



PERMANENT ADMINISTRATIVE ORDER

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CHAPTER 836
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
INSURANCE REGULATION

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FILING CAPTION: Revisions to Oregon Employee Counting Methodology

EFFECTIVE DATE: 01/01/2024

AGENCY APPROVED DATE: 01/24/2023

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Filed By:
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AMEND: 836-053-0015

NOTICE FILED DATE: 11/28/2022

RULE SUMMARY: Revises methodology for determining whether an employer is a small or large employer for purposes of purchasing a group health benefit plan under the Oregon Insurance Code. Adopts Exhibit B titled "Second Revised Counting Methodology for Determining Small or Large Group" and makes the counting guidance provided under Exhibit B mandatory for plan years beginning on or after January 1, 2024.

CHANGES TO RULE:

836-053-0015

Definition of Small Employer ¶

(1) This rule establishes the methodology for defining a small employer to be used in any instance in which the definition set forth in ORS 743B.005 would apply and in rules of the Department of Consumer and Business Services implementing the Insurance Code.¶

(2) For purposes of determining the number of employees in a group health benefit plan, insurers and producers should follow:¶

(a) For plan years beginning before January 1, 2024, the guidance entitled, "Revised Counting Methodology for Determining Small or Large Group," as set forth in Exhibit A of this rule; and¶

(b) For plan years beginning on or after January 1, 2024, the guidance entitled "Second Revised Counting Methodology for Determining Small or Large Group," as set forth in Exhibit B of this rule.

Statutory/Other Authority: ORS 731.244, ORS 743B.0053, ~~Chapter 142, 2017 Laws~~743B.020

Statutes/Other Implemented: ORS 743B.0053, ~~Chapter 142, 2017 Laws~~743B.020, 743B.100

RULE ATTACHMENTS DO NOT SHOW CHANGES. PLEASE CONTACT AGENCY REGARDING CHANGES.



Oregon
Kate Brown, Governor

Department of Consumer and Business Services

Division of Financial Regulation

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EXHIBIT A TO OAR 836-053-0015

November 15, 2017

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 to assist insurers in determining the correct placement of employer groups and applies to all plans issued or renewed on or after January 1, 2018.

In accordance with ORS 743B.005, “small employer” means an employer who employed an average of at least one but not more than 50 full-time equivalent employees on business days during the preceding calendar year and who employs at least one full-time equivalent employee on the first day of the plan year, determined in accordance with this methodology.

ORS 743B.020 directs the department vision 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 is the same as the definition specified in ORS 743B.005.

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.

Common law employee: an employee is considered a common law employee if the employer has the authority to direct and control the manner in which the services are performed by the individual.

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 that is enrolled in the plan, 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 that is enrolled in the plan.

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 these 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

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.

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

- Company X has 40 full-time employees for each calendar month during the calendar year.
- Company X also has 15 part-time employees for each calendar month during the calendar year 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 the calendar year.
- Employer X adds up the total number of full-time employees for each calendar month of the calendar year, which is 480 [40 x 12 = 480].
- Employer X adds up the total number of full-time equivalent employees for each calendar month of the calendar year, 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 the calendar year, 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 the calendar year.
- Company Y also has 20 part-time employees for each calendar month during the calendar year, 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 the calendar year.
- Employer Y adds up the total number of full-time employees for each calendar month of the calendar year, which is 492 [41 x 12 = 492].

² Additional examples can be found in section 54-49801-2 of the ESRP regulations.

- Employer Y adds up the total number of full-time equivalent employees for each calendar month of the calendar year, which is 120 [10 x 12 = 120].
- Employer Y adds those two numbers together and divides the total by 12, which equals 51 [(492 + 120 = 612)/12 = 51].
- So, although Company Y only has 41 full-time employees, it is a large employer for the following calendar year 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 during the calendar year.
- For every calendar month in the year, 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 the calendar year, Corporations X, Y, and Z together are a larger employer for the following calendar year.
- Corporation Y and Z are each a large employer member for the following calendar year.
- Corporation X is a large employer member for the calendar year because it does not have any employees during the previous calendar year.

Example 4 – Employer does not qualify to purchase insurance as a small group

- Company D has three owners, all practicing physicians that take paychecks and work 40 hours a week. All three owners elect coverage under their small group plan.
- Company D has a part time administrator that works 30 hours per week. The administrator waives coverage because she is covered under her spouses plan.
- Company D does not qualify to purchase small group insurance because no common law employee is electing coverage under the plan.

In order to qualify to purchase small group coverage Company D's administrator would need to qualify as a common law employee AND elect coverage under Company D's small employer Group.

- Because there is NO common law employee electing coverage, the three owners are not eligible to purchase a small group plan and will need to purchase individual health plans.

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 on Employer Shared Responsibility Provisions Under the Affordable Care Act*: <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 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>.



EXHIBIT B TO OAR 836-053-0015

January 1, 2024

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

RE: Second Revised Counting Methodology for Determining Small or Large Group

The Oregon Division of Financial Regulation of the Department of Consumer and Business Services (department) 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 to assist insurers in determining the correct placement of employer groups and applies to all plans issued or renewed on or after January 1, 2018.

In accordance with ORS 743B.005, “small employer” means an employer who employed an average of at least one but not more than 50 full-time equivalent employees on business days during the preceding calendar year and who employs at least one full-time equivalent employee on the first day of the plan year, determined in accordance with this methodology.

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 is the same as the definition specified in ORS 743B.005.

The methodology the department 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:

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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 that is enrolled in the plan, and offers the group health benefit plan to all full time employees.
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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.

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

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- 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 the calendar year.
- Employer Y adds up the total number of full-time employees for each calendar month of the calendar year, which is 492 [41 x 12 = 492].
- Employer Y adds up the total number of full-time equivalent employees for each calendar month of the calendar year, which is 120 [10 x 12 = 120].
- Employer Y adds those two numbers together and divides the total by 12, which equals 51 [(492 + 120 = 612) / 12 = 51].
- So, although Company Y only has 41 full-time employees, it is a large employer for the following calendar year due to the hours of service of its full-time equivalent employees.

² Additional examples can be found in section 54-4980H-2 of the ESRP regulations.

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.

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- 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 the calendar year, Corporations X, Y, and Z together are a larger employer for the following calendar year.
- Corporation Y and Z are each a large employer member for the following calendar year.
- Corporation X is a large employer member for the calendar year because it does not have any employees during the previous calendar year.

Example 4 – Employer does not qualify to purchase insurance as a small group

- Company D has three owners, all practicing physicians that take paychecks and work 40 hours a week. All three owners elect coverage under their small group plan.
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In order to qualify to purchase small group coverage Company D's administrator would need to qualify as a common law employee AND elect coverage under Company D's small employer Group.

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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.

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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.

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

- *Questions and Answers on Employer Shared Responsibility Provisions Under the Affordable Care Act:*
<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 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>