

**From:** Schopf, Michael D [<mailto:Michael.Schopf@providence.org>]  
**Sent:** Tuesday, September 08, 2015 5:53 PM  
**To:** WOODS Gayle \* DCBS  
**Cc:** HOLMAN Jeannette \* DCBS; WINKEL Karen J \* DCBS; Aaron Bals  
**Subject:** RE: Healthcare Reform Rulemaking Advisory Committee

Gayle,

I'm attaching a version of the employer sizing guidance with some comments from Providence Health Plan. Overall, we feel this is shaping up nicely.

Thank you for the opportunity to provide feedback.

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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 and the same method used to determine 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:

"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, H2, and H-3 substituting "101 full time employees" for "50 full-time employees and large employer" for "applicable large employer."

### 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 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.

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 plan 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 Employee

**Comment [SM1]:** If only one type of employer will be defined, we think it should be "small employer." Small employers are most closely regulated by OID (rates, EHB, AV etc.) and we feel the term needs to be clearly defined. Defining "small employer" by negation (i.e. "not a large employer") will be cumbersome and could create unnecessary confusion. We would prefer the rules include a definition of "small employer" similar to how the term is defined at 45 CFR 155.20.

**Comment [SM2]:** I'm not sure if you need to define the term "large employer." That term is not currently used in Division 53 of the OARs. I believe the current rules apply to "employers/groups" generally, or they are specific to "small employers."

**Comment [SM3]:** We recommend avoiding references to "applicable large employer" in the market sizing definitions. The term "applicable large employer" (ALE) is specific to employer shared responsibility and refers to those employers who are subject to the mandate. An ALE can be "small" or "large" under the Oregon Insurance Code.

**Comment [SM4]:** Most small employers actually won't qualify. An employer must have fewer than 25 employees to qualify for the SBHCTC and the employees are counted differently.

**Comment [SM5]:** Employers may have a non-calendar year plan year. Using "plan year" here clarifies that the count won't change in the middle of a plan year.

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 130 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 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 = 570)/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.
- 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 = 1200)/12 = 101].

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

- 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 an 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

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>2</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

**Comment [SM6]:** We interpret this to mean that a carrier would be required to treat each large employer member as a large group, even if the member, by itself, has fewer than 101 employees.

For example, let's assume the same facts except Y and Z are both headquartered out of state with no Oregon employees. X, however, is headquartered in Oregon and all employees live or work in Oregon. X, Y, & Z are still a controlled group, but only X is seeking insurance in Oregon.

Are we correct that, for rating and benefit purposes, an Oregon carrier should treat Corporation X (41 employees) as a large group?

**Comment [SM7]:** This language is from the employer shared responsibility provisions. It is irrelevant for the group sizing question.

**Comment [SM8]:** Again, this is shared responsibility language... I'm not sure what relevance this would have in Oregon.

**Comment [SM9]:** Should this be "common law" employees?

<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](#).

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?

**Comment [SM10]:** This question will be confusing to most employers, who are not part of controlled groups. In lieu of a question, we would prefer an approach that includes a mandatory disclaimer explaining the requirements for controlled groups and allowing the employer to complete the form accordingly.

We believe this will ensure that employers who are part of controlled groups will be appropriately advised of the aggregation requirements while at the same time avoid forcing the question on the vast majority of small employers.

Please note that the determination of controlled group status is a complicated tax question that can only be made by a qualified tax or legal professional with knowledge of each entity's ownership structure. Carriers cannot be expected to independently verify controlled group status or to investigate whether an employer that applies as a single entity is part of a controlled group.

Sample disclaimer language:

**Controlled and Affiliated Groups**

*Controlled and Affiliated Groups means groups that are commonly controlled and/or affiliated as described in subsection (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986. If a group is a controlled or affiliated group of employers, a carrier must treat the group as a single group, and the controlled group must complete one group profile form.*

*Controlled Groups include parent-subsidiary, brother-sister, and the combination of both of the preceding.*

**Comment [SM11]:** We are not sure the relevance of this question. Can you clarify?