

The 28 Ways to Determine Applicable Large Employer Status for 2015 (and 2014)

The starting point for any employer with respect to the Pay or Play decision is whether the employer is an Applicable Large Employer (ALE). An ALE, which is defined in the text of the ACA, is an employer who averaged at least 50 full-time employees (including full-time equivalent employees (FTEs)) on business days during the preceding calendar year. If an employer is not an ALE, it is not subject to the §4980H penalties. **When calculating an employer's ALE status, the controlled group rules apply.** Therefore, an employer should be careful and consult an attorney if there are parent and/or subsidiary arms associated with the employer.

Before discussing how an employer calculates whether it is an ALE, it is important to point out that an employer cannot use the monthly measurement method or the look-back measurement method when determining its ALE status. **An employer must calculate its ALE status using the actual hours of service accumulated by its workforce in the preceding calendar year.** However, an employer does not need to include the hours of service of leased employees, sole proprietors, partners, 2-percent S corporation shareholders, and workers described in IRC §3508 (real estate agents and certain sales people) when determining its ALE status as those individuals do not count as employees for ACA purposes.

There are two variables an employer uses to determine its ALE status. First, **an employer must determine its number of full-time employees.** A full-time employee is an employee who accumulates 30 or more hours of service per week. The final regulations allow an employer to use 130 hours of service in a calendar month (a calendar month is defined by the final regulations as one of the 12 months in the calendar year) as the monthly equivalent to 30 hours of service per week. If an employee meets the definition of a full-time employee for a calendar month, that employee will count as one employee for that calendar month when determining an employer's ALE status.

Next, an employer must determine its number of full-time equivalent employees (FTEs) for each calendar month. To determine the number of FTEs for a calendar month, all of the hours of service not accumulated by a full-time employee in that calendar month are aggregated together. However, when aggregating the employees' hours of service no single employee can have more than 120 hours of service included for any calendar month. Using these two rules an employer sums up the hours of service and divides by 120 to give the employer its FTE number for the calendar month. An employer is allowed to round to the nearest hundredth when determining its FTE number for a calendar month. For example if the FTE number is 12.457 an employer can round its FTE number to 12.46 for the calendar month.

The employer sums up its number of full-time employees and FTEs for each calendar month in the preceding year and divides by 12 to determine its ALE status for the current year. If the equation does not produce a whole number, an employer rounds down to the nearest whole number. For example if an employer's ALE status number equals 49.999, the employer can round down to 49.

The final regulations go into great detail about how an employer determines its ALE status. **A simpler approach for employers involves two simple rules:**

1. sum up the hours of service accumulated by an employer's workforce for the calendar month; and
2. never include more than 120 hours of service in any calendar month for an employee.

Apply the two rules and divide the number by 120 to get an employer's ALE number for a calendar month. After an employer does this for all 12 calendar months in a calendar year sum up the total and divide by 12. If an employer's number is 50 or more, it is an ALE unless the seasonal worker exception applies.

A seasonal worker is an employee who performs services on a seasonal basis such as a retail worker during the holiday season or an agricultural worker used for the harvest. If an employer has seasonal workers, the employer may be able to avoid ALE status by using the seasonal worker exception. For the seasonal worker exception to apply an employer must satisfy two requirements:

1. the employer must not be in excess of 50 full-time employees (including FTEs) for more than 120 days in the preceding calendar year; and
2. the employees employed during the period that is no more than 120 days who cause the employer to exceed 50 full-time employees (including FTEs) must be seasonal workers.

If these conditions are satisfied, the employer will not be an ALE despite averaging 50 or more full-time employees (including FTEs) throughout the preceding calendar year. In 2015 an employer can use the "Fewer than 100 Full-Time Employees" transition relief together with the seasonal worker exception to avoid the §4980H penalties.

The Shared Responsibility final regulations provide transition relief for an employer determining its ALE status for 2015. The transition relief allows an employer to use any period that is at least six consecutive calendar months to determine its ALE status for 2015. As a result, an employer has 28 options for determining its ALE status for 2015. The chart on the following page shows all 28 options:

The 28 Ways an Employer Can Determine its ALE Status for 2015												
1	Jan 2014	Feb 2014	March 2014	April 2014	May 2014	June 2014	July 2014	Aug 2014	Sept 2014	Oct 2014	Nov 2014	Dec 2014
2	Jan 2014	Feb 2014	March 2014	April 2014	May 2014	June 2014	July 2014	Aug 2014	Sept 2014	Oct 2014	Nov 2014	Dec 2014
3	Jan 2014	Feb 2014	March 2014	April 2014	May 2014	June 2014	July 2014	Aug 2014	Sept 2014	Oct 2014	Nov 2014	Dec 2014
4	Jan 2014	Feb 2014	March 2014	April 2014	May 2014	June 2014	July 2014	Aug 2014	Sept 2014	Oct 2014	Nov 2014	Dec 2014
5	Jan 2014	Feb 2014	March 2014	April 2014	May 2014	June 2014	July 2014	Aug 2014	Sept 2014	Oct 2014	Nov 2014	Dec 2014
6	Jan 2014	Feb 2014	March 2014	April 2014	May 2014	June 2014	July 2014	Aug 2014	Sept 2014	Oct 2014	Nov 2014	Dec 2014
7	Jan 2014	Feb 2014	March 2014	April 2014	May 2014	June 2014	July 2014	Aug 2014	Sept 2014	Oct 2014	Nov 2014	Dec 2014
8	Jan 2014	Feb 2014	March 2014	April 2014	May 2014	June 2014	July 2014	Aug 2014	Sept 2014	Oct 2014	Nov 2014	Dec 2014
9	Jan 2014	Feb 2014	March 2014	April 2014	May 2014	June 2014	July 2014	Aug 2014	Sept 2014	Oct 2014	Nov 2014	Dec 2014
10	Jan 2014	Feb 2014	March 2014	April 2014	May 2014	June 2014	July 2014	Aug 2014	Sept 2014	Oct 2014	Nov 2014	Dec 2014
11	Jan 2014	Feb 2014	March 2014	April 2014	May 2014	June 2014	July 2014	Aug 2014	Sept 2014	Oct 2014	Nov 2014	Dec 2014
12	Jan 2014	Feb 2014	March 2014	April 2014	May 2014	June 2014	July 2014	Aug 2014	Sept 2014	Oct 2014	Nov 2014	Dec 2014
13	Jan 2014	Feb 2014	March 2014	April 2014	May 2014	June 2014	July 2014	Aug 2014	Sept 2014	Oct 2014	Nov 2014	Dec 2014
14	Jan 2014	Feb 2014	March 2014	April 2014	May 2014	June 2014	July 2014	Aug 2014	Sept 2014	Oct 2014	Nov 2014	Dec 2014
15	Jan 2014	Feb 2014	March 2014	April 2014	May 2014	June 2014	July 2014	Aug 2014	Sept 2014	Oct 2014	Nov 2014	Dec 2014
16	Jan 2014	Feb 2014	March 2014	April 2014	May 2014	June 2014	July 2014	Aug 2014	Sept 2014	Oct 2014	Nov 2014	Dec 2014
17	Jan 2014	Feb 2014	March 2014	April 2014	May 2014	June 2014	July 2014	Aug 2014	Sept 2014	Oct 2014	Nov 2014	Dec 2014
18	Jan 2014	Feb 2014	March 2014	April 2014	May 2014	June 2014	July 2014	Aug 2014	Sept 2014	Oct 2014	Nov 2014	Dec 2014
19	Jan 2014	Feb 2014	March 2014	April 2014	May 2014	June 2014	July 2014	Aug 2014	Sept 2014	Oct 2014	Nov 2014	Dec 2014
20	Jan 2014	Feb 2014	March 2014	April 2014	May 2014	June 2014	July 2014	Aug 2014	Sept 2014	Oct 2014	Nov 2014	Dec 2014
21	Jan 2014	Feb 2014	March 2014	April 2014	May 2014	June 2014	July 2014	Aug 2014	Sept 2014	Oct 2014	Nov 2014	Dec 2014
22	Jan 2014	Feb 2014	March 2014	April 2014	May 2014	June 2014	July 2014	Aug 2014	Sept 2014	Oct 2014	Nov 2014	Dec 2014
23	Jan 2014	Feb 2014	March 2014	April 2014	May 2014	June 2014	July 2014	Aug 2014	Sept 2014	Oct 2014	Nov 2014	Dec 2014
24	Jan 2014	Feb 2014	March 2014	April 2014	May 2014	June 2014	July 2014	Aug 2014	Sept 2014	Oct 2014	Nov 2014	Dec 2014
25	Jan 2014	Feb 2014	March 2014	April 2014	May 2014	June 2014	July 2014	Aug 2014	Sept 2014	Oct 2014	Nov 2014	Dec 2014
26	Jan 2014	Feb 2014	March 2014	April 2014	May 2014	June 2014	July 2014	Aug 2014	Sept 2014	Oct 2014	Nov 2014	Dec 2014
27	Jan 2014	Feb 2014	March 2014	April 2014	May 2014	June 2014	July 2014	Aug 2014	Sept 2014	Oct 2014	Nov 2014	Dec 2014
28	Jan 2014	Feb 2014	March 2014	April 2014	May 2014	June 2014	July 2014	Aug 2014	Sept 2014	Oct 2014	Nov 2014	Dec 2014

If an employer elects to use a six month ALE measurement period, the employer sums up its ALE numbers for those six calendar months and divides by six to determine its ALE status for 2015. If an employer elects to use a seven month ALE measurement period, the employer sums up its ALE numbers for those seven calendar months and divides by seven to determine its ALE status for 2015. And so on...

An employer using an ALE measurement period that ends December 31 will have no time to offer coverage to its workforce by January 1 of the next year. This could create an issue for an employer who is unsure if it will meet or exceed the 50 full-time employee (including FTEs) threshold going into the calendar month of December. Remember an employer who fails to offer coverage to a full-time employee for any day of a calendar month is treated as not offering coverage to that full-time employee for the entire calendar month. Thus, in the worst case scenario an employer could learn it is an ALE on December 31 and have a §4980H(a) penalty assessed against it after the employer failed to offer a full-time employee coverage by January 1.

Treasury recognized this issue and provided some helpful new guidance that will assist employers. For the first year, and only the first year, an employer is recognized as an ALE the employer will not be subject to a potential §4980H(a) penalty for a full-time employee who was not offered coverage in the prior calendar year so long as the full-time employee is offered coverage by April 1. If the employer fails to offer coverage to an employee who was not offered coverage in the prior calendar year by April 1, the employer will be subject to a potential §4980H(a) penalty with respect to that employee for January, February, and March as well as any subsequent calendar month for which coverage is not offered to the employee. If the employer fails to offer coverage that provides minimum value to an employee who was not offered coverage in the prior calendar year by April 1, the employer will be subject to a potential §4980H(b) penalty with respect to that employee for January, February, and March as well as any subsequent calendar month for which coverage that provides minimum value is not offered to the employee.

One confusing aspect of the new guidance is what year counts as an employer's first as an ALE. Notice 2013-45 delayed the penalties associated with §4980H until 2015. However, it appears the notice did not delay the other provisions of §4980H which include the provision for an employer determining its ALE status for the 2014 calendar year. Thus, it could be argued that in order to use the new guidance in 2015 an employer must not have been an ALE based on the hours of service its workforce accumulated in 2013 (for the 2014 ALE status determination).

The Shared Responsibility proposed regulations provided the exact same transition relief provision for determining ALE status in 2014 that was provided by the final regulations for determining ALE status in 2015. Therefore, an employer has 28 different ways to calculate its ALE status for 2014. There is nothing in the final regulations that prevent an employer from using a different ALE measurement period in 2015 than it used in 2014. For example it appears an employer can measure the hours of service accumulated by its employees in 2013 from January 1, 2013 thru June 30, 2013 to determine its ALE Status for 2014. The employer could then use a different six calendar month (or seven, eight, etc. calendar month) ALE measurement period, such as July 1, 2014 thru December 31, 2014, to determine its ALE status for 2015. So long as an employer can use one of the 28 different ways to determine its ALE status to average less than 50 full-time employees (including FTEs) for 2014 and 2015, it will be able to take the position that 2016 (or any subsequent year) is its first as an ALE if the hours of service over the 12 month ALE measurement period dictate that result.

An argument could be made that every employer is going to be an ALE for the first time in the 2015 calendar year. To make this argument Notice 2013-45 would have had to delay all of §4980H which is possible because all of §4980H's provisions relate to the penalties discussed in §4980H(a) and §4980H(b). If that is the case, any employer (including employers with thousands of employees) could avoid a §4980H(a) for three months by offering coverage to employees that were not offered coverage in the prior calendar year by April 1, 2015. The better interpretation of the final regulations includes measuring an employer's ALE status in 2014, but many issues like this now exist because of the delays and piecemeal transition relief provisions.

The Shared Responsibility final regulations also included several other transition relief provisions, two of which were discussed in the Relief, Confusion Associated with §4980H(a) Transition Relief publication. An employer is allowed to use the transition relief provisions together which often times makes the transition relief provisions more useful. For example an employer using an ALE measurement period of at least six consecutive calendar months to determine its ALE status in 2015 can coordinate with the "Fewer than 100 Full-Time Employees" transition relief provision. Keep in mind it may be advantageous for an employer to have its ALE number be 100 or greater in 2015 as an employer will have more planning opportunities available to it and the §4980H(a) penalty will be \$100,000 cheaper.

The transition relief provisions provide an employer flexibility in determining its ALE status for 2015. The sooner an employer begins tracking the hours of service that will impact its ALE status for 2015, the more control it will have over its ALE fate.

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