



Oregon

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EXHIBIT 1 TO OAR 836-053-0015

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TO: Health Insurers Who Issue Health Benefit Plans to Small Employers

RE: Revised Counting Methodology for Determining Small or Large Group

The Oregon Division of Financial Regulation (division) of the Department of Consumer and Business Services is issuing this guidance to assist insurers and producers with determining employer group size. Specifically, this guidance will:

1. Clarify how to determine whether an employer is qualified to purchase a group health benefit plan
2. Clarify the counting methodology an insurer must use to determine the size of an employer group in order to identify the group as a large or small employer group.
3. Clarify what an eligible employee means as used in the Insurance Code as applicable to group health benefit plans.

The guidance is provided now to assist insurers in determining the correct placement of employer groups and applies to all plans issued or renewed on or after January 1, 2016.

In accordance with ORS 743B.005, “small employer” has the meaning given that term in 42 U.S.C. 18024 unless otherwise prescribed by the department. The division has adopted OAR 836-053-0015, which amends that definition to reflect changes enacted by Congress in H.R. 1624 which was signed by President Obama on October 7, 2015 (P.L. 114-60). Thus, for purposes of determining group size, the term “small employer” means, in connection with a group health plan with respect to a calendar year and a plan year, an employer who employed an average of at least 1 but not more than 50 employees on business days during the preceding calendar year and who employs at least 1 employee on the first day of the plan year. 42 U.S.C. 18024 (b) (2) as amended by P.L. 114-60.

ORS 743B.020 directs the department to adopt by rule a method for determining whether an employer is a small employer as defined in ORS 743B.005. The method adopted by the department must be consistent with the corresponding federal requirements for the Small Business Health Options Program (SHOP) as defined in ORS 741.300. The definition of small employer for purposes of the SHOP program defines small employer the same using the same definition as cited above. 42 U.S.C. 18031 (b) (2).

The methodology the division adopts to determine whether an employer is a “small employer” or a “large employer” is the Full Time Equivalent employee counting methodology employed by the IRS which is the same method used to determine qualification for SHOP.

This guidance is in alignment with requirements found in Section 1304 of the Patient Protection and Affordable Care Act (PPACA) and adopts the IRS method described for determining number of employees. This guidance mirrors advice provided in the IRS Fact Sheet, “Determining if an Employer is an Applicable Large Employer” which provides guidance for interpreting the regulations adopted by the Department of Treasury on employer shared responsibility for employers. 26 CFR 4980H-1, H-2 and H-3. <http://www.irs.gov/Affordable-Care-Act/Employers/Determining-if-an-Employer-is-an-Applicable-Large-Employer> .

The following definitions will be used:

Full-time employee means an employee who for any calendar month has on average at least 30 hours of service per week during the calendar month, or at least 130 hours of service during the calendar month.

Large employer means, with respect to a calendar year, an employer that employed an average of at least 51 full-time employees (including full-time equivalent employees) on business days during the preceding calendar year.

Seasonal worker is generally defined for this purpose as an employee who performs labor or services on a seasonal basis. For example, retail workers employed exclusively during holiday seasons are seasonal workers.

The following criteria determine whether an employer is eligible to purchase a group health benefit plan:

1. If the employer is a sole proprietor, a partner in a partnership, a 2-percent S corporation shareholder, or the spouse of a person who is a sole proprietor, a partner in a partnership or a 2-percent S corporation shareholder, at the beginning of the plan year, the employer employs at least one common law employee, and offers the group health benefit plan to all full time employees.
2. At the beginning of the plan year, the group has at least one common law employee.

The following methodology should be used to determine whether an employer is a large (at least 51 employees) or small (50 or fewer employees) employer:

The determination of the number of employees shall be based on the number of employees during the prior calendar year. If an employer **has at least 51** full-time employees, including full-time equivalent employees, on average during the prior calendar year, the employer is a large employer for the current calendar year.

Whether an employer is a large employer is determined each calendar year, and generally depends on the average size of an employer's workforce during the prior calendar year. If an employer **has fewer than 51** full-time employees, including full-time equivalent employees, on

average during the prior calendar year, the employer is a small employer for the current calendar year.

To determine its workforce size for a year an employer adds its total number of full-time employees for each month of the prior calendar year to the total number of full-time equivalent employees for each calendar month of the prior calendar year and divides that total number by 12.

Full-time equivalent employees

An employer determines its number of full-time-equivalent employees for a month in the two steps:

1. Combine the number of hours of service of all non-full-time employees for the month but do not include more than 120 hours of service per employee; and
2. Divide the total by 120.

An employer's number of full-time equivalent employees (or part-time employees) is only relevant to determining whether an employer is a large employer.

The following employees should not be included in the count:

- Temporary employees
- Seasonal employees
- Leased employees¹
- Contracted employees
- Retired or former employees on continuation of coverage
- A sole proprietor
- A partner in a partnership
- A 2-percent S corporation shareholder
- The spouse of a person who is a sole proprietor, a partner in a partnership or a 2-percent S corporation shareholder
- A worker described in 26 U.S.C. Section 3508

Growing employers

For plans sold outside the Oregon Health Insurance Marketplace (OHIM), an insurer must conduct an annual employee count in order to determine the current group size and to comply with ORS 743B.010.

Basic employer size determination examples²

Example 1 — Employer is a small employer

¹ An employer may continue to offer group health insurance to its leased workers in accordance with ORS 743.521, but the leased employees are not included in the employee count when determining group size.

² Additional examples can be found in section 54-4980H-2 of the [ESRP regulations](#).

- Company X has 40 full-time employees for each calendar month during 2016.
- Company X also has 15 part-time employees for each calendar month during 2016 each of whom have 60 hours of service per month.
- When combined, the hours of service of the part-time employees for a month totals 900 [$15 \times 60 = 900$].
- Dividing the combined hours of service of the part-time employees by 120 equals 7.5 [$900 / 120 = 7.5$]. This number, 7.5, represents the number of Company X's full-time-equivalent employees for each month during 2016.
- Employer X adds up the total number of full-time employees for each calendar month of 2016, which is 480 [$40 \times 12 = 480$].
- Employer X adds up the total number of full-time equivalent employees for each calendar month of 2016, which is 90 [$7.5 \times 12 = 90$].
- Employer X adds those two numbers together and divides the total by 12, which equals 47.5. [$(480 + 90) / 12 = 47.5$].
- Because the result is not a whole number, it is rounded to the next lowest whole number, so 47 is the result.
- So, although Company X has 55 employees in total [40 full-time and 15 part-time] for each month of 2016, it has 47 full-time employees (including full-time equivalent employees) for purposes of determining group size.
- Because 47 is less than 51, Company X is not a large employer for 2017.

Example 2 — Employer is a large employer

- Company Y has 41 full-time employees for each calendar month during 2016.
- Company Y also has 20 part-time employees for each calendar month during 2016, each of whom has 60 hours of service per month.
- When combined, the hours of service of the part-time employees for a month totals 1,200 [$20 \times 60 = 1,200$].
- Dividing the combined hours of service of the part-time employees by 120 equals 10 [$1,200 / 120 = 10$]. This number, 10, represents the number of Company Y's full-time-equivalent employees for each month during 2016.
- Employer Y adds up the total number of full-time employees for each calendar month of 2016, which is 492 [$41 \times 12 = 492$].
- Employer Y adds up the total number of full-time equivalent employees for each calendar month of 2016, which is 120 [$10 \times 12 = 120$].
- Employer Y adds those two numbers together and divides the total by 12, which equals 51 [$(492 + 120) / 12 = 51$].
- So, although Company Y only has 41 full-time employees, it is a large employer for 2017 due to the hours of service of its full-time equivalent employees.

Employer aggregation rules

Companies with a common owner or that are otherwise related under certain rules of section 414 of the Internal Revenue Code are generally combined and treated as a single employer for determining large employer status. If the combined number of full-time employees and full-time-equivalent employees for the group is large enough to meet the definition of a large employer, then each

employer in the group (called a large employer member) is part of a large employer, even if separately the employer would not meet the definition of large employer.

Example 3 — Employers are aggregated to determine group size:

- Corporation X owns 100 percent of all classes of stock of Corporation Y and Corporation Z.
- Corporation X has no employees at any time in 2015. • For every calendar month in 2015, Corporation Y has 21 full-time employees and Corporation Z has 30 full-time employees. Neither Corporation Y nor Corporation Z has any full-time equivalent employees.
- Corporations X, Y, and Z are considered a controlled group of corporations.
- Because Corporations X, Y and Z have a combined total of 51 full-time employees for each month during 2015, Corporations X, Y, and Z together are a larger employer for 2016.
- Corporation Y and Z are each a large employer member for 2016.
- Corporation X is a large employer member for 2016 because it does not have any employees during 2015.

Seasonal workers

When determining whether an employer is a large employer, the employer must measure its workforce by counting all of its common law employees. However, there is an exception for seasonal workers.

An employer is not considered to have more than 50 full-time employees (including full-time equivalent employees) if both of the following apply:

1. The employer's workforce exceeds 50 full-time employees (including full-time equivalent employees) for 120 days or fewer during the calendar year, and
2. The employees in excess of 50 employed during such 120-day period are seasonal workers

Application to new employers

A new employer (that is, an employer that was not in existence on any business day in the prior calendar year) is a large employer for the current calendar year if it reasonably expects to employ, and actually does employ, an average of at least 51 full-time employees (including full-time equivalent employees) on business days during the current calendar year.

More Information

More information about determining group size status can be found in the following IRS guidance:

- *Questions and Answers:* <http://www.irs.gov/Affordable-Care-Act/Employers/Questions-and-Answers-on-Employer-Shared-Responsibility-Provisions-Under-the-Affordable-Care-Act>.
- *Publication 5208 – Affordable Care Act – Are you an applicable large employer?:* <http://www.irs.gov/pub/irs-pdf/p5208.pdf>.
- *Employee (Common-Law Employee):* <https://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Employee-Common-Law-Employee>

The Department of the Treasury and the IRS also issued the following legal guidance related to the employer shared responsibility provisions:

- Regulations on the employer shared responsibility for employers. In particular, section 54.4980H-2 of the regulations addresses rules for determining large employer group status. <http://www.ecfr.gov/cgi-bin/text-idx?rgn=div8&node=26:17.0.1.1.5.0.1.41>
- *Notice 2013-45* announcing transition relief for 2014: <http://www.irs.gov/pub/irs-drop/n-13-45.pdf>.

For more information on seasonal employees, including the full definition of seasonal worker:

- Regulations found in section 54.4980H-1(a)(39): <http://www.ecfr.gov/cgi-bin/text-idx?rgn=div8&node=26:17.0.1.1.5.0.1.41>.

Group profile form

In an effort to provide consistency of group profile forms between insurers, the division is requiring that all insurers use the following questions in their group profile form. Insurers may add additional questions as necessary:

1. Either the following two questions, or other information requests that allow the insurer to determine whether the employer is a member of a controlled group:
 - a. Are you a part of a controlled group?
 - b. If you are a part of a controlled group, who is the employer for purposes of filing taxes?
2. How many full time employees were in the group during the prior calendar year?
3. How many full-time equivalent employees are in the group during the prior calendar year?
4. For the purposes of determining eligibility for group coverage, the employer must employ one common law employee and offer the health benefit plan to the employee. (The employee need not enroll in the plan but the employer must offer the plan to all full time employees.)
 - a. How many employees are there at the beginning of plan year for the health benefit plan?
 - b. Are all full time employees offered enrollment? (If no, the employer does not qualify for a group health benefit plan.)
 - c. If the employer is a sole proprietor, at the time of purchase enrollment, is there at least one common law employee other than the employer? (If no, the employer cannot purchase a small group plan only for the employer and the employer's dependents; the employer must purchase an individual plan.)