



# VCU Medical Center

## Office of Health Innovation

### Proposed Rule - Shared Responsibility for Employers Regarding Health Coverage

**Description:** This document contains proposed regulations providing guidance under section 4980H of the Internal Revenue Code with respect to the shared responsibility for employers regarding employee health coverage. These proposed regulations would affect only employers that meet the definition of “applicable large employer” as described in these proposed regulations. The purpose of the proposed rule is to provide the standards by which assessments will be made in the case of applicable large employers, one or more of whose employees receive subsidies through Exchanges for either of the two reasons (i.e., the employer offers no coverage, or else the coverage is either unaffordable or lacks minimum value). The rule attempts to take the enormous uncertainties of employment into account in the methods that it establishes for calculating employer size.

### Major Provisions

The proposed rules, which build on earlier guidance issued over the 2011-2012 time period, interpret §4980H of the Internal Revenue Code, as added by the ACA. This section provides that an “applicable” large employer is subject to a shared responsibility payment under the following circumstances:

1. 4980H(a) liability: the employer fails to offer its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage (MEC) under an eligible employer sponsored plan and any full-time employee is certified to the employer has having received an applicable premium tax credit or cost-sharing reduction; or
2. 4980H(b) liability: the employer offers its full-time employees (and their dependents) the opportunity to enroll in MEC under an eligible employer-sponsored plan, but one or more employees is certified as having received an applicable tax credit or cost sharing reduction because either the coverage is unaffordable or does not provide minimum value, both of which are required under Internal Revenue Code as amended (§36B(c)(2)(C)(ii)) in order for employers that do offer an employer sponsored health benefit plan to avoid liability for payment.

The assessable payment is based on the number of full-time employees, minus the first 30, who are certified as having received premium or cost-sharing subsidies for their purchase of coverage for themselves, but not for those who have received subsidies simply for the purchase of coverage for their dependents.

The proposed rule contains 44 separate definitions. Among these are several that propose to clarify key elements of the previous notices, particularly how Treasury will determine whether an employer is an “applicable large” employer, meaning that its employees reach the 50-full-time employee threshold for triggering the shared responsibility assessment obligation. Some of these definitions are listed below.

- *Applicable large employer.* An “applicable large employer” covered by the shared responsibility law is defined under the proposed rule as an employer that employed at least 50 full-time employees, including full-time-equivalent employees, on business days during the preceding calendar year. Thus, universities that employ faculty under 9 month contracts would be considered applicable large employers because the faculty were employed on a full-time basis during business days under the terms of their contract.
- *Employee.* An employee is an individual who meets the common law definition of employee, as opposed to the definition used in the Fair Labor Standards Act. Under the common law, an employee is an individual who is subject to “the will and control of the employer not only as to what shall be done but how it shall be done.” (Preamble, p. 221). As the Preamble notes, this definition follows Title I of the ACA, which specifies that the ERISA definition of employee (the common law standard) is to be used.
- *Full-time employee.* Consistent with the ACA, the NPRM defines a full-time employee as an individual who is employed an “average of” 30 hours per week with the employer.
- *Full-time-equivalent employees.* This group is defined as a combination of employees, none of whom may be full-time but who are determined in the aggregate when an employer is an applicable large employer subject to the shared responsibility requirements.