee’s dependents) if the employer offers minimum essential coverage that provides minimum value and is affordable (using the federal poverty line safe harbor under Section 4980H) to the employee and the employee’s dependents and the employee’s spouse each month during the year (a “qualifying offer”). The Final Rules also provide a transition rule for large employers reporting with respect to 2015. Specifically, the Rules provide for a special certification for any large employer that makes an offer of coverage described above with respect to 95 percent of its full-time employees (and their dependents and spouses).

- Also, if a large employer offers minimum essential coverage that provides minimum value and is affordable (using any of the safe harbors available with respect to Section 4980H) to 98 percent or more of its employees (full-time and non-full time), and their dependents and spouses, the Final Rules will not require the employer to identify (or provide the number of) its full-time employees.

- **Failure to file penalties**

  Failure to timely file the information returns required by Section 6055 and Section 6056 may trigger penalties similar to existing IRS failure-to-file penalties. Each member entity in a controlled group must meet the reporting requirements of Section 6055 (if applicable) and Section 6056; if it does not, the member entity may be subject to failure-to-file penalties.

  Here, again, however, the Final Rules provide for transition relief for 2015. Specifically, the Final Rules indicate that the IRS will not impose penalties on a large employer that makes a good faith effort to meet the reporting requirements under Section 6056 (or Section 6055, if applicable) in 2016 (i.e., reporting with respect to 2015).

---

22 In general, penalties to which a large employer may be subject for failing to file an information return with the IRS, or failing to provide an individual statement to an employee, pursuant to Section 6055 or Section 6056 would be similar to penalties currently imposed with respect to information returns and payee statements under Section 6721 and Section 6722 in the Code.
Again, the information in this Client Alert is not intended to answer every question, or address every issue, that a large employer may be confronted with in planning for the Employer Mandate. Nor should any information in this Client Alert be construed as legal advice. If you have specific questions regarding the Employer Mandate, or whether or how the Mandate may apply to you, please contact our firm or other appropriate legal counsel.