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[T.D. 9655, 79 FR 8577, Feb. 12, 2014]

§ 54.4980H-1 **Definitions.**

(a) *Definitions.* The definitions in this section apply only for purposes of this section and §§ 54.4980H-2 through 54.4980H-6.

(1) *Administrative period.* The term *administrative period* means an optional period, selected by an applicable large employer member, of no longer than 90 days beginning immediately following the end of a measurement period and ending immediately before the start of the associated stability period. The administrative period also includes the period between a new employee's start date and the beginning of the initial measurement period, if the initial measurement period does not begin on the employee's start date.

(2) *Advance credit payment.* The term *advance credit payment* means an advance payment of the premium tax credit as provided in Affordable Care Act section 1412 (42 U.S.C. 18082).

(3) *Affordable Care Act.* The term *Affordable Care Act* means the Patient Protection and Affordable Care Act,

Public Law 111-148 (124 Stat. 119 (2010)), and the Health Care and Education Reconciliation Act of 2010, Public Law 111-152 (124 Stat. 1029 (2010)), as amended by the Medicare and Medicaid Extenders Act of 2010, Public Law 111-309 (124 Stat. 3285 (2010)), the Comprehensive 1099 Taxpayer Protection and Repayment of Exchange Subsidy Overpayments Act of 2011, Public Law 112-9 (125 Stat. 36 (2011)), the Department of Defense and Full-Year Continuing Appropriations Act, 2011, Public Law 112-10 (125 Stat. 38 (2011)), and the 3% Withholding Repeal and Job Creation Act, Public Law 112-56 (125 Stat. 711 (2011)).

(4) *Applicable large employer.* The term *applicable large employer* means, with respect to a calendar year, an employer that employed an average of at least 50 full-time employees (including full-time equivalent employees) on business days during the preceding calendar year. For rules relating to the determination of applicable large employer status, see § 54.4980H-2.

(5) *Applicable large employer member.* The term *applicable large employer member* means a person that, together with one or more other persons, is treated as a single employer that is an applicable large employer. For this purpose, if a person, together with one or more other persons, is treated as a single employer that is an applicable large employer on any day of a calendar month, that person is an applicable large employer member for that calendar month. If the applicable large employer comprises one person, that one person is the applicable large employer member. An applicable large employer member does not include a person that is not an employer or only an employer of employees with no hours of service for the calendar year. For rules for government entities, and churches, or conventions or associations of churches, see § 54.4980H-2(b)(4).

(6) *Applicable premium tax credit.* The term *applicable premium tax credit* means any premium tax credit that is allowed or paid under section 36B and any advance payment of such credit.

(7) *Bona fide volunteer.* The term *bona fide volunteer* means an employee of a government entity or an organization described in section 501(c) that is exempt from taxation under section

501(a) whose only compensation from that entity or organization is in the form of—

(i) Reimbursement for (or reasonable allowance for) reasonable expenses incurred in the performance of services by volunteers, or

(ii) Reasonable benefits (including length of service awards), and nominal fees, customarily paid by similar entities in connection with the performance of services by volunteers.

(8) *Calendar month.* The term *calendar month* means one of the 12 full months named in the calendar, such as January, February, or March.

(9) *Church or a convention or association of churches.* The term *church or a convention or association of churches* has the same meaning as provided in § 1.170A-9(b).

(10) *Collective bargaining agreement.* The term *collective bargaining agreement* means an agreement that the Secretary of Labor determines to be a collective bargaining agreement, provided that the health benefits provided under the collective bargaining agreement are the subject of good faith bargaining between employee representatives and one or more employers, and the agreement between employee representatives and one or more employers satisfies section 7701(a)(46).

(11) *Cost-sharing reduction.* The term *cost-sharing reduction* means a cost-sharing reduction and any advance payment of the reduction as defined under section 1402 of the Affordable Care Act and 45 CFR 155.20.

(12) *Dependent.* The term *dependent* means a child (as defined in section 152(f)(1) but excluding a stepson, stepdaughter or an eligible foster child (and excluding any individual who is excluded from the definition of dependent under section 152 by operation of section 152(b)(3))) of an employee who has not attained age 26. A child attains age 26 on the 26th anniversary of the date the child was born. A child is a dependent for purposes of section 4980H for the entire calendar month during which he or she attains age 26. Absent knowledge to the contrary, applicable large employer members may rely on an employee's representation about that employee's children and the ages of those children. The term *dependent*

does not include the spouse of an employee.

(13) *Educational organization.* The term *educational organization* means an entity described in § 1.170A-9(c)(1), whether or not described in section 501(c)(3) and tax-exempt under section 501(a). Thus, the term *educational organization* includes taxable entities, tax-exempt entities and government entities.

(14) *Eligible employer-sponsored plan.* The term *eligible employer-sponsored plan* has the same meaning as provided under section 5000A(f)(2) and the regulations thereunder and any other applicable guidance.

(15) *Employee.* The term *employee* means an individual who is an employee under the common-law standard. See § 31.3401(c)-1(b). For purposes of this paragraph (a)(15), a leased employee (as defined in section 414(n)(2)), a sole proprietor, a partner in a partnership, a 2-percent S corporation shareholder, or a worker described in section 3508 is not an employee.

(16) *Employer.* The term *employer* means the person that is the employer of an employee under the common-law standard. See § 31.3121(d)-1(c). For purposes of determining whether an employer is an applicable large employer, all persons treated as a single employer under section 414(b), (c), (m), or (o) are treated as a single employer. Thus, all employees of a controlled group of entities under section 414(b) or (c), an affiliated service group under section 414(m), or an entity in an arrangement described under section 414(o), are taken into account in determining whether the members of the controlled group or affiliated service group together are an applicable large employer. For purposes of determining applicable large employer status, the term *employer* also includes a predecessor employer (see paragraph (a)(36) of this section) and a successor employer.

(17) *Employment break period.* The term *employment break period* means a period of at least four consecutive weeks (disregarding special unpaid leave), measured in weeks, during which an employee of an educational organization is not credited with hours

of service for an applicable large employer.

(18) *Exchange.* The term *Exchange* means an Exchange as defined in 45 CFR 155.20.

(19) *Federal poverty line.* The term *federal poverty line* means for a plan year any of the poverty guidelines (updated periodically in the FEDERAL REGISTER by the Secretary of Health and Human Services under the authority of 42 U.S.C. 9902(2)) in effect within six months before the first day of the plan year of the applicable large employer member's health plan, as selected by the applicable large employer member.

(20) *Form W-2 wages.* The term *Form W-2 wages* with respect to an employee refers to the amount of wages as defined under section 3401(a) for the applicable calendar year (required to be reported in Box 1 of the Form W-2 (Wage and Tax Statement)) received from an applicable large employer.

(21) *Full-time employee*—(i) *In general.* The term *full-time employee* means, with respect to a calendar month, an employee who is employed an average of at least 30 hours of service per week with an employer. For rules on the determination of whether an employee is a full-time employee, including a description of the look-back measurement method and the monthly measurement method, see § 54.4980H-3. The look-back measurement method for identifying full-time employees is available only for purposes of determining and computing liability under section 4980H and not for the purpose of determining status as an applicable large employer under § 54.4980H-2.

(ii) *Monthly equivalency.* Except as otherwise provided in paragraph (a)(21)(iii) of this section, 130 hours of service in a calendar month is treated as the monthly equivalent of at least 30 hours of service per week, and this 130 hours of service monthly equivalency applies for both the look-back measurement method and the monthly measurement method for determining full-time employee status.

(iii) *Determination of full-time employee status using weekly rule under the monthly measurement method.* Under the optional weekly rule set forth in § 54.4980H-3(c)(3), full-time employee status for certain calendar months is

based on hours of service over four weekly periods and for certain other calendar months is based on hours of service over five weekly periods. With respect to a month with four weekly periods, an employee with at least 120 hours of service is a full-time employee, and with respect to a month with five weekly periods, an employee with at least 150 hours of service is a full-time employee. For purposes of this rule, the seven continuous calendar days that constitute a week (for example Sunday through Saturday) must be consistently applied for all calendar months of the calendar year.

(22) *Full-time equivalent employee (FTE)*. The term *full-time equivalent employee*, or *FTE*, means a combination of employees, each of whom individually is not treated as a full-time employee because he or she is not employed on average at least 30 hours of service per week with an employer, who, in combination, are counted as the equivalent of a full-time employee solely for purposes of determining whether the employer is an applicable large employer. For rules on the method for determining the number of an employer's full-time equivalent employees, or FTEs, see § 54.4980H-2(c).

(23) *Government entity*. The term *government entity* means the government of the United States, any State or political subdivision thereof, any Indian tribal government (as defined in section 7701(a)(40)) or subdivision of an Indian tribal government (determined in accordance with section 7871(d)), or any agency or instrumentality of any of the foregoing.

(24) *Hour of service*—(i) *In general*. The term *hour of service* means each hour for which an employee is paid, or entitled to payment, for the performance of duties for the employer; and each hour for which an employee is paid, or entitled to payment by the employer for a period of time during which no duties are performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence (as defined in 29 CFR 2530.200b-2(a)). For the rules for determining an employee's hours of service, see § 54.4980H-3.

(ii) *Excluded hours*—(A) *Bona fide volunteers*. The term *hour of service* does

not include any hour for services performed as a bona fide volunteer.

(B) *Work-study program*. The term *hour of service* does not include any hour for services to the extent those services are performed as part of a Federal Work-Study Program as defined under 34 CFR 675 or a substantially similar program of a State or political subdivision thereof.

(C) *Services outside the United States*. The term *hour of service* does not include any hour for services to the extent the compensation for those services constitutes income from sources without the United States (within the meaning of sections 861 through 863 and the regulations thereunder).

(iii) *Service for other applicable large employer members*. In determining hours of service and status as a full-time employee for all purposes under section 4980H, an hour of service for one applicable large employer member is treated as an hour of service for all other applicable large employer members for all periods during which the applicable large employer members are part of the same group of employers forming an applicable large employer.

(25) *Initial measurement period*. The term *initial measurement period* means a period selected by an applicable large employer member of at least three consecutive months but not more than 12 consecutive months used by the applicable large employer as part of the look-back measurement method in § 54.4980H-3(d).

(26) *Limited non-assessment period for certain employees*. References to the *limited non-assessment period for certain employees* refers to the limited period during which an employer will not be subject to an assessable payment under section 4980H(a), and in certain cases section 4980H(b), with respect to an employee as set forth in—

(i) Section 54.4980H-2(b)(5) (regarding the transition rule for an employer's first year as an applicable large employer),

(ii) Section 54.4980H-3(c)(2) (regarding the application of section 4980H for the three full calendar month period beginning with the first full calendar month in which an employee is first otherwise eligible for an offer of coverage under the monthly measurement method),

(iii) Section 54.4980H-3(d)(2)(iii) (regarding the application of section 4980H during the initial three full calendar months of employment for an employee reasonably expected to be a full-time employee at the start date, under the look-back measurement method),

(iv) Section 54.4980H-3(d)(3)(iii) (regarding the application of section 4980H during the initial measurement period to a new variable hour employee, seasonal employee or part-time employee determined to be employed on average at least 30 hours of service per week, under the look-back measurement method),

(v) Section 54.4980H-3(d)(3)(vii) (regarding the application of section 4980H following an employee's change in employment status to a full-time employee during the initial measurement period, under the look-back measurement method), and

(vi) Section 54.4980H-4(c) and § 54.4980H-5(c) (regarding the application of section 4980H to the calendar month in which an employee's start date occurs on a day other than the first day of the calendar month).

(27) *Minimum essential coverage.* The term *minimum essential coverage*, or *MEC*, has the same meaning as provided in section 5000A(f) and any regulations or other guidance thereunder.

(28) *Minimum value.* The term *minimum value* has the same meaning as provided in section 36B(c)(2)(C)(ii) and any regulations or other guidance thereunder.

(29) *Month.* The term *month* means—

(i) A *calendar month* as defined in paragraph (a)(8) of this section, or

(ii) The period that begins on any date following the first day of a calendar month and that ends on the immediately preceding date in the immediately following calendar month (for example, from February 2 to March 1 or from December 15 to January 14).

(30) *New employee.* Under the look-back measurement method, the term *new employee* means an employee who has been employed by an applicable large employer for less than one complete standard measurement period; for treatment of the employee as a new employee or continuing employee under the look-back measurement

method following a period for which no hours of service are earned, see the rehire and continuing employee rules at § 54.4980H-3(d)(6). Under the monthly measurement method, the term *new employee* means an employee who either has not previously been employed by the applicable large employer or has previously been employed by the applicable large employer but is treated as a new employee under the rehire and continuing employee rules at § 54.4980H-3(c)(4).

(31) *Ongoing employee.* The term *ongoing employee* means an employee who has been employed by an applicable large employer member for at least one complete standard measurement period. For the treatment of an ongoing employee as a new employee or continuing employee following a period for which no hours of service are earned, see the rehire and continuing employee rules at § 54.4980H-3(d)(6).

(32) *Part-time employee.* The term *part-time employee* means a new employee who the applicable large employer member reasonably expects to be employed on average less than 30 hours of service per week during the initial measurement period, based on the facts and circumstances at the employee's start date. Whether an employer's determination that a new employee is a part-time employee is reasonable is based on the facts and circumstances at the employee's start date. Factors to consider in determining a new employee's full-time employee status are set forth in § 54.4980H-3(d)(2)(ii).

(33) *Period of employment.* The term *period of employment* means the period of time beginning on the first date for which an employee is credited with an hour of service for an applicable large employer (including any member of that applicable large employer) and ending on the last date on which the employee is credited with an hour of service for that applicable large employer, both dates inclusive. An employee may have one or more periods of employment with the same applicable large employer.

(34) *Person.* The term *person* has the same meaning as provided in section 7701(a)(1) and the regulations thereunder.

(35) *Plan year.* A *plan year* must be twelve consecutive months, unless a short plan year of less than twelve consecutive months is permitted for a valid business purpose. A *plan year* is permitted to begin on any day of a year and must end on the preceding day in the immediately following year (for example, a plan year that begins on October 15, 2015, must end on October 14, 2016). A calendar year *plan year* is a period of twelve consecutive months beginning on January 1 and ending on December 31 of the same calendar year. Once established, a plan year is effective for the first plan year and for all subsequent plan years, unless changed, provided that such change will only be recognized if made for a valid business purpose. A change in the plan year is not permitted if a principal purpose of the change in plan year is to circumvent the rules of section 4980H or these regulations.

(36) *Predecessor employer.* [Reserved]

(37) *Qualified health plan.* The term *qualified health plan* means a qualified health plan as defined in Affordable Care Act section 1301(a) (42 U.S.C. 18021(a)), but does not include a catastrophic plan described in Affordable Care Act section 1302(e) (42 U.S.C. 18022(e)).

(38) *Seasonal employee.* The term *seasonal employee* means an employee who is hired into a position for which the customary annual employment is six months or less.

(39) *Seasonal worker.* The term *seasonal worker* means a worker who performs labor or services on a seasonal basis as defined by the Secretary of Labor, including (but not limited to) workers covered by 29 CFR 500.20(s)(1), and retail workers employed exclusively during holiday seasons. Employers may apply a reasonable, good faith interpretation of the term *seasonal worker* and a reasonable good faith interpretation of 29 CFR 500.20(s)(1) (including as applied by analogy to workers and employment positions not otherwise covered under 29 CFR 500.20(s)(1)).

(40) *Section 1411 Certification.* The term *Section 1411 Certification* means the certification received as part of the process established by the Secretary of Health and Human Services under

which an employee is certified to the employer under section 1411 of the Affordable Care Act as having enrolled for a calendar month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee.

(41) *Section 4980H(a) applicable payment amount.* The term *section 4980H(a) applicable payment amount* means, with respect to any calendar month, 1/12 of \$2,000, adjusted for inflation in accordance with section 4980H(c)(5) and any applicable guidance thereunder.

(42) *Section 4980H(b) applicable payment amount.* The term *section 4980H(b) applicable payment amount* means, with respect to any calendar month, 1/12 of \$3,000, adjusted for inflation in accordance with section 4980H(c)(5) and any applicable guidance thereunder.

(43) *Self-only coverage.* The term *self-only coverage* means health insurance coverage provided to only one individual, generally the employee.

(44) *Special unpaid leave.* The term *special unpaid leave* means—

(i) Unpaid leave that is subject to the Family and Medical Leave Act of 1993 (FMLA), Public Law 103-3, 29 U.S.C. 2601 et seq.;

(ii) Unpaid leave that is subject to the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), Public Law 103-353, 38 U.S.C. 4301 et seq.; or

(iii) Unpaid leave on account of jury duty.

(45) *Stability period.* The term *stability period* means a period selected by an applicable large employer member that immediately follows, and is associated with, a standard measurement period or an initial measurement period (and, if elected by the employer, the administrative period associated with that standard measurement period or initial measurement period), and is used by the applicable large employer member as part of the look-back measurement method in § 54.4980H-3(d).

(46) *Standard measurement period.* The term *standard measurement period* means a period of at least three but not more than 12 consecutive months that is used by an applicable large employer member as part of the look-back measurement method in § 54.4980H-3(d). See

§ 54.4980H-3(d)(1)(ii) for rules on the use of payroll periods that include the beginning and end dates of the measurement period.

(47) *Start date.* The term *start date* means the first date on which an employee is required to be credited with an hour of service with an employer. For rules relating to when, following a period for which an employee does not earn an hour of service, that employee may be treated as a new employee with a new start date rather than a continuing employee, see the rehire and continuing employee rules at § 54.4980H-3(c)(4) and § 54.4980H-3(d)(6).

(48) *United States.* The term *United States* means United States as defined in section 7701(a)(9).

(49) *Variable hour employee—(i) In general.* The term *variable hour employee* means an employee if, based on the facts and circumstances at the employee's start date, the applicable large employer member cannot determine whether the employee is reasonably expected to be employed on average at least 30 hours of service per week during the initial measurement period because the employee's hours are variable or otherwise uncertain.

(ii) *Factors—(A) In general.* Factors to consider in determining whether it can be determined that the employee is reasonably expected to be (or reasonably expected not to be) employed on average at least 30 hours of service per week during the initial measurement period include, but are not limited to, whether the employee is replacing an employee who was a full-time employee or a variable hour employee, the extent to which the hours of service of employees in the same or comparable positions have actually varied above and below an average of 30 hours of service per week during recent measurement periods, and whether the job was advertised, or otherwise communicated to the new employee or otherwise documented (for example, through a contract or job description) as requiring hours of service that would average at least 30 hours of service per week, less than 30 hours of service per week, or may vary above and below an average of 30 hours of service per week. These factors are only relevant for a particular new employee if the em-

ployer has no reason to anticipate that the facts and circumstances related to that new employee will be different. In all cases, no single factor is determinative. For purposes of determining whether an employee is a variable hour employee, the applicable large employer member may not take into account the likelihood that the employee may terminate employment with the applicable large employer (including any member of the applicable large employer) before the end of the initial measurement period.

(B) *Additional factors for an employee hired by an employer for temporary placement at an unrelated entity.* In the case of an individual who, under all the facts and circumstances, is the employee of an entity (referred to solely for purposes of this paragraph (a)(49) as a "temporary staffing firm") that hired such individual for temporary placement at an unrelated entity that is not the common law employer, additional factors to consider to determine whether the employee is reasonably expected to be (or reasonably expected not to be) employed by the temporary staffing firm on average at least 30 hours of service per week during the initial measurement period include, but are not limited to, whether other employees in the same position of employment with the temporary staffing firm, as part of their continuing employment, retain the right to reject temporary placements that the temporary staffing firm offers the employee; typically have periods during which no offer of temporary placement is made; typically are offered temporary placements for differing periods of time; and typically are offered temporary placements that do not extend beyond 13 weeks.

(C) *Educational organizations.* An employer that is an educational organization cannot take into account the potential for, or likelihood of, an employment break period in determining its expectation of future hours of service.

(iii) *Application only for look-back measurement method.* The term *variable hour employee* is used as a category of employees under the look-back measurement method and is not relevant to the monthly measurement method.

(50) *Week*. The term *week* means any period of seven consecutive calendar days applied consistently by the applicable large employer member.

(b) *Effective/applicability date*. This section is applicable for periods after December 31, 2014.

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§ 54.4980H-2 Applicable large employer and applicable large employer member.

(a) *In general*. Section 4980H applies to an applicable large employer and to all of the applicable large employer members that comprise that applicable large employer.

(b) *Determining applicable large employer status*—(1) *In general*. An employer's status as an applicable large employer for a calendar year is determined by taking the sum of the total number of full-time employees (including any seasonal workers) for each calendar month in the preceding calendar year and the total number of FTEs (including any seasonal workers) for each calendar month in the preceding calendar year, and dividing by 12. The result, if not a whole number, is then rounded to the next lowest whole number. If the result of this calculation is less than 50, the employer is not an applicable large employer for the current calendar year. If the result of this calculation is 50 or more, the employer is an applicable large employer for the current calendar year, unless the seasonal worker exception in paragraph (b)(2) of this section applies.

(2) *Seasonal worker exception*. If the sum of an employer's full-time employees and FTEs exceeds 50 for 120 days or less during the preceding calendar year, and the employees in excess of 50 who were employed during that period of no more than 120 days are seasonal workers, the employer is not considered to employ more than 50 full-time employees (including FTEs) and the employer is not an applicable large employer for the current calendar year. In the case of an employer that was not in existence on any business day during the preceding calendar year, if the employer reasonably expects that the sum of its full-time employees and FTEs for the current calendar year will exceed 50 for 120 days or less during the cal-

endar year, and that the employees in excess of 50 who will be employed during that period of no more than 120 days will be seasonal workers, the employer is not an applicable large employer for the current calendar year. For purposes of this paragraph (b)(2) only, four calendar months may be treated as the equivalent of 120 days. The four calendar months and the 120 days are not required to be consecutive.

(3) *Employers not in existence in preceding calendar year*. An employer not in existence throughout the preceding calendar year is an applicable large employer for the current calendar year if the employer is reasonably expected to employ an average of at least 50 full-time employees (taking into account FTEs) on business days during the current calendar year and it actually employs an average of at least 50 full-time employees (taking into account FTEs) on business days during the calendar year. An employer is treated as not having been in existence throughout the prior calendar year only if the employer was not in existence on any business day in the prior calendar year. See paragraph (b)(2) of this section for the application of the seasonal worker exception to employers not in existence in the preceding calendar year.

(4) *Special rules for government entities, churches, and conventions and associations of churches*. [Reserved]

(5) *Transition rule for an employer's first year as an applicable large employer*. With respect to an employee who was not offered coverage by the employer at any point during the prior calendar year, if the applicable large employer offers coverage to the employee on or before April 1 of the first calendar year for which the employer is an applicable large employer, the employer will not be subject to an assessable payment under section 4980H by reason of its failure to offer coverage to the employee for January through March of that year, provided that this relief applies only with respect to potential liability under section 4980H(b) (for January through March of the first calendar year for which the employer is an applicable large employer) if the coverage offered by April 1 provides minimum value. If the employer does