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HCR FAQ: Play or Pay

Q: **What is Play or Pay?**

A: Per IRS regulations, effective for calendar year 2015, employers with 100 or more full-time equivalent employees (FTEs) must offer adequate, affordable health coverage to at least 70% of their full-time employees (and their dependent children up to age 26), or potentially pay a penalty if at least one of those employees goes into the Exchange and qualifies for a premium tax credit.

Effective calendar year 2016, these employers must offer coverage to at least 95% of their full-time employees (and their dependent children up to age 26).

Employers with less than 100 but more than 50 FTEs have until January 1, 2016 to comply with the employer requirements. To be eligible, an employer will have to go through a certification process to demonstrate that during a period beginning on February 9, 2014, and ending on December 31, 2014, the employer did not reduce the size of its workforce or the overall hours of service of its employees in order to satisfy the workforce size conditions.

All eligible employers will have to offer coverage to at least 95% of their full-time employees and their dependent children up to age 26 in 2016 to avoid potential tax penalties.

Employers with less than 50 FTEs do not have to comply with this mandate.

This provision in the Affordable Care Act is known as Employer Shared Responsibility or the Employer Mandate. It should be noted that employers are not mandated to offer coverage to their part-time employees.

Q: **How does the Mandate apply to employers who offer non-calendar year plans?**

A: Employers who offer non-calendar year plans are not required to comply with the mandate until the start of their plan year in 2015, rather than on January 1, 2015, provided that the plan meets the following criteria:

A. The employer maintained a non-calendar year plan before December 27, 2012

B. The plan year was not modified after December 27, 2012

C. Eligibility rules were not changed after February 9, 2014.

Also, the group must meet one of two coverage tests:

A. Since December 27, 2012, the plan needs to have been either offering coverage to at least 33% of all employees or covering at least 25% of its entire workforce, including part-time workers.

B. The group would have to demonstrate that since December 27, 2012, it has been offering coverage to at least 50% of all full-time employees or covering at least 33% of all full-time employees.

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Another important point is that this provision applies to the ERISA plan year stipulated in the group's plan documents, not their plan contract renewal date, and these dates may differ! If a group doesn't have legal ERISA plan documents, the contract renewal date is the default date, but plan documents need to be established. If a group has appropriate plan documents, they may want to modify their ERISA plan year to conform with the plan renewal date for ease of administration, but they can only do that if the ERISA renewal date is later in the year than the plan contract renewal. If the ERISA date comes first, the plan needs to have all changes in effect on the date of the ERISA plan anniversary.

Q: What would cause an employer to incur a penalty?

A: Assuming the employer qualifies as an applicable large employer, a penalty could be incurred if the employer:

A. Fails to offer "minimum essential coverage" under an eligible employer sponsored plan to at least 70% or 95% of full-time employees (for employers with 100 or more FTEs in calendar year 2015, and 2016 respectively).

B. Offers coverage that does not meet "minimum value" or "affordability" requirements under the ACA, and at least one full-time employee enrolls in the Exchange and receives a premium tax credit.

Q: What is Minimum Essential Coverage?

A: Starting in 2014, under the ACA, most individuals must have minimum essential coverage for themselves and their dependents or potentially be subject to an income tax penalty (this provision is known as the "Individual Mandate"). Any private employer- sponsored healthcare plan that offers medical coverage will qualify as "minimum essential coverage," which is separate from affordability or minimum value requirements.

Q: What are the affordability and minimum value requirements?

A: The ACA's "affordability" standard is that the employee's cost for self-only coverage must not exceed 9.5% of household income. As it is impossible for an employer to know for certain what any employee's household income might be, the IRS has issued three "safe-harbor" methods for employers to determine if a plan is affordable.

1. In order to be considered "affordable", the monthly premium for employee-only coverage must not exceed 9.5% of the employee's monthly wages, or Box 1 on their W-2. OR

2. The monthly premium for employee-only coverage does not exceed 9.5% of one-twelfth of the annual poverty level for a single person. Currently the annual poverty level is $11,490, so to satisfy this provision the monthly premium cannot exceed $90.96. OR

3. The required monthly contribution for the lowest cost employee-only coverage that provides minimum value does not exceed 9.5% of an amount equal to 130 hours multiplied by the employee's hourly rate of pay as of the first day of the coverage period.

For salaried employees, monthly salary is used instead of 130 multiplied by the hourly rate of pay. To rely on this safe harbor, an employer cannot decrease the employee's rate of pay during the year.

In order to meet "Minimum Value" (MV) requirements, the employer-sponsored plan must offer health coverage that pays at least 60% of the cost of the covered services provided under the plan. For fully-insured group plans, it is up to the plan carrier to determine if a plan meets minimum value and provide that information to the employer.

There are three ways to determine whether a plan meets minimum value.

1. The IRS and HHS have created a "Minimum Value calculator" to determine whether a plan satisfies this 60% threshold. This calculator is located on the CMS.gov website: http://www.cms.gov/site-search/search-results.html?q=minimum%20value%20calculator.

2. The IRS provided three design-based safe harbor plans listing acceptable levels of benefits. If the employer-sponsored plan provides coverage that is at least as generous as any of the safe-harbor plans, the plan satisfies the MV provision. (See chart below)

Design-based safe harbor plans that satisfy minimum value

	Individual Deductible		Coinsurance	Individual Out-of-Pocket Maximum	Prescription Drug Copayments	Employer Individual Annual HSA Contribution
	Medical	Prescription Drug				
1	$3,500 integrated medical and drug		80% all services	$6,000	N/A	N/A
2	$4,500 integrated medical and drug		70% all services	$6,400	N/A	$500
3	$3,500	$0	60% medical 75% prescription drug	$6,400	$10/$20/$50 Specialty drugs at 75%	N/A

3. Where the Minimum Value calculator or checklist safe-harbors are not appropriate, for example, if the plan contains nonstandard features (such as limitations on the number of doctor visits or on the amount of covered visits in the hospital), then a member of the American Academy of Actuaries must provide certification that the plan satisfies the MV requirement.

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Q: **What if the employer doesn't offer dependent coverage?**

A: Under the ACA, "dependent" is defined as an employee's natural or adopted child under age 26, and excludes foster and step-children. Starting in 2015, an employer must offer coverage to its full-time employees and their children up to age 26 to satisfy the Employer Shared Responsibility requirements. However, the policy that employers offer coverage to their full-time employees' dependents will not apply in 2015 to employers that are taking steps to arrange for such coverage to begin in 2016.
If an employer is offering dependent coverage, the employer is not required to contribute toward the cost of dependent coverage, and will not be subject to a penalty if the coverage qualifies as "affordable" based on the cost of employee-only coverage.

Note that employers are not required to offer spousal coverage, and the receipt of a premium tax credit by an employee's spouse or dependent will not result in a penalty for the employer.

Q: **How does an employer know if they are an "applicable large employer?"**

A: An employer is an applicable large employer for a calendar year if it employed an average of at least 50 full-time equivalent employees on the employer's business days during the preceding calendar year.
This number is calculated by taking the number of full-time employees (employees who worked an average of 30 hours per week or 130 hours per month) and adding it to the calculated number of full-time equivalent employees (FTEs) (employees who are part-time, seasonal, or variable hour.)

The number of FTEs an employer has is calculated by taking the total hours of all part-time employees (those working less than 30 hours a week, including any seasonal workers) during each calendar month (not to exceed 120 hours per month for any employee) and dividing by 120, for each month in the preceding calendar year. The total number is then divided by 12. (See example below.)

> ABC Company has 30 full-time employees each working at least 30 hours a week. The company also has 30 part-time employees who all work 25 hours a week (a total of 3,000 hours per month). The part time employees would be treated as an equivalent of 25 full-time employees. Here's how:
>
> (30 part-time employees x 100 hours = 3000 hours) / 120 = 25 full-time equivalent employees. (If this was not a whole number, it would be rounded down to the nearest whole number.)
>
> As a result, ABC Company would be considered a "large employer" since they have a total of 55 full-time equivalent employees (30 + 25 = 55).

It should be noted that there is a "seasonal employee" exception when calculating FTEs. Seasonal employees are defined as employees in a position for which the customary annual employment is 6 months or less, customary being a period that begins each calendar year in approximately the same part of the year such as winter or summer.

Under this exception, seasonal employees may be excluded from the calculation of FTEs if the employer exceeds 50 full-time employees for no more than 120 days during the

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preceding calendar year, and the employees causing the employer to exceed the 50 full-time employee threshold are seasonal employees employed no more than 120 days during the preceding calendar year. So, if an employer has less than 50 full-time equivalent employees for most of the year and then employs seasonal employees for no more than 120 days during the year, they do not have to count the seasonal employees in their FTE calculation.

However, once an employer is an "applicable large employer," that is, they employ 50 or more full-time employees without counting the seasonal employees, the seasonal employees' hours are measured along with the hours of other employees, and such seasonal employees may be considered "full-time" if they work, on average, at least 30 hours per week during a measurement period.

Q: How does an employer identify a full-time employee?

A: A full-time employee is an employee who works an average of at least 30 hours of service per week or 130 hours of service per month. Hours of service include paid time off due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence. Hours of service also includes certain unpaid time if the employee is absent due to USERRA, FMLA, or jury duty.

Under the ACA, "employee" is defined by the common law standard and, as such, non-employee directors, sole proprietors, partners, 2-percent or more shareholders in an S corporation, and "leased employees" (as defined in Code Section 414(n)(2)) are not treated as employees. However, an employee who provides services as both an employee and non-employee (such as an individual serving as both an employee and a director) is an employee with respect to his or her hours of service as an employee.

Q: What if the employer can't reasonably determine if an employee will be full-time?

A: If, based on the facts and circumstances available at time of hire, an employer cannot reasonably determine whether a new employee will work an average of at least 30 hours per week, then the employee is considered a "variable hour" employee. In that case, the employer may use a safe harbor method for determining the status of its variable hour employees.

The final regulations provide two measurement methods for an employer to determine whether an employee is a full-time employee: the monthly measurement method and the look-back measurement method.

Under the monthly measurement method, an employer determines whether each employee is a full-time employee by counting the employee's hours of service for each month. An employer will not be subject to a Play or Pay penalty with respect to an employee as long as the employee is offered affordable, minimum value coverage no later than the day after the end of the three-month period that begins with the first full

calendar month in which the employee meets the plan's eligibility requirements for coverage other than a waiting period.

Under the look-back measurement method, an employer determines an employee's full-time status during a future period known as the "stability period" based upon the employee's hours of service in a prior period referred to as the "measurement period." For ongoing employees, employers determine full-time employee status by reference to hours worked during a "standard measurement period" that is between 3 and 12 months long. Each ongoing employee who works an average of 30 hours per week during the standard measurement period is treated as a full-time employee during the subsequent stability period.

Q: **Are seasonal employees considered variable-hour employees?**

A: Once an employer meets the 50 full-time employee threshold and is an applicable large employer, seasonal employees are treated as variable hour employees and are evaluated under the employer's measurement/stability periods.

Many seasonal employees will not be full-time employees if the employer uses a 12-month measurement period, because the employees will not have worked, on average, 30 or more hours during the 12-month measurement period. However, if an employer uses a shorter measurement period (e.g., 3 months), it is possible that a seasonal employee could be considered a full-time employee based on that measurement period.

Q: **How does the "look-back" measurement period work?**

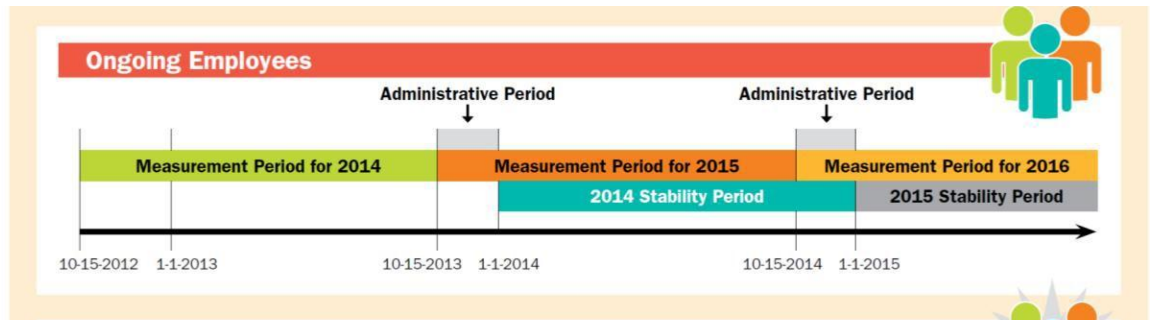
A: The look-back measurement period can be from 3 to 12 consecutive months long. Then the employer can add an optional administrative period, during which it determines whether the employee is full-time and that period can be no more than 90 days. The Measurement Period plus the Administrative Period cannot equal more than 13 months. Then the employer must add a stability period which must equal the initial measurement period, during which the employee must be offered coverage if they qualify as a full-time employee. There are two categories of variable-hour employees, ongoing and new, and these measurement periods can be different depending on which category they fall into.

Q: **How do the "look-back" and measurement periods work for ongoing employees?**

A: "Ongoing" employees are employees who have worked for their employer for one full standard measurement period. An employer may determine whether an ongoing employee worked an average of at least 30 hours per week or 130 hours per month by looking back at a defined period of 3 to 12 consecutive calendar months, as chosen by the employer (the "standard measurement period").

If an employee is determined to have worked full-time during a standard measurement period, then the employee is treated as full-time during the "standard stability period" so long as he or she remains employed during that period and regardless of the hours actually

worked. In general, the standard stability period must be at least six consecutive months, but no shorter than the standard measurement period, taking into account any applicable "administrative period."



Here you can see, this employer has chosen a Standard Measurement period of 12 months, beginning October 15, 2012, through October 15, 2013. Then they have added an Administrative Period to allow them time to determine who qualifies as a full-time employee. All full-time employees will now enter a Stability Period, where they will need to be offered coverage for a period of time that equals the 12-month Standard Measurement Period, so, from January 1, 2014 to January 1, 2015.

Going forward, to prevent an administrative period from creating a potential gap in coverage, it must overlap with the prior stability period, so that ongoing full-time employees will continue to be offered coverage during the administrative period. As you can see on this graph, an employee entitled to coverage for a stability period that is calendar year 2015 will be covered during any administrative period in 2015.

Q: How do the "look-back" and measurement periods work for new variable hour and seasonal employees?

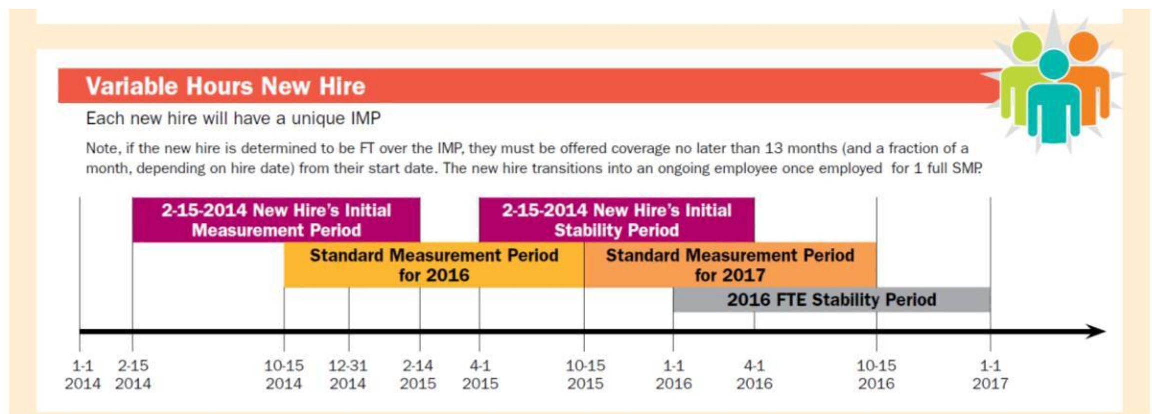
A: "New" variable hour and seasonal employees have not yet worked for their employer for one full standard measurement period. An employer may determine whether a new employee worked an average of at least 30 hours of service per week or 130 hours of service per month by looking back at period of 6 to 12 consecutive calendar months, as chosen by the employer. This is the "initial measurement period".

As is permitted for ongoing employees, an employer may use an administrative period before the start of the initial stability period following an employee's initial measurement period. The administrative period must not exceed 90 days in total, and includes all periods between the new employee's date of hire and the employee's eligibility date, other than the initial measurement period.

So this is a little different. For example, if the employer begins the initial measurement period on the first day of the month following a new variable hour or seasonal employee's date of hire, the period between the employee's start date and the first day of the next

month must be taken into account in applying the 90-day limit on the administrative period. Similarly, if there is a period between the end of the initial measurement period and the date the employee is first offered coverage under the plan, that period must be taken into account in applying the 90-day limit on the administrative period.

In addition, the initial measurement period and administrative period together cannot extend beyond the last day of the first calendar month beginning on or after the first anniversary of the employee's date of hire. For example:



In this example, the employer used a 12-month initial measurement period for a new variable hour employee, and begins that initial measurement period on the first day of the first calendar month following the employee's start date. The period between the end of the initial measurement period and the offer of coverage must not exceed one month (assuming the variable hour employee works full-time during the initial measurement period).

If an employee is determined to work full-time during the initial measurement period, then the employee is treated as full-time during the "initial stability period" so long as he or she remains employed during that period and regardless of the hours actually worked. In general, the initial stability period must be the same length as the stability period for these employees, taking into account any applicable administrative period for new employees.

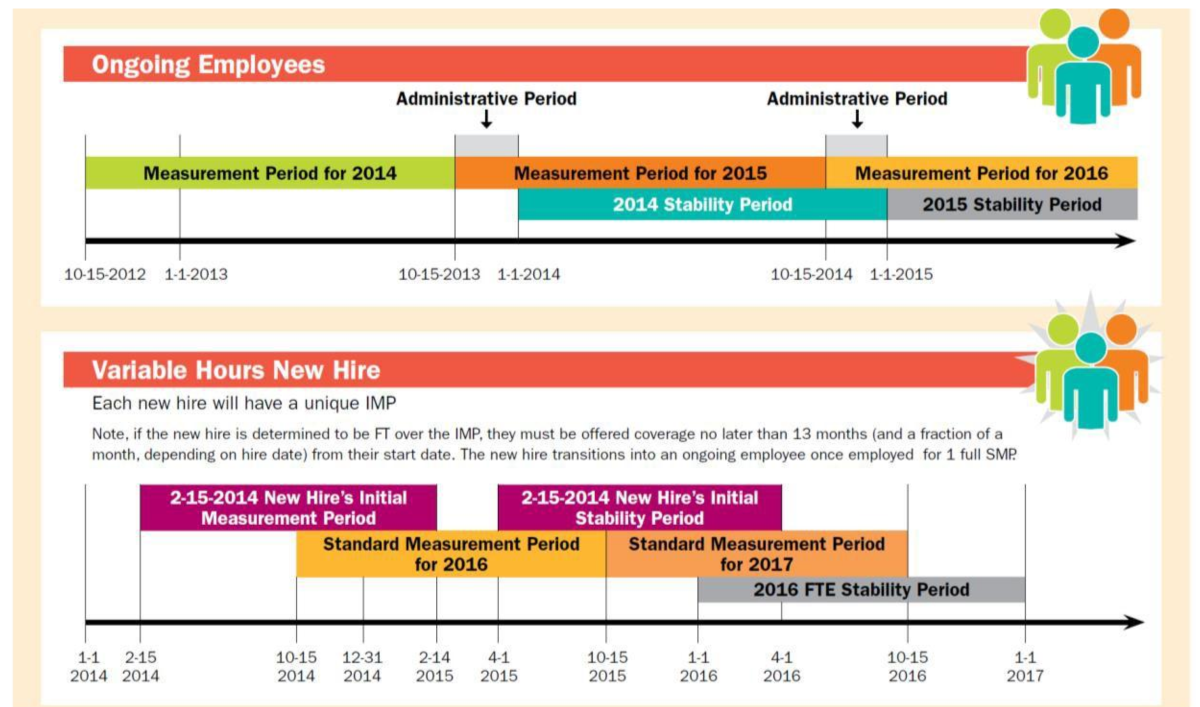
Q: **Will employers be required to enroll employees at different times during the plan year?**

A: Possibly. Each new hire will have their own Initial Measurement Period, based on each new employee's date of hire, which means that new employees may become eligible for coverage at various times during the plan year.

If they are determined to be full-time over the Initial Measurement Period, they must be offered coverage no later than 13 months from their start date The new hire then

becomes an “ongoing” employee once they have been employed for 1 full Standard Measurement Period.

In general, a 12-month measurement period (and a 12-month stability period that corresponds to the plan year) may be easiest administratively for the employer. The chart below shows how the measurement periods would work for an employer with both ongoing and new and/or seasonal employees.



Q: What relief is there for employers that want to use a 12-month stability period for new employees but are unable to use an administrative period shorter than 2 months?

A: An employer may use an initial stability period that is one month longer than the initial measurement period, as long as it does not exceed the remainder of the standard measurement period (plus any associated administrative period) in which the initial measurement period ends. This is intended to give additional flexibility to employers that wish to use a 12-month stability period for new variable hour and seasonal employees and an administrative period that exceeds one month. To that end, such an employer could use an 11-month initial measurement period (in lieu of the 12-month initial measurement period that would otherwise be required) and still comply with the general rule that the initial measurement period and administrative period combined may not extend beyond the last day of the first calendar month beginning on or after the one-year anniversary of the employee’s start date.

Q: **What are the penalties for not being in compliance with the ACA with regard to the Employer Shared Responsibility Mandate?**

A: There are two circumstances under which an employer may not be in compliance with the mandate, and there are different penalties associated with them. See next page.

1. If an employer fails to offer coverage to at least 95% of its full-time employees (employers are not mandated to offer coverage to part-time employees), and at least one full-time employee enrolls in the Exchange and qualifies for a tax credit, the penalty will be calculated as follows: (Number of full-time employees (not FTEs), - 30) X $2,000. **NOTE:** For calendar year 2015 ONLY, employers may subtract the first **80** employees.

   Example:

   Z Company has 40 full-time employees each working at least 30 hours a week. The company also has 30 part-time employees who all work 25 hours a week (a total of 100 hours per month). The part time employees would be treated as an equivalent of 25 full-time employees.

   As a result, Z Company would be considered a “large employer” since they have a total of 65 full-time equivalent employees (40 + 25 = 65).

   Z Company does not offer health coverage. The annual penalty for failing to offer coverage would be: (40-30) X $2,000 = $20,000.

2. If an employer offers coverage, but that coverage is not affordable and/or does not provide minimum value, and at least one full-time employee enrolls in the Exchange and qualifies for a tax credit, the penalty would be the lesser of: Number of employees enrolled in the Exchange who received a tax credit X $3,000, OR, $2,000 X number of full-time employees (minus 30).

   Example:

   Z Company as illustrated above, has 40 full-time employees

   Z offers coverage, but it does not meet the affordability or minimum value requirements.

   4 full-time Z employees enroll in the exchange and receive a tax credit.

   The annual penalty would be 4 X $3,000 = $12,000.

   The $12,000 penalty would apply as it is less than the $2,000 per full-time employee penalty which would be $20,000.

Penalties are calculated on a monthly basis, and will be indexed for inflation in future years.

Q: **How does this affect employers with multiple businesses (Controlled Groups)?**

A: Under IRS regulations, all members of a tax controlled group are treated as a single employer. However, each member of a controlled group is treated as a separate entity for purposes of determining the liability for, or amount of, the Employer Shared Responsibility penalty. See example on next page.

One owner has three businesses in which:

A: has 20 full-time employees,

B: has 40 full-time employees, and

C: has 5 full-time employees.

When combined, this equals 65 full-time employees, which designates them as a large employer under the law.

If the employer is subject to a penalty, they are allowed to subtract 30 **total** employees from that number. However, the 30 employees will be split up among the three businesses based on the number of employees in each business. The calculation would be as follows:

A:	20 employees = 31% of 65.	31% of 30 = 9	A can subtract 9 employees from its total.
B:	40 employees = 61% of 65.	61% of 30 = 18	B can subtract 18 employees from its total.
C:	5 employees = 8% of 65.	8% of 30 = 2	C can subtract 2 employees from its total.

Under the rules of the ACA governing controlled groups, the employer does not need to offer identical coverage to each entity, or in fact, any coverage at all. For example:

The employer may decide to not offer coverage to business A and C, but will offer minimum value, affordable coverage to B.

In that case, the penalties would only apply to A and C, and not B.

The penalty reductions for each business would be:

A: (20 - 9) x $2,000 = $22,000 and

C: (5 - 2) x $2,000 = $6,000

NOTE: For calendar year 2015 ONLY, employers may subtract the first **80** employees.

Q: **How is the Employer Shared Responsibility tracked and penalties applied?**

A: The IRS has added thousands of agents just to monitor this provision of the new law. After the end of each calendar year, the IRS will contact employers to inform them of their potential liability and provide an opportunity for a response.

The IRS has indicated that employers will not be notified until after employees' individual tax returns are due for that year and after the due date for applicable large employers to file information returns.

Q: Can an employer avoid Play or Pay by either paying for their employees' individual coverage or just offering them additional compensation?

A: No. If an employer pays for individual coverage or provides additional compensation for coverage, the employer is still not offering an "eligible employer-sponsored plan" so under the law, is not offering coverage and would be subject to penalties.

However, an employer may offer an "opt-out" benefit wherein the employer offers coverage to their employees, but will allow the employees to "opt-out" of the employer-sponsored coverage and take a cash payment instead. It should be noted that this "opt-out" benefit must be written into the employer's cafeteria plan document.

Q: How does the Employer Shared Responsibility mandate apply to staffing companies?

A: With regard to coverage offers, the rule states that a determination has to be made if the employee is the "common law" employee of the hiring company or the PEO or staffing firm. The IRS states that in typical cases the PEO or staffing firm is not the common law employer, so the coverage offer would be the responsibility of the hiring entity if it was an applicable large employer. A staffing firm or PEO may make the offer of coverage for the hiring employer, but if the hiring employer is an employer subject to the mandate, the employer's obligation to offer coverage will only be satisfied if: "the fee the client employer would pay to the staffing firm for an employee enrolled in health coverage under the plan is higher than the fee the client employer would pay to the staffing firm for the same employee if the employee did not enroll in health coverage under the plan.

When tracking hours due to extreme variability in practices within this industry, temp firms are directed to calculate their employees' hours based on "the typical experience of an employee …with the temporary staffing firm."

Q: Are Union employees excluded from the Play or Pay calculations?

A: No. Union employees are counted along with non-union employees and employers that make contributions to a multiemployer plan pursuant to a collective bargaining agreement under which coverage is offered to full-time employees and their dependents, are not liable for a penalty if the coverage satisfies the affordability and minimum value requirements.

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