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**Sent:** Tuesday, September 08, 2015 2:22 PM

**To:** WOODS Gayle \* DCBS; WINKEL Karen J \* DCBS; HOLMAN Jeannette \* DCBS

**Subject:** Group Size Clean (Including all internal comments) 9-2-15.docx

Attached are my suggestions. You may want to check the document to ensure that the same font is used throughout.

The Oregon Insurance Division (OID) of the Department of Consumer and Business Services is issuing this guidance to assist insurers and producers with determining employer group size. The guidance is effective immediately and applies to all plans issued or renewed on or after January 1, 2016.

In accordance with ORS 743.730 as amended by section 9, chapter 515 Oregon Laws 2015, "small employer" has the meaning given that term in 42 U.S.C. 18024 unless otherwise prescribed by the department. Section 3a, chapter 515 Oregon Laws 2015 directs the department to adopt by rule a method for determining whether an employer is a small employer as defined in ORS 743.730. The method adopted by the department must be consistent with the corresponding federal requirements for the Small Business Health Options Program as defined in ORS 741.300.

The OID intends to adopt the methodology for determining whether an employer is a "small employer" or a "large employer" by rule as part of the rulemaking currently underway to implement the provisions of House Bill 2466 (2015). The method will use the Full Time Equivalent employee counting methodology employed by the IRS. This is and the same method used to determine eligibility qualification for SHOP.

~~This guidance will allow insurers and producers to determine employer size for purposes of plans issued or renewed in the 2016 in anticipation of the final adoption of the rules.~~

#### The following definitions will be used:

##### "Full-time Employee"

A full-time employee for any calendar month, means is an employee who 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 101 full-time employees (including full-time equivalent employees) on business days during the preceding calendar year

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

"Small employer" means an employer that is not a large employer.

"Large employer" means, with respect to a calendar year, an employer that employed an average of at least 101 full-time employees (including full-time equivalent employees) on business days during the preceding calendar year. For rules relating to the determination of applicable large employer status, see 26 CFR § 54.4980H-1, H-2, and H-3 substituting "101 full-time employees" for "50 full-time employees."

#### The following methodology should be used to determine whether an employer is a large employer:

The determination of the number of employees shall be based on the number of employees during the prior 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 at least 101 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.

**Comment [aab1]:** Unnecessary repetition of the first paragraph.

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**Comment [aab2]:** Definitions should be in alphabetical order.

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**Comment [aab3]:** Definitions should be in alphabetical order.

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If an employer **has fewer than 101** 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. ~~Employers who are small employers may be eligible for the Small Business Health Care Tax Credit.~~

Comment [aab5]: Unnecessary.

~~If an employer has at least 101 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.~~

To determine its workforce size for a given year, an employer adds ~~theirs~~ 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 Employee~~

~~A full-time employee for any calendar month is an employee who has on average at least 30 hours of service per week during the calendar month, or at least 120 hours of service during the calendar month.~~

#### Full-Time Equivalent Employees

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

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.

### Basic ~~e~~ Employer size determination examples<sup>1</sup>

#### Example 1 — Employer is a small employer

- 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 x 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 x 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 x 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 101, Company X is not a large employer for 2017.

#### Example 2 — Employer is a large employer

- Company Y has 91 full-time employees for each calendar month during 2016.

<sup>1</sup> Additional examples can be found in section 54-4980H-2 of the [ESRP regulations](#).

- 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 x 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 1,080 [91 x 12 = 1,092].
- Employer Y adds up the total number of full-time equivalent employees for each calendar month of 2016, which is 120 [10 x 12 = 120].
- Employer Y adds those two numbers together and divides the total by 12, which equals 101 [(1092 + 120) / 12 = 101].
- So, although Company Y only has 91 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 41 full-time employees and Corporation Z has 60 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 101 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.

There is an important distinction for employers to keep in mind regarding these aggregation rules. Although employers with a common owner or that are otherwise related generally are combined and treated as a single employer for determining whether an employer is a large employer, potential liability under the employer shared responsibility provisions is determined separately for each corporation in a controlled group.

A special standard applies to government entity employers in the application of the aggregation rules. Ownership isn't a typical arrangement for government entities and specific rules for aggregation of government entities have not been developed. Government entities may apply a good faith reasonable interpretation to determine if they should be aggregated with any other government entities.

### Seasonal Workers

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

An employer is not considered to have more than 101 full-time employees (including full-time equivalent employees) if both of the following apply:

1. The employer's workforce exceeds 101 full-time employees (including full-time equivalent employees) for 120 days or fewer during the calendar year, and

2. The employees in excess of 101 employed during such 120-day period are seasonal workers.<sup>2</sup>

~~A **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.<sup>3</sup>~~

### 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 101 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 IRS [Questions and Answers](#) and [Publication 5208](#), Affordable Care Act — Are you an applicable large employer? The Department of the Treasury and the IRS have 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.
- [Notice 2013-45](#), announcing transition relief for 2014.

### Group profile form

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

1. Are you a part of a controlled group?
2. Who is the employer for purposes of filing taxes?

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<sup>2</sup> ~~For more information about how seasonal workers affect ALE determinations, see the [Internal Revenue Services Questions and Answers page](#). For information on the difference between a seasonal worker and a seasonal employee under the employer shared responsibility provisions see Q&A #54. And for the full definition of seasonal worker, see section 54.4980H-1(a)(39) of the ESRP regulations.~~

<sup>3</sup> ~~For more information about how seasonal workers affect ALE determinations, see the [Internal Revenue Services Questions and Answers page](#). For information on the difference between a seasonal worker and a seasonal employee under the employer shared responsibility provisions see Q&A #54. And for the full definition of seasonal worker, see section 54.4980H-1(a)(39) of the ESRP regulations.~~