



ACA OVERVIEW

Provided by S.S. Nesbitt & Co., Inc.

Pay or Play—Employer Shared Responsibility Penalties

The Affordable Care Act (ACA) requires applicable large employers (ALEs) to offer affordable, minimum value health coverage to their full-time employees (and dependents) or pay a penalty. This employer mandate is also known as the “employer shared responsibility” or “pay or play” rules.

An ALE will face a penalty if one or more full-time employees obtain a subsidy through an Exchange. An individual may be eligible for a subsidy either because the ALE does not offer coverage, or offers coverage that is “unaffordable” or does not provide “minimum value.”

This ACA Overview provides a summary of the penalties that may apply under the employer shared responsibility rules.

LINKS AND RESOURCES

- On July 9, 2013, the Internal Revenue Service (IRS) issued [Notice 2013-45](#) to provide formal guidance on the one-year delay.
- On Feb. 12, 2014, the IRS published [final regulations](#) on the ACA’s employer shared responsibility rules.
- The IRS has also provided [Questions and Answers](#) for employers on the employer shared responsibility rules.
- On Dec. 16, 2015, the IRS issued [Notice 2015-87](#) to confirm the adjusted penalty amounts for 2015 and 2016.

This ACA Overview is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. Readers should contact legal counsel for legal advice.

HIGHLIGHTS

APPLICABLE LARGE EMPLOYERS

Only ALEs are subject to the employer shared responsibility rules.

- ALEs are employers that employ, on average, **at least 50 full-time employees, including full-time equivalent employees (FTEs)**, during the preceding calendar year.
- All ALEs are subject to these rules, including for-profit, nonprofit and government employers.

POTENTIAL PENALTIES

- Two separate penalties can apply under the employer shared responsibility rules—the Section 4980H(a) penalty and the Section 4980H(b) penalty.
- Only one of the penalties will apply for an ALE in a given situation; both penalties cannot apply to the same ALE at the same time.



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APPLICABLE LARGE EMPLOYERS

Only an ALE may be subject to shared responsibility penalties regarding employer-sponsored health coverage. An ALE is an employer with, on average, **at least 50 full-time employees, including full-time equivalent employees (FTEs)**, during the preceding calendar year.

In determining whether an employer is an ALE, both full-time and part-time employees are included in the calculation. Full-time employees are those working an average of **30 or more hours per week** (or 130 hours in a calendar month). The hours worked by part-time employees (that is, those working less than 30 hours per week) are included in the ALE calculation on a monthly basis by dividing their total number of monthly hours worked by 120. These are called full-time equivalent employees (FTEs).

EXAMPLE

A company has 35 full-time employees (30+ hours), and 20 part-time employees who all work 24 hours per week (96 hours per month). The part-time employees' hours are treated as equivalent to 16 full-time employees, based on the following calculation:

$$20 \text{ employees} \times 96 \text{ hours} / 120 = 1920 / 120 = 16$$

This company would be considered an ALE, based on a total FTE count of 51. That is, 35 full-time employees plus 16 FTEs, based on part-time hours.

Table 1 illustrates whether certain groups of employees are counted in determining whether an employer is an ALE and whether they are included in any penalty calculation.

Table 1. Determination and Potential Application of Employer Penalties for Categories of Employees

Employee Category	How is this category of employee used to determine ALE status?	If the employer is an ALE, could it be subject to a penalty if this type of employee received a subsidy?
Full-time	Counted as one employee, based on a 30-hour or more work week	Yes
Part-time	Pro-rated (calculated by taking the hours worked by part-time employees in a month divided by 120)	No
Seasonal	Counted in initial calculation, but a special rule may apply	Yes, for the month in which the seasonal worker is full-time
Temporary Agency	Generally, counted as working for the temporary agency (except for those workers who are independent contractors)	Yes, for those counted as working for the temporary agency

POTENTIAL PENALTIES

Regardless of whether or not an ALE offers coverage, it will be potentially liable for a penalty *only if* at least one of its full-time employees receives a subsidy for coverage purchased through an Exchange. A full-time employee includes only those individuals working 30 hours or more per week. As shown in Table 1, part-time workers are *not* included in penalty calculations, even though they are included in the determination of whether an employer is an ALE. An ALE will not pay a penalty for any part-time worker, even if that part-time worker receives a subsidy.

Individuals who are not offered employer-sponsored coverage (and who are not eligible for Medicaid or other programs) may be eligible for a premium tax credit for coverage purchased through an Exchange if they have income between 100 percent and 400 percent of the federal poverty level (FPL). Individuals who are offered employer-sponsored coverage can only obtain subsidies for Exchange coverage if, in addition to the other criteria above, they also are not enrolled in their employer's coverage and their employer's coverage is either **unaffordable** or **does not provide minimum value**.

Other ACA provisions will also affect whether full-time employees can obtain a subsidy for Exchange coverage. For example, Exchanges have "screen and enroll" procedures in place for all individuals who apply for subsidies, which means that individuals who apply for subsidies must be screened for Medicaid and the state Children's Health Insurance Program (CHIP) eligibility and, if found eligible, are to be enrolled in those programs. Exchange subsidies will not be an option for these individuals. This could affect whether any of an ALE's full-time employees obtain an Exchange subsidy.

Penalty for ALEs Not Offering Coverage—The 4980H(a) Penalty

Under Section 4980H(a), an ALE will be subject to a penalty if it does not offer coverage to "substantially all" full-time employees (and dependents) and any of its full-time employees receives an Exchange subsidy. However, the 4980H(a) penalty will not apply to an ALE that intends to offer coverage to all of its full-time employees, but fails to offer coverage to a few of these employees, regardless of whether the failure to offer coverage was inadvertent.

An ALE satisfies the requirement to offer coverage to "substantially all" of its full-time employees and their dependents if it offers coverage to **at least 95 percent**—or fails to offer coverage to 5 percent (or, if greater, five)—of its full-time employees (and dependents). The alternative margin of five full-time employees is designed to accommodate relatively small ALEs, because a failure to offer coverage to a handful of full-time employees might exceed 5 percent of the ALE's full-time employees.

Under Section 4980H(a), the monthly penalty assessed on ALEs that do not offer coverage to substantially all full-time employees (and their dependents) is equal to **the ALE's number of full-time employees (minus 30) x 1/12 of \$2,000, for any applicable month**. However, ALEs are not required to include any employees who are in a limited non-assessment period in the penalty calculation. A "**limited non-assessment period**" is a period during which an ALE will not be subject to an employer shared

responsibility penalty for a full-time employee, regardless of whether that employee is offered health coverage during that period. These periods include:

- January through March of the employer’s first year as an ALE, for an employee who was not offered coverage by the employer during the prior calendar year;
- A permitted waiting period under either the look-back measurement method or the monthly measurement method;
- A new employee’s initial measurement period under the look-back measurement method;
- The period following an employee’s change in employment status that occurs during his or her initial measurement period under the look-back measurement method; and
- An employee’s first calendar month of employment, if he or she begins employment on a day other than the first of the month.

After 2014, the \$2,000 penalty amount is indexed by the premium adjustment percentage for the calendar year. The IRS confirmed the adjusted Section 4980H(a) penalty amounts, as follows:

\$2,080 for 2015

\$2,160 for 2016

\$2,260 for 2017

\$2,320 for 2018

Penalty for ALEs Offering Coverage—The 4980H(b) Penalty

ALEs that do offer coverage to substantially all full-time employees (and dependents) may still be subject to penalties if at least one full-time employee obtains a subsidy through an Exchange because:

- The ALE did not offer coverage to **all full-time employees**; or
- The ALE’s coverage is **unaffordable** or does not provide **minimum value**.

AFFORDABILITY

Employer-sponsored coverage is considered “unaffordable” if the employee’s required contribution for the lowest cost self-only coverage exceeds 9.5 percent (as adjusted annually) of his or her household income for the year. Because an employer generally will not know an employee’s household income, three optional affordability safe harbors are available for ALEs to determine affordability based on information that is available to them—the Form W-2 safe harbor, the rate of pay safe harbor and the federal poverty level safe harbor. The affordability contribution percentage is adjusted annually, as follows: 9.56 percent for 2015; 9.66 percent for 2016; 9.69 percent for 2017; and 9.56 percent for 2018.

MINIMUM VALUE

Employer-sponsored coverage fails to “provide minimum value” if:

- The plan’s share of total allowed costs of benefits provided under the plan is less than 60 percent of those costs; and/or
- The plan does not provide coverage for in-patient hospitalization or physician services.

Four approaches may be used to determine whether an employer’s health coverage provides minimum value—a Minimum Value calculator, safe harbor checklists, actuarial certification or, for plans in the small group market, a “metal level” of coverage.

Under Section 4980H(b), the monthly penalty assessed on an ALE for each full-time employee who receives a subsidy is **1/12 of \$3,000 for any applicable month**. However, the total penalty for an ALE would be limited to the Section 4980H(a) penalty amount.

After 2014, the \$3,000 penalty amount is indexed by the premium adjustment percentage for the calendar year. The IRS confirmed the adjusted Section 4980H(a) penalty amount, as follows:

\$3,120 for 2015

\$3,240 for 2016

\$3,390 for 2017

\$3,480 for 2018

OFFER OF COVERAGE

If an employee has not been offered an effective opportunity to accept coverage (or decline to enroll), the employee will not be treated as having been offered the coverage for purposes of the employer shared responsibility rules. This offer must be made at least **once during the plan year**.

The employee must also have an **effective opportunity to decline** an offer of coverage that is not affordable or does not provide minimum value. However, an effective opportunity to decline is not required for an offer of coverage that provides minimum value and is either affordable based on the FPL safe harbor or no cost to the employee. Thus, an ALE may not render an employee ineligible for subsidized coverage by providing an employee with mandatory coverage (that is, coverage which the employee is not offered an effective opportunity to decline) that does not provide minimum value.

For an employee to be treated as having been offered coverage for a month (or any day in that month), the coverage offered, if accepted, must be applicable for that month (or that day). **If an ALE fails to offer coverage to a full-time employee for any day of a calendar month during which the employee was employed, the employee is treated as not being offered coverage during that entire month.** However, a full-time employee who terminates employment in a calendar month will be treated as having been offered coverage during that month as long as the employee would have been offered coverage for the entire month if he or she had been employed for the entire month.

If an employee enrolls in coverage but **fails to pay the employee's share of the premium on a timely basis**, the ALE is not required to provide coverage for the period for which the premium is not timely paid, but will still be treated as having offered that employee coverage for the remainder of the coverage period (typically the remainder of the plan year) for purposes of the employer shared responsibility rules.

Examples

Table 2 shows four types of scenarios reflecting health coverage offerings of four ALEs (columns A through D) and whether any employer shared responsibility penalty applies. In these ALE scenarios, the employer size is assumed to remain constant, at 50 full-time employees, throughout the year. The table provides examples of the penalty consequences based on whether the ALE offers coverage and whether an employee receives a subsidy.

The four scenarios are:

SCENARIO A	The ALE does not offer coverage, but no full-time employees receive an Exchange subsidy. No penalty would be assessed.
SCENARIO B	The ALE does not offer coverage, and one or more full-time employees receive an Exchange subsidy. The annual penalty calculation is the ALE’s number of full-time employees minus 30, multiplied by \$2,000 (as adjusted annually). In this example (using 50 full-time employees), the penalty would not vary if only one employee or all 50 employees received a subsidy. The ALE’s annual penalty would be $(50 - 30) \times \$2,000$ —or \$40,000.
SCENARIO C	The ALE offers coverage, and no full-time employees receive an Exchange subsidy. No penalty would be assessed.
SCENARIO D	<p>The ALE offers coverage, but one or more full-time employees receive an Exchange subsidy. The number of full-time employees receiving a subsidy is used in the penalty calculation for an ALE that offers coverage. The annual penalty is the lesser of:</p> <ul style="list-style-type: none"> • The number of the ALE’s full-time employees minus 30, multiplied by \$2,000—or \$40,000, for an ALE with 50 full-time employees; or • The number of the ALE’s full-time employees who receive an Exchange subsidy, multiplied by \$3,000.

Note: These examples do not take into account the one-year delay for medium-sized ALEs or the 2015 plan year transition relief allowing ALEs with 100 or more full-time employees to reduce their full-time employee count by 80 when calculating the 4980H(a) penalty. They also do not take into account adjustments that are made to the penalty amounts for years after 2014.

Although the penalties are assessed on a monthly basis (with the dollar amounts above divided by 12), these examples use annual amounts, assuming the number of affected employees is the same throughout the year.

If an ALE with 50 full-time employees had 10 full-time employees who received a subsidy, then the potential annual penalty for the ALE for those individuals would be \$30,000. Because this is less than the overall limitation for this ALE of \$40,000, the penalty in this example would be \$30,000.

However, if an ALE with 50 full-time employees had 30 full-time employees who received a subsidy, the ALE’s potential annual penalty for those individuals would be \$90,000. Because \$90,000 exceeds this ALE’s overall limitation of \$40,000, the penalty in this example would be limited to \$40,000.

Table 2. Potential Annual Penalties for ALEs
(Applies to For-Profit and Nonprofit Organizations)

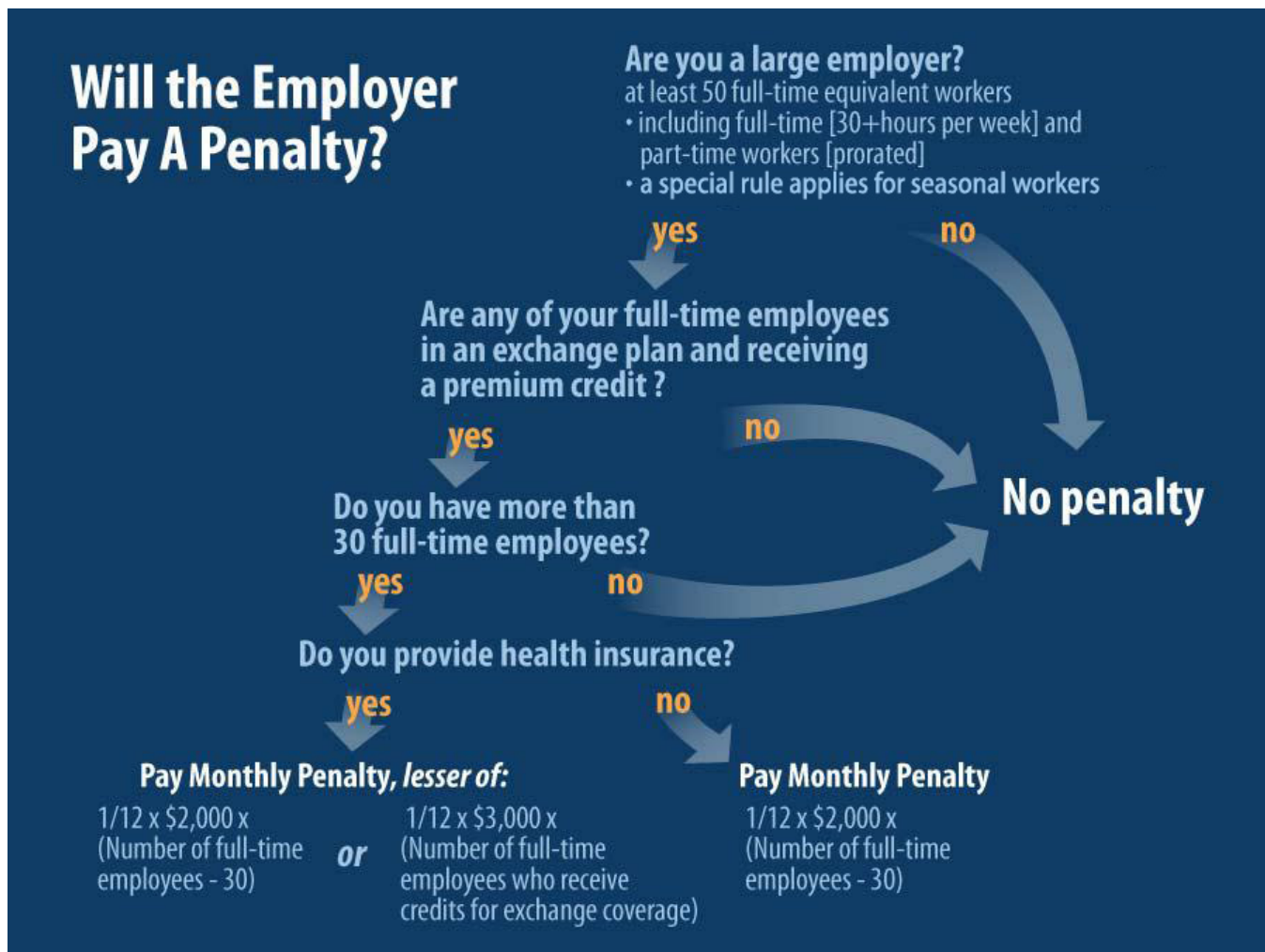
NOT AN ALE: LESS THAN 50 FULL-TIME (AND FTE) EMPLOYEES	ALE: 50 OR MORE FULL-TIME (AND FTE) EMPLOYEES			
	Does not offer coverage to substantially all full-time employees (and dependents)		Offers coverage to substantially all full-time employees (and dependents)	
	<u>Scenario A</u> No full-time employees receive an Exchange subsidy	<u>Scenario B</u> One or more full-time employees receive an Exchange subsidy	<u>Scenario C</u> No full-time employees receive an Exchange subsidy	<u>Scenario D</u> One or more full-time employees receive an Exchange subsidy
No penalty	No penalty	Number of full-time employees minus 30, multiplied by \$2,000	No penalty	Lesser of: <ul style="list-style-type: none"> • Number of full-time employees minus 30, multiplied by \$2,000 • Number of full-time employees who receive an Exchange subsidy multiplied by \$3,000 Penalty is \$0 if the ALE has 30 or fewer full-time employees, because it is based on the lesser of the two calculations

MORE INFORMATION

Please contact S.S. Nesbitt & Co., Inc. for more information on the ACA's employer shared responsibility rules.

DETERMINING IF AN EMPLOYER WILL PAY A PENALTY

The following flow chart summarizes the employer shared responsibility rules in broad terms. It gives a general overview of how the various provisions under the employer shared responsibility rules fit together to determine possible penalties. **It does not include all the rules that may apply to a specific employer to determine its potential liability for a penalty.**



Source: Congressional Research Service