CLIENT - ALERT

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TO: Clients and Contacts

FROM: D. Brent Wills, Esq.

RE: ***Affordable Care Act*** **–** Employer Mandate Review - Nine Things To Do Now

DATE: March 18, 2015

As you are probably aware, the Affordable Care Act's (the "ACA's")[1] "employer mandate" is now in effect. Beginning as of January 1, 2015, "large" employers (generally, employers with 50 or more employees, determined for ACA purposes) must offer health insurance coverage to their full-time employees or pay a penalty, all in accordance with Section 4980H of the Internal Revenue Code (the "Code") and its related regulations (collectively, "Section 4980H"). Certain large employers may qualify for so-called "transition relief" to delay imposition of any penalties under Section 4980H until later this year, or until 2016. In addition, large employers are now subject to ACA reporting requirements under Section 6056 of the Code and its related regulations (collectively, "Section 6056") and must deliver certain notices to their employees and to file information returns with the Internal Revenue Service (the "IRS") beginning next year. Large employers that sponsor self-insured health plans may be subject to additional reporting requirements under Section 6055 of the Code and its related regulations (collectively, "Section 6055").

As noted above, Section 4980H may apply to different large employers at different times. Also, the implications of Section 4980H may be vastly different, depending on each large employer's particular circumstances. Nonetheless, there are a number of steps many large employers may take now, if they haven't already, to apprehend and address their risk, if any, of any Section 4980H penalties. Moreover, all large employers should by now be implementing strategies and procedures to gather the necessary data to comply with the reporting requirements under Section 6055 and Section 6056 (collectively, the "Reporting Rules"). Significantly, the Reporting Rules apply with respect to all large employers, regardless of their number of employees, and regardless of whether they qualify for any transition relief under Section 4980H, beginning as of January 1, 2015.

This Client Alert sets forth nine steps large employers may take now to better position themselves to eliminate or minimize their exposure to penalties under Section 4980H and comply with the Reporting Rules.

[1] See Patient Protection and Affordable Care Act, Public Law 111-148 (Mar. 23, 2010).

1. Stay tuned.

Notwithstanding that the employer mandate is now in effect, there is still considerable uncertainty regarding the validity and implementation of the ACA, in general, and the employer mandate, specifically. As you are likely aware, the United States Supreme Court recently heard oral arguments in *King v. Burwell*,[2] a case challenging the ability of federal health insurance exchanges established last year pursuant to the ACA to furnish individuals with subsidies, called premium tax credits, to assist them in purchasing health insurance through the exchange. Given that the federal exchange operates in a significant majority of the States (i.e., the States, including the State of Alabama, that elected not to establish their own health insurance exchanges), the potential implications of *King v. Burwell* in regard to the ongoing viability of the ACA are significant. Moreover, because Section 4980H penalties are triggered only in the event one or more "full-time" employees receives a premium tax credit, the outcome of *King v. Burwell* could bear significantly on whether and how the IRS may enforce the employer mandate, at least in the States (again, including Alabama) that utilize the federal exchange.

Besides the events at the Supreme Court, legislation introduced in both the United States Senate[3] and the U.S. House of Representatives[4] seeks to modify the definition of "full-time employee" for ACA purposes. Currently, "full-time" means 30 or more hours of service per week on average. Both the Senate and House proposals would redefine "full-time" to mean 40 hours per week. As evidenced by the discussion in this Client Alert, modifying the definition of "full-time" in this manner likely would dramatically affect the impact of the employer mandate on large employers. In addition, in the event the Supreme Court ruling in King v. Burwell invalidates premium tax credits issued by the federal exchange, Republicans in the Senate have introduced legislation that would extend the credits until 2017 (i.e., until after the 2016 federal elections) and, at least as initially drafted, would repeal both the ACA's individual and employer mandates.[5]

Moreover, the IRS and other executive agencies continue to struggle to implement the employer mandate and numerous other ACA provisions, even as the employer mandate "goes live." This is to say nothing, again, of the significant controversies and uncertainties that have arisen over the implementation, thus far, of various Section 4980H provisions, how (and even whether) the IRS will (or will be able to) impose and collect

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[2] *David King, et al. v. Sylvia Burwell, Secretary of Health and Human Services, et al.*, United States Supreme Court, Docket 14-114. For additional information, please see, e.g., http://www.scotusblog.com/case-files/cases/king-v-burwell/.

[3] *Forty Hours is Full-time Act*, Senate Bill 30 114th Congress (2015). For additional information, please see, e.g., https://www.congress.gov/bill/114th-congress/senate-bill/30.

[4] *Save American Workers Act*, H.R. 30, 114th Congress (2015). For additional information, please see, e.g., https://www.congress.gov/bill/114th-congress/house-bill/30?q=%7B%22search%22%3A%5B%22hr+30%22%5D%7D.

[5] See *Preserving Freedom and Choice in Health Care Act*, Senate Bill 1016 114th Congress (2015). For additional information, please see https://www.congress.gov/bill/114th-congress/senate-bill/1016/text?q=%7B%22search%22%3A%5B%22Preserving+Freedom+and+Choice+in+Healthcare%22%5D%7D.

penalties under Section 4980H, and various other matters. (The Reporting Rules likely will also generate their share of controversy and uncertainty, in due time.)

In any event, from the perspective of a large employer, the watchword is simply, "stay tuned." The actions of the Supreme Court, the Congress and various regulating agencies could impact the employer mandate and its implementation in various ways, and large employers must stay informed to ensure they are in position to properly address the penalty provisions in Section 4980H and comply with the Reporting Rules on an ongoing basis.

2. Confirm *when* Section 4980H applies to you.

Again, the penalty provisions of Section 4980H took effect, generally, beginning January 1, 2015, but different large employers may be subject to penalties beginning at different times. This is because of two key items of transition relief included in IRS final regulations published last year:[6] transition relief for certain large employers with fewer than 100 employees, and transition relief for large employers that sponsor non-calendar year health plans.

(a) Transition relief for large employers with fewer than 100 employees

Notwithstanding that an employer has 50 or more employees (i.e., the employer is a "large" employer, within the meaning of Section 4980H), if the employer has fewer than 100 employees, calculated pursuant to the applicable provisions of Section 4980H,[7] the employer will not be subject to penalties under Section 4980H for any month during 2015. The IRS rules for counting employees in accordance with Section 4980H are discussed in Section 3 below.

(b) Transition relief for large employers that sponsor non-calendar year health plans

In addition to the transition relief available to large employers with fewer than 100 employees, IRS regulations also provide transition relief for large employers (regardless of whether they have fewer than 100 employees) that maintain non-calendar year health plans (i.e., health plans that have plan years that begin on a date other than January 1). Large employers that qualify for this transition relief will not be subject to penalties under Section 4980H for any month prior to the first month of their plan year that begins in 2015 (i.e., the 2015 plan year). Importantly, a large employer that qualifies for the transition relief available to large employers with fewer than 100 employees may also qualify for the transition relief available to large employers that maintain a non-calendar year health plan, in which case the employer would not be subject to a penalty under Section 4980H for any month prior to the first month of its plan year that begins in 2016 (i.e., the 2016 plan year).

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[6] See 26 USC §4980H; Shared Responsibility for Employers Regarding Health Coverage (Final Rule), Department of the Treasury Internal Revenue Service, 79 Fed. Reg. 8544 (Feb. 12, 2014).
[7] See 26 USC §4980H(c)(2); 26 CFR §54.4980H-2.

We caution employers, however, that both the transition relief available to large employers with fewer than 100 employees and the transition relief available to large employers that sponsor non-calendar year health plans are subject to very specific, and often confusing, conditions. The implications for large employers are significant: compliance (or non-compliance) with these conditions dictates when the IRS may first impose penalties on an employer under Section 4980H. With this in mind, we encourage large employers to consult an appropriate professional advisor prior to relying on either of these items of transition relief for planning purposes.

3. Confirm your employee count, and whether (and when) Section 4980H applies to you.

As noted above, the employer mandate applies generally to employers that have 50 or more employees, beginning as of January 1, 2015, but large employers that have fewer than 100 employees and meet certain conditions may qualify for transition relief to avoid any penalties under Section 4980H until 2016. In other words, for purposes of Section 4980H, it is critical *this year* not only whether an employer has 50 or more employees, but also whether the employer has 100 or more employees.

Section 4980H provides specific rules employers must follow to determine their number of employees. In general, employers must count their employees at the end of each calendar year; specifically, the employer must determine its *monthly average* number of employees during the calendar year. To do so, an employer must calculate the number of its employees *each month* during the year, taking into account both full-time employees (within the meaning of Section 4980H) *and part-time* employees (i.e., "full-time employee equivalents").[8] If the monthly average number of employees employed during the year is 50 or more, the employer will be deemed to be a "large" employer, subject to both the penalty provisions of Section 4980H (unless transition relief applies) and the Reporting Rules, every month during the ensuing calendar year, even if the employer's number of employees is reduced.

(a) Transition relief for calculating monthly average number of employees

As indicated above, Section 4980H generally provides that employers will determine their monthly average number of employees based on the calendar year. However, Section 4980H includes transition relief that permits employers to determine their monthly average number of employees for calendar year 2014, and thus whether the employer is a large employer for months during calendar year 2015, using any period of six (6) consecutive calendar months, rather than the entire year.[9] Employers whose number of employees vary from month-to-month may should consider whether applying

[8]For purposes of Section 4980H, an employee is "full-time" if the employee averages 30 or more hours per week. For purposes of calculating an employer's number of employees during any month, Section 4980H specifies that an employee to whom an employer credits 130 or more hours of service during the month will be deemed to be "full-time."

[9] See Final Rule, 79 Fed. Reg. at 8573.

this transition relief may enable them to avoid large employer status for 2015 (i.e., if their monthly average number of employees during any period of six consecutive months during calendar year 2014 is less than 50) or to avoid Section 4980H penalties until 2016 (i.e., if their monthly average number of employees during a similar period is fewer than 100).

(b) Seasonal worker exception

In addition to the above-described transition relief available this year, Section 4980H includes an exception from large employer status for employers that utilize seasonal workers.[10] The seasonal worker exception may also be used this year to qualify for the transition relief for large employers that have fewer than 100 employees. The exception is available, however, only if (i) the employer's number of employees does not exceed 50 (or 100, as the case may be) for more than 120 days (or four calendar months) during the year; and (ii) on any day, or during any period, when the employer's number of employees is 50 or greater (or 100 or greater, as the case may be), the employers number of non-seasonal employee is less than 50 (or less than 100, as the case may be). If the seasonal worker exception applies, a large employer may avoid large employer status, even if the employer's monthly average number of employees in a given year is 50 or greater. Likewise, even if a large employer's monthly average number of employees for calendar year 2014 is 100 or greater, the employer may avoid large employer status for 2015 if the seasonal worker exception applies.[11]

(c) Aggregation rules

Significantly, if an employer is part of a "controlled group" or an "affiliated service group" of employers, within the meaning of Section 414 of the Code (i.e., an "aggregated group"), the employees of the various employers within the group must be aggregated to determine the total number of employees in the group.[12] Even if some or all of the employers within an aggregated group, on their own, have fewer than 50 employees, if the group collectively has 50 or more employees, each employer within the group will be deemed to be a large employer subject, on its own, to the penalty provisions under Section 4980H and the Reporting Rules. Moreover, the IRS aggregation rules include certain attribution rules that may attribute an individual's or an entity's ownership in an employer to other, related or affiliated individuals or entities. Small employers that are part of an affiliated group of entities, or a group of entities (such as a family owned, or other closely held business) with overlapping ownership, should carefully consider the potential application of the aggregation rules, and whether these rules may require them

[10] For purposes of Section 4980H, "seasonal worker" means a worker who works on a seasonal basis as defined by the Department of Labor. Examples of seasonal workers include snow ski instructors employed exclusively during ski seasons and retail workers employed exclusively during holiday sales seasons. See 26 CFR § 54.4980H-1(a)(39). Significantly, note that "seasonal worker" is not synonymous with the term "seasonal employee" discussed in Section 7 herein.
[11] See 26 CFR § 54.4980H-2(b)(2).
[12] See 26 USC §4980H(c)(2)(B); 26 CFR §54.4980H-1(16).

to aggregate the employees within the group for purposes of determining their monthly average number of employees under Section 4980H.

4. Confirm *how* you will identify your "full-time" employees, and *when* you must offer them coverage to avoid a penalty under Section 4980H.

As you may be aware, both Section 4980H and the Reporting Rules are tied largely to a large employer's *full-time* employees.[13] As discussed further below, in order to avoid a penalty under Section 4980H, large employers must offer health insurance coverage that is affordable and provides minimum value to their full-time employees (and their dependents) each month. If a large employer fails to offer coverage, any resulting penalty will be calculated taking into account the employer's full-time employees. Similarly, the Reporting Rules require large employers to track and report the number of their full-time employees, and whether their full-time employees are offered coverage, on a month-to-month basis, and to furnish certain information each year to each of their full-time employees.[14]

Therefore, in order to avoid penalties under Section 4980H and comply with the Reporting Rules, large employers must, among other things, be able to identify and quantify their full-time employees. Likewise, different rules and circumstances, discussed in more detail below, may dictate or permit that a large employer determine whether different employees are full-time employees, and so whether the employees must be offered coverage to avoid a penalty, at different times. It is critical that large employers understand these distinctions, particularly given that a large employer may be subject to a penalty *in any month* in which it fails to offer affordable, minimum value coverage to the requisite number of its full-time employees.

Subject, potentially, to pending legislation in Congress, as discussed above, a "full-time" employee, for ACA purposes, is an employee credited with 30 or more hours of service per week. This definition begs a very important question, however: *How* does a large employer determine an employee's hours of service *per week?*

In very general terms, then, in order to avoid penalties under Section 4980H and comply with the Reporting Rules, large employers must understand *how* to identify full-time employees and *when* a full-time employee must be offered coverage to avoid a penalty. The short answer to these questions is (i) large employers must identify full-time employees by applying an appropriate *measurement period*; and (ii) large employers must offer coverage to their full-time employees every month, or during the appropriate *stability period*, depending on the applicable measurement period. Importantly, as discussed further below, the measurement period and stability period concepts apply differently to new hires and so-called "ongoing" employees.

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[13] Note, however, that an employee that is a "full-time" employee for purposes of Section 4980H and the Reporting Rules may not be a "full-time" employee within the meaning of Section 4980H.

[14] As discussed further in Section 6 below, large employers that sponsor self-insured health plans must also provide certain information to other (i.e., non-full-time) employees covered under the plan.

(a) Measurement period / Stability period

IRS regulations define two types of measurement periods: the "monthly" measurement period, and the "look back" measurement period. The monthly measurement period is the default approach to identify full-time employees under Section 4980H; however, as discussed further below, large employers may elect to use the look back measurement period in certain circumstances. As the name suggests, where the monthly measurement period applies, a large employer must determine whether an employee is a "full-time" employee each month – that is, each month, the employer must determine whether the employee is credited with 30 or more hours of service per week *during that month*. If so, the employer may be required to offer the employee health insurance coverage *during the next month* to avoid a penalty under Section 4980H.

The "look back" measurement period, on the other hand, is longer: where the look back method applies, the employer may select any period of three to twelve months to determine whether employees are full-time employees. That is, under the look back measurement period, large employers may determine whether an employer is credited with 30 or more hours or service per week *during the look back period*, rather than every month. An employee credited with an average of 30 or more hours of service per week over the course of the look back measurement period (as opposed to every month) will be deemed to be a full-time employee during a corresponding stability period (i.e., in *every month* during the stability period), regardless of the employee's actual hours during the stability period (i.e., even if the employee is credited with less than 30 hours of service per week during the stability period, or in any month during the stability period).[15] The stability period is generally the same duration as the corresponding measurement period, except that the duration of the stability period may not be less than six months.

(b) New hires / Ongoing employees

As noted above, application of the measurement period and stability period concept differs depending on whether the concepts are being applied in respect to a new hire or an ongoing employee. An "ongoing" employee, as defined in Section 4980H, means an employee who has been employed by a large employer for a specified period of time – specifically, for at least one full measurement period. Large employers may freely elect whether to utilize the monthly measurement period or the look back measurement period (referred to as the "standard" measurement period, in the case of an ongoing employee) to determine whether their ongoing employees are full-time employees. So, for example, if a large employer elects to use the maximum, twelve month (i.e., 52 week) standard look back measurement period (rather than the monthly measurement period, or a shorter look back period) in respect to its ongoing employees, any ongoing employee credited with 1,560 or more hours of service (i.e., 52 weeks multiplied by 30 hours of

[15] Large employers that elect to use a(n initial or standard) look back measurement period must use the same period (i.e., the same duration) for all employees, except that different look back periods may be used for hourly and salaried employees, for employees located in different states, and in some cases for union employees and employees subject to collective bargaining arrangements.

service per week) during the look back measurement period will be deemed to be a full-time employee, for ACA purposes, so that the large employer must offer coverage to the employee during an ensuing, 12 month standard stability period in order to avoid a penalty under Section 4980H.

Unlike ongoing employees, for whom a large employer may elect to use a standard look back measurement period to determine full-time status, with respect to new hires, the IRS rules are prescriptive: specifically, large employers may utilize the look back measurement period (referred to as the "initial" look back measurement period) only in respect to so-called "seasonal" employees, "variable hour" employees, and "part-time" employees. The initial look back measurement period is not available (i.e., the monthly measurement period must be used) with respect to new hires deemed to be "full time," as discussed below. In other words, when coverage must be offered to a new hire to avoid a penalty under Section 4980H may vary significantly depending on whether the employee is properly classified as a variable hour, seasonal or part-time employee, in which case the employer may defer an initial offer of coverage for as long as one year (i.e., if the employer selects the maximum, 12 month initial look back measurement period) without a penalty, or as a full-time employee, in which case an offer of coverage may be required much sooner. These distinctions may be of critical importance to large employers in certain industries, such as hotel and hospitality, retail and restaurant, agriculture and nursing home industries, where employee turnover is typically high – and so the likelihood that new hires will still be employed at the end of the applicable initial look back measurement period may be much lower than in other industries.

Whether an employee is a part-time, full-time, variable hour or seasonal employee must be determined as of the employee's start date, taking into account the relevant facts and circumstances on that date. If it is reasonable to expect, on the start date, that an employee will average 30 hours of service or more per week, beginning on the start date, the employee must be treated as a full-time employee, and the monthly measurement period applies. If it is reasonable to expect that the employee will average less than 30 hours of service or more per week, beginning on the start date, the employee will be treated as a part time employee, and the employer may elect to utilize an initial look back measurement period. If it cannot be reasonably determined, based on the relevant circumstances on the start date, whether the employee will average 30 hours of service or more per week, the employee may be treated as a variable hour employee, and the employer may use the initial look back measurement period to (ultimately) determine whether the employee is a full-time employee. Likewise, if the employee is a seasonal employee, even if the employee averages 30 or more hours of service per week, the employer may elect to use the initial look back measurement period to determine whether the employee is a full-time employee. Variable hour and seasonal employees are discussed in more detail in Section 8(b) below.

(c) Limited non-assessment period

Notwithstanding application of the rules in respect to measurement periods and stability periods, as discussed above, IRS regulations specify that large employers will not be subject to penalties under Section 4980H during certain periods, referred to as "limited non-assessment" periods. Perhaps most significantly, where a large employer appropriately elects to utilize the look back measurement period with respect to certain employees, no penalty will be imposed under Section 4980H during the applicable look back measurement period. So, in the case of a new hire, for example, whom the employee properly treats as a variable hour, seasonal or part-time employee (as opposed to full-time), no penalty will be imposed under Section 4980H in respect to the employee for any month during the applicable initial look back measurement period – even if the employee averages 30 or more hours of service per week in those months. On the other hand, if a new hire is properly treated as a new, full-time employee, notwithstanding that the monthly measurement period (that may otherwise require an offer of coverage each month) applies, IRS regulations generally do not require that the employer offer coverage to the employee prior to the first day of the fourth calendar month after the employee's start date.[16]

5. Get familiar with Reporting Rules and related forms, and begin capturing reporting data.

By way of review, the Reporting Rules require that large employers provide certain notifications to their employees, and file certain information returns with the IRS, beginning next year, in respect to calendar year 2015. Likewise, unlike Section 4980H, which provides numerous items of transition relief, some of which are discussed above, under the Reporting Rules, all large employers are on the same schedule – that is, every large employer (regardless of its number of employees, or whether the employer qualifying for transition relief under Section 4980H) is responsible for reporting for all months beginning with January, 2015. Significantly, in the case of an aggregated group of employers that meets the definition of a large employer (i.e. that collectively has 50 or more employees), each employer within the group (regardless of whether it has 50 or more employees itself) must independently comply with the Reporting Rules; consolidated reporting including multiple employer is not permitted.

(a) Form 1094-C: Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns

The Reporting Rules require that every large employer prepare and file Form 1094-C with the IRS not later than March 31 each year, beginning in 2016. The information solicited and included in Form 1094-C will relate to the preceding calendar year.[17] Among other things, the information is intended to notify the IRS whether the employer is or may be subject to the "big" penalty under Section 4980H(a), discussed below. For example, the employer must indicate in the Form 1094-C the number of its full-time employees during each month of the calendar year and whether the employer

[16] Note that (i) as discussed further below, this limited non-assessment period may effectively be pre-empted by other ACA provisions, such as the ACA provision limiting group health plan waiting periods to 90 days, subject to certain exceptions; and (ii) if the coverage ultimately offered to the employee does not provide minimum value, the employer may be subject to a penalty under Section 4980H(b), discussed below, for the months during the (otherwise) limited non-assessment period.

offered health coverage to a sufficient number of its full-time employees in each month to avoid a penalty under Section 4980H(a) – or that the employer qualified for transition relief, so that Section 4980H(a) did not apply in that month. Large employers will identify their full-time employees using the monthly and/or look back measurement periods discussed in Section 4 above.

(b) Form 1095-C: Employer Provided Health Insurance Offer and Coverage

The Reporting Rules also require that every large employer prepare and furnish Form 1095-C[18] to its employees each January, beginning in 2016. The Form 1095-C includes three parts. Part I identifies the employee and the employer. Part II confirms, for each month during the year, whether an employee was offered health coverage and, if so, certain information regarding the offer, including whether the offered coverage was affordable and provided minimum value. Part III identifies, again for each month during the year, the family members and other individuals covered by the offer of coverage to the employee.[19] All large employers must complete Part I and Part II; only large employers that sponsor self-insured health plans are required to complete Part III. All large employers, regardless of whether self-insured, must complete Form 1095-C, as described above, for each of their full-time employees and deliver the completed Form 1095-C to the employee not later than January 31 each calendar year.[20] Like the Form 1094-C, the information reported in Form 1095-C will relate to the preceding calendar year.

Although Form 1095-C is only one page, the reporting requirements are substantial, particularly in Part II. The information in Part II will be reported, for the most part, using indicator codes. The IRS instructions for Form 1095-C include two series of indicator codes, totaling 18 distinct codes.[21] Review of the indicator codes reflects that, in order to complete Form 1095-C, a large employer will need to capture (at least) the following information for each of its employees for every month during the year:

- Was the employee employed during the month?
- Was the employee a *full-time* employee during the month?
- Did *non-calendar year transition relief* apply to the employee?
- Was the employer eligible for *multiemployer interim relief*?
- Was the employee in a *limited non-assessment period*?
- Did the employee receive an offer of coverage for the month?
- Did the employee enroll in the offered coverage?

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[17] Form 1094-C is available online at http://www.irs.gov/pub/irs-pdf/f1094c.pdf
[18] Form 1095-C is available online at http://www.irs.gov/pub/irs-pdf/f1095c.pdf
[19] Significantly, Part III requires that the (self-insured) large employer gather and report the social security numbers and dates of birth for each individual covered under the employer's plan.
[20] Because January 31, 2016 falls on a weekend, large employers will not be required to deliver Form 1095-C to their full-time employees until February 2, 2016.
[21] The indicator codes are set forth on pages 7 and 8 in the instructions to Form 1094-C and Form 1095-C. The instructions are available online at http://www.irs.gov/pub/irs-pdf/i109495c.pdf.

- Did the offer include “dependent” coverage (discussed below)?
- Did the offer include the employee’s spouse?
- Did the offered coverage provide *minimum value* (discussed below)?
- What is employee’s share of the (lowest) *single* premium for *minimum value* coverage?
- Which affordability “safe harbor” (W-2, rate of pay, FPL) applies to the employee?

As noted above, Form 1095-C must be prepared and delivered to every full-time employee; large employers should be aware that this includes any individual who was a full-time employee in any month during the calendar year, regardless of whether the employee was not a full-time in other months, whether the employee was employed at the end of the year, or whether the employee was offered or enrolled in coverage in the employer’s health plan.

Moreover, large employers should be aware that, like the Form 1094-C, the IRS will utilize the information in the Form 1095-C to determine whether the reporting in employer is subject to penalties under Section 4980H. Consequently, it is critical that large employers have a thorough understanding not only of the rules under Section 4980H and the Reporting Rules, but also of the various indicator codes to be used to complete Part II.

In any case, in order to facilitate compliance with the Reporting Rules, and to ensure no penalties are (inadvertently or otherwise) triggered under Section 4980H, we recommend that large employers, if they have not already done so, review Form 1094-C and Form 1095-C, in coordination with their appropriate advisors, to formulate strategies in respect to the Reporting Requirements, and to begin compiling necessary reporting data.

6. Identify and address any potential penalty exposure under Section 4980H

Section 4980H includes three penalty provisions. Section 4980H(a) requires, in general, that, each month, a large employer must offer health insurance coverage to not less than 95 percent of its full-time employees and their dependents (i.e., their children under the age of 26), or pay a penalty in the amount of $167 per month multiplied by the employer’s total number of full-time employees during the month, not taking into account the first 30. So, for example, if a large employer that has 200 full-time employees in a particular month does not offer coverage to at least 190 of those employees (and their children under age 26) for the month, the employer may be subject to a penalty under Section 4980H(a) for the month, in the amount of $28,390 ($167 x [200-30]) for the month. If the employer does not offer coverage for any month during the year, and no other circumstances change, the employer may be subject to aggregate penalties under Section 4980H(a) for the year in the amount of $340,680 ($28,390 x 12). This is the “big” penalty referenced above.

Even if a large employer offers coverage sufficient to avoid the "big" penalty under Section 4980H(a) in a particular month, the employer may still be subject to either of two penalties under Section 4980H(b) if (i) the employer's health plan does not provide *minimum value*; or (ii) the coverage the employer offers is *not affordable* to one or more of the employer's full-time employees. If the employer's plan does not provide minimum value, the employer would be subject to a monthly penalty in the amount of $250 multiplied by the number of its full-time employees who receive a premium tax credit for the month. Even if the employer's plan provides minimum value, the employer may still be subject to a penalty for the month in the amount of $250 for each full-time employee for whom coverage is not affordable, if the employee receives a premium tax credit for the month.

Also, similar to the Reporting Rules, the penalty provisions of Section 4980H will apply separately to each employer within an aggregated group (discussed in Section 3 above) that meets the definition of a large employer. That is, even if an employer has fewer than 50 employees itself, if it is part of an aggregated group that collectively has 50 or more employees, the employer (and each other employer in the group) may be subject to a penalty under Section 4980H in the same manner as if the employer had 50 or more employees.

As noted previously, IRS regulations provide a number of items of transition relief that may limit the applicability or the amount of the Section 4980H penalties for months during 2015 – or, in the case of a large employer that qualifies for the transition relief discussed above for large employers with non-calendar year health plans, for months during the employer's 2015 plan year. With this in mind, large employers may take the following steps to avoid penalties under Section 4980H for months during 2015 and during 2016 and later years.[22]

(a) 2015

(i) *Qualify for transition relief available to large employers that have fewer than 100 employees*. As discussed in Section 2 above, Section 4980H includes transition relief that precludes the IRS from imposing penalties under Section 4980H for any month during 2015 (including any month during the employer's 2015 plan year that falls in 2016, if applicable) with respect to large employers that have fewer than 100 employees and meet certain conditions. As noted above, large employers that are not certain whether they have 100 or more employees should review Section 3 and the related provisions in Section 4980H, in coordination with appropriate advisors, to confirm their employee count.

(ii) *Confirm that the employer has not more than 80 full-time employees*. As noted above, in general, the "big" penalty under Section 4980H(a) will be calculated not taking into account a large employer's first 30 full-time employees. Transition relief

[22] Please note the steps set forth in this Section 6 are intended to enable a large employer to eliminate or avoid penalties under Section 4980H to the maximum extent possible. Some employers may determine, for economic or other reasons, that paying a penalty is preferable, in their circumstances.

included in IRS regulations increases this 30 full-time employee "carve out" to 80 for 2015 only. That is, even if a large employer's monthly average number of employees for 2014 is 100 or greater, so that the employer is deemed to be a large employer during 2015, the employer is still not subject to a penalty under Section 4980H in any month (including any month during the employer's 2015 plan year that falls in 2016, if applicable) when the employer's total number of *full-time* employees is 80 or less.[23] The number of a large employer's full-time employees in any month must be calculated using the appropriate measurement period, as discussed in Section 4 above.

Significantly, however, in the case of an aggregated group of large employers, the 80 full-time employee carve out described above must be allocated among the employers within the group. So, for example, if, in a given month in 2015, an aggregated group that collectively meets the definition of large employer under Section 4980H consists of four employers each of which has 50 full-time employees but none of which offers health insurance coverage, the 80 full-time employee carve out available to calculate the "big" penalty in months during 2015 would be allocated equally among the four employers, or 20 to each of them. That is, notwithstanding that each of the employers in the group had 80 or fewer full-time employees, after application of the aggregation rules, each employer would be subject to a penalty for the month under Section 4980H(a) in the amount of $5,010 [$167 x 50 – 80(50 /(50 x 4))], or $20,040 for the group ($5,010 x 4).

(iii)*Offer health coverage to at least 70 percent of its full-time employees (and their children under age 26) to avoid the "big" penalty under Section 4980H(a)*. As noted previously, to avoid the "big" penalty under Section 4980H(a) in any month, a large employer generally must offer health coverage for that month to not less than *95 percent (95%)* of the employer's full-time employees *and* their children under the age of 26. Transition relief is available, however, in respect to both these thresholds. Specifically, to avoid the "big" penalty in any month during 2015 (including months in 2016 included in the employer's 2015 plan year, if applicable), a large employer must offer coverage to not less than *70 percent (70%)* of its full-time employees for the month. In addition, large employers not currently offering dependent (child) coverage may qualify for transition relief to avoid the "big" penalty (so long as the employer offers coverage to 70 percent of its full-time employees), in certain circumstances.[24]

(iv)*Confirm the offered coverage provides minimum value.* Section 4980H(b) specifies that a health plan provides minimum value if it is responsible for paying at least 60 percent of the costs of benefits available under the plan. As a practical matter, whether a health plan provides minimum value, within the meaning of Section 4980H(b),

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[23] Section 4980H further provides that the amount of any penalty under Section 4980H(b) in any month will not exceed the penalty that would be imposed for the month under Section 4980H(a), if such penalty were imposed. In other words, if the amount of the penalty that could be imposed under Section 4980H(a) in a particular month is $0, there would also be no penalty for the month under Section 4980H(b).

[24] In regard to transition relief relating to dependent coverage, see Final Rule, Fed. Reg. at 8573-74.

is ultimately an actuarial determination. We recommend that large employers confirm with their health insurance carrier that their plan meets the minimum value standard.[25]

(v) *Determine the risk, if any, that the plan is not "affordable."* Even if a large employer offers coverage to a sufficient number of its full-time employees to avoid a penalty under Section 4980H(a), and even if the coverage provides minimum value and so avoids a penalty under Section 4980H(b), the employer may still be subject to a penalty under Section 4980H(b) in the event the coverage is not affordable to one or more full-time employees, within the meaning of Section 4980H. In general, an offer of coverage will be deemed to be affordable unless the cost to a full-time employee to obtain single coverage under the plan exceeds 9.5 percent of the employee's household income. A large employer likely will not know a full-time employee's household income, of course, but the employer may identify the full-time employees for whom the employer *may* have a risk of an affordability penalty. As an example, if a large employer requires its (full-time) employees to pay $150 per month toward the single premium under the employer's lowest cost plan that provides minimum value, the employer's exposure to an affordability penalty, if any, is limited to the (full-time) employees, if any, to whom the employer pays compensation less than (approximately) $1,579 per month ($150 divided by .095), or $18,947 per year. Even in the case of the full-time employees, if any, paid less than $1,579 for the month, there is no penalty under Section 4980H(b) (assuming the offered coverage provides minimum value) unless (i) the employee's *household* income for the month is less than $1,579; *and* (ii) the employee qualifies for and obtains a premium tax credit.[26]

(b) 2016

To avoid a penalty under Section 4980H for months during 2016 (including any month during the employer's 2015 plan year that falls in 2016, if applicable), steps a large employer may take would be generally similar to those identified above for 2015, with a few notable exceptions.

(i) No transition relief will be permitted for large employers with fewer than 100 total employees. Every large employer may be subject to penalties under Section 4980H for months during 2016 (or beginning with the first month of the employer's 2016 plan year, for an employer that qualifies for both the transition relief available to large employers with fewer than 100 employers and the transition relief for large employers with non-calendar year health plans).

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[25] For example, we understand that the "Blue Saver Bronze" plan offered by Blue Cross Blue Shield of Alabama will provide minimum value, within the meaning of Section 4980H, so that large employers that offer the "bronze" plan or better will not be subject to a "minimum value" penalty under Section 4980H(b). See, e.g., https://www.ibcbsal.com/sales/documents/1102395/1300608/Blue+Saver+Bronze.pdf/cd0db0e1-86c4-479e-bb4d-9ff6d5e87f76.

[26] In this regard, applicable rules preclude certain individuals from obtaining the premium tax credit, regardless of income level. These include, for example, individuals eligible for Medicare, Medicaid or other government healthcare programs or for affordable, minimum value coverage through a spouse, relative or other individual.

(ii) The 80 full-time employee "carve out" discussed above in respect to the "big" penalty under Section 4980H(a) would be reduced to 30. Again, the 30 full-time employee carve out must be allocated among the employers within an aggregated group.

(iii)The other transition relief available in respect to the "big" penalty under Section 4980H(a) for months during 2015 (except for months in 2016 included in the employer's 2015 plan year, if applicable) would not be available. In order to avoid the "big" penalty in months during 2016 (including any month during the employer's 2015 plan year that falls in 2016, if applicable), all large employers must offer health coverage to not less than 95 percent (95%) of the employer's full-time employees and their children under the age of 26.[27] This is where the "rubber meets the road," in respect to Section 4980H; given that the margin for error with respect to the "big penalty" under Section 4980H(a) will be considerably thinner in 2016 than in 2015, large employers should ensure that (as soon as possible, but not later than the beginning of their 2016 plan year) they have adequate systems and procedures in place to, each month, (a) accurately determine the number of their full-time employees for the month; and (b) confirm that coverage is offered for the month to not less than 95 percent of the employer's full-time employees and the employees' children under 26.

7. Review your health plan eligibility provisions.

Large employers, especially large employers that may be modifying the terms for eligibility in their health plan in response to Section 4980H, should review eligibility provisions in appropriate plan documents to determine the changes, if any, needed to, for example, incorporate the ACA's definition of "full-time employee," application of the appropriate measurement periods, and so on. Large employers that have fully insured health plans may need to examine, and possibly revise, their group insurance contracts and any certificates of coverage. Large employers that sponsor self-insured health plans may need to examine, and possibly revise, the written plan document and the summary plan description required by the ACA. Likewise, "wrap" plans, or similar plans, whether fully insured or self insured, may include other documents that address eligibility.

Large employers should also consider whether eligibility terms for other benefit plans (e.g., cafeteria plan, dental or vision plans, flexible spending accounts) may need to be updated. Likewise, large employers should consider whether steps they may be taking to address Section 4980H (e.g., application of measurement periods) may impact their obligations under COBRA or other, similar employment laws, and whether changes are needed to their employee handbook. As a practical matter, if changes are needed to health plan or other documents, large employers may consider, in lieu of amending the various documents to include the (potentially lengthy) explanations of measurement periods, etc., simply creating a separate policy addressing ACA / Section 4980H matters, and incorporating the policy into the various plan documents by reference.

[27] In the case of a large employer that has fewer than 100 full-time employees, Section 4980H(a) provides that the "big" penalty will not be imposed so long as the employer offers coverage to "all but five" of its full-time employees – i.e., even if the number of full-time employee offered coverage for the month is less than 95 percent of the employer's total number of full-time employees.

8. Identify special rules and issues that may apply to you, and plan accordingly.

There are numerous rules and issues within the employer mandate and other sections of the ACA not specifically addressed in this Alert that may affect certain employers. The items highlighted in this Section 8 are not intended to comprise a complete list of these types of issues. Nonetheless, we encourage large employers to consider whether and how they may be affected by these items, in their particular circumstances.

(a) Independent contractors

There is every reason to believe that the IRS will scrutinize independent contractor arrangements more often and more closely to enforce the employer mandate and other ACA provisions. Improperly classifying workers as independent contractors may understate an employer's numbers of employees under Section 4980H, so that, for example, the employer may mistakenly believe that it either is not subject to the employer mandate (i.e., that it has fewer than 50 employees) or that it qualifies for the transition relief discussed herein available to large employers with fewer than 100 employees. Moreover, if a worker improperly classified as an independent contractor averages 30 or more hours of service per week, the employer may be required to offer health coverage to the worker (and the worker's dependents) in order to avoid a penalty under Section 4980H(a) or (b). With this in mind, employers that utilize "contract" or "1099" workers should ensure they have a thorough understanding of the IRS rules distinguishing between independent contractors and employees, and apply them whenever appropriate.[28]

(b) Variable hour and seasonal employees

As noted previously, certain large employers (including large employers in the hotel and hospitality, restaurant and agricultural industries, for example) may have a special interest in whether and when newly hired employees may be classified as "seasonal" or "variable hour" employees, as opposed to full-time employees: the employer may utilize an initial, look back measurement period, and thus potentially delay an offer of health coverage, in respect to seasonal and variable hour employees, but not in respect to full-time employees.

Section 4980H defines *seasonal employee* as an employee (for example, a snow ski instructor, or a retail worker hired to work the holiday season) hired into a position for which the customary period of employment, due to the nature of the position, is six months or less, and begins at approximately the same time each calendar year, such as

[28] A detailed discussion of the IRS rules distinguishing between employees and independent contractors is beyond the scope of this Client Alert. For additional information regarding the IRS rules, please visit the IRS website, at http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Independent-Contractor-Self-Employed-or-Employee.

summer or winter.[29] Significantly, a large employer may select the look back measurement period for a newly hired seasonal employee even if the seasonal employee averages 30 or more hours of service per week while employed.

As noted previously, a new hire may only be treated as a *variable hour employee* if the employer cannot reasonably determine, as of the employee's start date, whether the employee will average 30 or more hours of service per week. because the employee's hours are variable or otherwise uncertain. The IRS provides a list of factors a large employer should consider in determining whether the employer may treat a new hire as a variable hour employee: whether the employee is replacing an employee who was a variable hour employee, whether hours of service credited to employees in similar positions actually vary above and below 30 hours or service per week, and whether the employee's position is advertised, or otherwise communicated to the employee (in a job description or contract, for example) as requiring hours of service that may vary above and below 30 hours of service per week. The list is not exhaustive, and no single factor is by itself determinative. Significantly, the employer may *not* take into account the likelihood that the employee's employment may terminate prior to the end of the initial measurement period.[30]

(c) Rehire and break in service rules

IRS regulations provide certain rules whereby a large employer may treat an employee as having been terminated and rehired – so that, upon the deemed rehiring, the employee would begin a new (initial) measurement period, if available – following a period during which the employee is not credited with hours of service. Specifically, a large employer generally may treat an employee as having been terminated and rehired, for purposes of Section 4980H, (i) if the employee is not credited with any hours of service for not less than 13 consecutive weeks between the dates the employee is treated as having been terminated and the date the employee returns to work;[31] or (ii) if the employee is not credited with any hours of service during a period of not less than 4 consecutive weeks, if the period exceeds the number of weeks the employee was employed immediately prior to the beginning of the period.[32]

(d) Staffing firms

Section 4980H poses a variety of challenges to staffing firms and their clients. Among other things, staffing firms must be diligent in monitoring whether particular employees are, as a legal matter, the common law employee of the staffing firm or its client, using the common law factors used to distinguish between employees and independent contractors, as noted in subsection (a) above.

[29] Note that IRS regulations define "seasonal employee" differently from "seasonal worker," a term used in connection with the seasonal worker exception discussed in Section 3 herein.
[30] See 26 CFR §54.4980H-1(49).
[31] See 26 CFR §54.4980H-3(c)(4)(i) and 3(d)(6)(i); Final Rule, 79 Fed. Reg. at 8560-61.
[32] See 26 CFR §54.4980H-3(c)(4)(iv) and 3(d)(6)(iv).

Also, the variable hour employee definition and the rehire and break in service rules may have significant application to staffing agencies. In regard to the former, IRS regulations specify that employees hired by staffing agencies will not be deemed to be variable hour employees; that is, staffing agencies should generally apply the rules and factors dealing with variable hour employees in the same manner as other large employers.[33] The regulations do, however, include a series of additional factors large employers should consider (i.e., in addition to the factors generally applicable to determining whether a new hire is a variable hour employee, as noted in subsection (c) above).[34]

IRS regulations also specify that, in cases where a client of a staffing firm, and not the firm itself, is the common law employer of an employee, an offer of coverage made the staffing firm on behalf of its client under a health plan established or maintained by the staffing firm may be treated as made by the client, but only if there is a cost – that is, only if the fee the client employer would pay to the staffing firm for an employee enrolled in health coverage under the plan is more than the fee the client employer would pay the staffing firm for the same employee if the employee does not enroll in the plan.[35]

(e) Certain employees

The IRS has acknowledged that the rules implementing Section 4980H are not easily applied with respect to certain employees whose hours of service may be particularly difficult to track. These include adjunct teaching faculty employed by educational organizations, commissioned salespeople, airline employees, and healthcare and other worker whose work includes on-call hours and coverage. It is expected that the IRS will address these employees and situations in future rulemaking. Until further guidance is issued, large employers may use any reasonable method to credit hours of service to such employees that is consistent with Section 4980H.[36]

(f) "Skinny" health plans

Media reports indicate that at least some large employers will, or are at least considering, offering employees coverage under a low cost, so-called "skinny" health plan.[37] There is no precise definition for a "skinny" plan, but such plans are generally considered *not* to provide minimum value, as discussed in Section 7 above. Skinny plans may be offered as an alternative to coverage that meets the requirements of Section 4980H in respect to minimum value and affordability, for example, to permit lower earning employees to purchase lower cost coverage to avoid a penalty under the ACA's

[33] See Final Rule, 79 Fed. Reg. at 8556-57.
[34] See 26 CFR §54.4980H-1(49)(ii)(B); Final Rule, 79 Fed. Reg. at 8556-57.
[35] See 26 CFR §54.4980H-4(b)(2); Final Rule, 79 Fed. Reg. at 8566.
[36] See Final Rule, 79 Fed. Reg. at 8551.
[37] See, e.g., Jay Hancock, 16% of Large Employers Plan to Offer Low-Benefit 'Skinny' Plans Despite ACA: Survey, Kaiser Health News (Aug. 13, 2014), available at http://kaiserhealthnews.org/news/16-percent-of-large-employers-offer-low-benefit-skinny-plans/.

individual mandate, or as a stand-alone product, presumably to enable the employer to avoid the "big" penalty under Section 4980H(a).[38] Large employers considering the latter approach should consider their potential exposure to a penalty under Section 4980H(b) if the plan does not provide minimum value. In particular, large employers should be aware that the IRS recently announced that plans that do not cover in-patient hospitalization or physician services will *not* satisfy the minimum value standard.[39]

(g) ACA health plan reforms / 90-day waiting period

The ACA includes a serious of reforms to group health insurance plans, including specific reforms eliminating exclusions for pre-existing conditions and certain spending limits, restrictions on certain out-of-pocket obligations, coverage for preventive services without cost sharing, and so on, many of which are already effective.[40] Each of these reforms may be enforced by the imposition of the $100 per day penalty under Section 4980D. Penalties under Section 4980D may be even more severe than potential penalties under Section 4980H, depending on the circumstances. In any case, large employers should be vigilant regarding compliance with these reforms, in addition to the employer mandate.[41] In particular, large employers should be mindful of the ACA restriction that limits group health plan waiting periods to 90 days. The 90-day period may be extended, in an appropriate circumstances (for example, if eligibility is conditioned on satisfaction of certain factors not related to time, or on completion of a bona fide orientation period that does not exceed one month), but in many cases may expire prior to the date a large employers is obligated to offer coverage to a new hire to avoid a penalty under Section 4980H (i.e., not later than the first day of the fourth full calendar month following the start date, as discussed in Section 4(c) above). The 90-day restriction became effective in respect to certain group health plans beginning in 2014.

(h) Anti-discrimination rules

In general, employers have historically been (and are currently) permitted to offer different health coverage to different groups of employees at their discretion, at least in the case of fully insured plans.[42] Employers that sponsor self-insured health plans currently are subject to certain prohibitions against discriminating in the provision of health coverage in favor of so-called "highly compensated" employees.[43] Non-discrimination rules also apply in respect to cafeteria plan contributions.[44] Guidance

[38] See, e.g., Anna Wilde Mathews and Julie Jargon, Companies Try to Escape Health Law's Penalties, Wall Street Journal (Oct. 21, 2014), available at http://www.wsj.com/articles/companies-try-to-escape-health-laws-penalties-1413938115#livefyre-comment.
[39] See IRS Notice 2014-69, available at http://www.irs.gov/pub/irs-drop/n-14-69.pdf.
[40] A comprehensive list of the ACA's group health plan reforms is set forth in
[41] Already, this author has learned anecdotally of numerous instances of non-compliance with these various market reforms, presumably attributable to a failure by the plan to make timely plan modifications to comply with the reforms.
[42] Differences in coverage should be based on bona fide employment categories, such as hourly and salaried employees, specific job descriptions, etc.
[43] See 26 USC §105(h).
[44] See 26 USC §125(b).

regarding both groups of rules is limited, however, since implementing regulations have not been finalized, and there has been little government enforcement, in either case.

The ACA includes statutory provisions that require that non-discrimination rules be adopted and implemented in respect to fully insured plans similar to the existing non-discrimination rules for self-insured plans.[45] The penalties to be imposed in respect to fully insured plans, however, may be much more severe. Currently, in the case of a discriminatory arrangement involving a self-insured plan, the applicable employee is taxed on any excess (i.e., discriminatory) benefit. Under the ACA, however, if the IRS identifies a discriminatory arrangement that involves a fully insured plan, it may impose the $100 per day penalty under Section 4980D (discussed in subsection (g) above) *on the employer*. Here again, however, the (immediate) implications of the ACA provisions is not clear; to date, the IRS has failed to adopt regulations to implement the statutory provisions, and it is not clear when it will do so.[46]

Large employers may also be subject to federal discrimination claims under Section 510 of the Employee Retirement Income Security Act ("ERISA"), particularly in the event the employer takes steps (for example, putting a cap on or otherwise limiting an employee's hours of service) to preclude an employee currently covered under the employer's health plan from qualifying for coverage in the future. The case law in this area is slight and somewhat muddled, but it is likely that at least some plaintiffs will assert, and at least a few may prevail, on claims under Section 510 of ERISA, as employers take steps to limit their costs in response to the ACA.

(i) Health reimbursement arrangements

The IRS has determined that certain "employer payment plans" – that is, group health plans whereby an employer pays or reimburses employees for the cost of individual health insurance – are group health plans that fail to meet certain ACA health plan reform requirements (see Section 9(g) above) and thus are subject to the $100 per day penalty under Section 4980D. Thus, for example, a large employer that offers to pay (all or any portion of) its employees' premiums to purchase health coverage through an insurance exchange (i.e., in an effort to mitigate its cost to offer coverage to avoid a penalty under Section 4980H) likely will be subject to the $100 penalty under Section 4980D.[47]

(j) "Cadillac" tax

Besides Section 4980H, the ACA also added Section 4980I to the Code, the so-called "Cadillac tax."[48] Beginning in 2018, Section 4980I will impose an excise tax in the amount of 40 percent on employer-sponsored health coverage to the extent such

[45] See Affordable Care Act, §10101(d); 42 USC §300gg-5.
[46] See IRS Notice 2011-1, available at http://www.irs.gov/pub/irs-drop/n-11-01.pdf.
[47] See IRS Notice 2015-17, available at http://www.irs.gov/pub/irs-drop/n-15-17.pdf; IRS Notice 2013-54, available at http://www.irs.gov/pub/irs-drop/n-13-54.pdf.
[48] See 26 USC §4980I; IRS Notice 2015-16, available at http://www.irs.gov/pub/irs-drop/n-15-16.pdf.

coverage (i.e., the amount of the applicable premium) exceeds certain specified maximums: $10,200 for single coverage and $27,500 for family coverage. Like the penalties payable under Section 4980H, the Cadillac tax will not be tax deductible. Particularly now that its effective date is less than three years away, large employers should be mindful of the Cadillac tax as they consider their options in planning to address and comply with Section 4980H.

9. Prepare to receive (and respond to) ACA insurance exchange notices.

The ACA requires insurance exchanges (both state-run exchanges and the federal exchange) to send a notice to employers when their employees purchase health insurance on the exchange and receive a premium tax credit.[49] In respect to states, including Alabama, that have not established a state-run exchange, the notice will be provided by the U.S. Health and Human Services Department ("HHS") (i.e., on behalf of the federal exchange).

There is little in the way of guidance in respect to the notices, and it is not clear when the exchanges will (or must) begin providing them.[50] Moreover, it appears that exchanges may send the notices to employers using mailing addresses furnished by the employees when they purchase insurance on the exchange. Exchanges are also permitted to send the notices one at a time, or in batches.

Significantly, large employers that receive exchange notices should realize that the notices do not represent tax or penalty assessments, by any agency or under the employer mandate or any other law; indeed, the notice is required to state that the credit *may* trigger a penalty for a large employer under Section 4980H. Nonetheless, employers *may appeal* the notice to the HHS (in the case of a notice furnished by the federal exchange) or the appropriate state-run exchange within 90 days of receipt.[51] Again, there are few details available regarding the appeals process; but, it is significant that, unlike an appeal of a tax assessment to the IRS, it appears that employers will not be required to pay any tax or penalty prior to appeal. It also appears that large employers may appeal the notice without jeopardizing their right to appeal a subsequent tax or penalty assessment from the IRS pursuant to Section 4980H.

In any case, large employers would be well served to begin preparing to receive and respond to the exchange notices. Among other things, employers should determine to whom such notices should be directed (for example, human resources or outside legal counsel) and set up procedures and mechanisms to ensure the notices are received, taking into account that HHS (or the state exchange, if appropriate) may be relying on contact information for the employer provided by a current or former employee.

[49] Note the exchange notices are not required by Section 4980H or Section 6056; they are required by and subject to other regulations promulgated under the ACA.
[50] See 45 CFR §155.310(h).
[51] See 45 CFR §155.555.

Conclusion

This Client Alert is intended only to provide a high level overview of certain generally applicable steps large employers may take now to prepare for the onset of penalties under Section 4980H and for reporting under the Reporting Rules. In any case, nothing in this Client Alert is intended to provide a comprehensive review of the issues addressed, nor to provide legal advice in regard to any matters herein. As this Client Alert evidences, however, there are a multitude of issues large employers may need to consider in their particular circumstances. With this in mind, we strongly recommend that large employers contact (and stay in contact) with appropriate counsel to advise them in regard to the employer mandate and the ACA.