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New Guidance Tackles Various Employer Mandate Issues

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IRS Notice 2015-87 provides further guidance on the application of various provisions of the Affordable Care Act ("ACA") that affect applicable large employers ("ALEs") under the Employer Penalty.

Unless otherwise provided, the guidance in Notice 2015-87 applies for plan years beginning on or after January 1, 2016, but employers may rely upon this guidance for all prior periods.

Notably, the guidance:

- Announces 2015 inflation adjustments to the "A" and "B" Penalties for calendar year (CY) 2015, $2,080/$3,120 and CY 2016, $2,160/$3,240 respectively.
- Clarifies how to calculate hours of service in certain situations when no duties are performed.
- Requires some non-educational organizations, like a staffing firm, to follow special rules applicable to educational organizations when placing individuals in an educational organization if a meaningful opportunity to provide services is not available throughout the entire year.

Additional details are provided below.

Inflation Adjustment To Employer Penalty (Q/A-13)

Background. Under the ACA, the amount of the Employer Penalty was established for a 2014 effective date with an annual inflation adjustment. However, the government delayed any assessments for one year (until 2015) and did not announce inflation adjustments for calendar years beginning after 2014.

New Guidance. The Notice provides the adjustments to the annual assessment for calendar years 2015 and 2016 as follows:

Calendar Year	"A" Penalty	"B" Penalty
2015	$2,080 (or $173.33/month)	$3,120 (or $260/month)
2016	$2,160 (or $180/month)	$3,240 (or $270/month)

Penalties are paid annually but assessed monthly. Future adjustments will be posted at www.irs.gov.

Example 1

An ALE with 200 FTEs does not offer coverage in calendar year 2015 and 2016. One FTE receives a subsidy in the marketplace to purchase health insurance coverage for all 12 months of the calendar year.

For 2015: $2,080 × (200 – 80 FTEs) = $249,600

For 2016: $2,160 × (200 – 30 FTEs) = $367,200

Example 2

An ALE with 200 FTEs offers unaffordable coverage to all FTEs. Instead of taking the employer's coverage, 50 FTEs receive a subsidy in the Marketplace to purchase health insurance coverage for all 12 months of the calendar year.

For 2015: $3,120 × 50 FTEs = $156,000

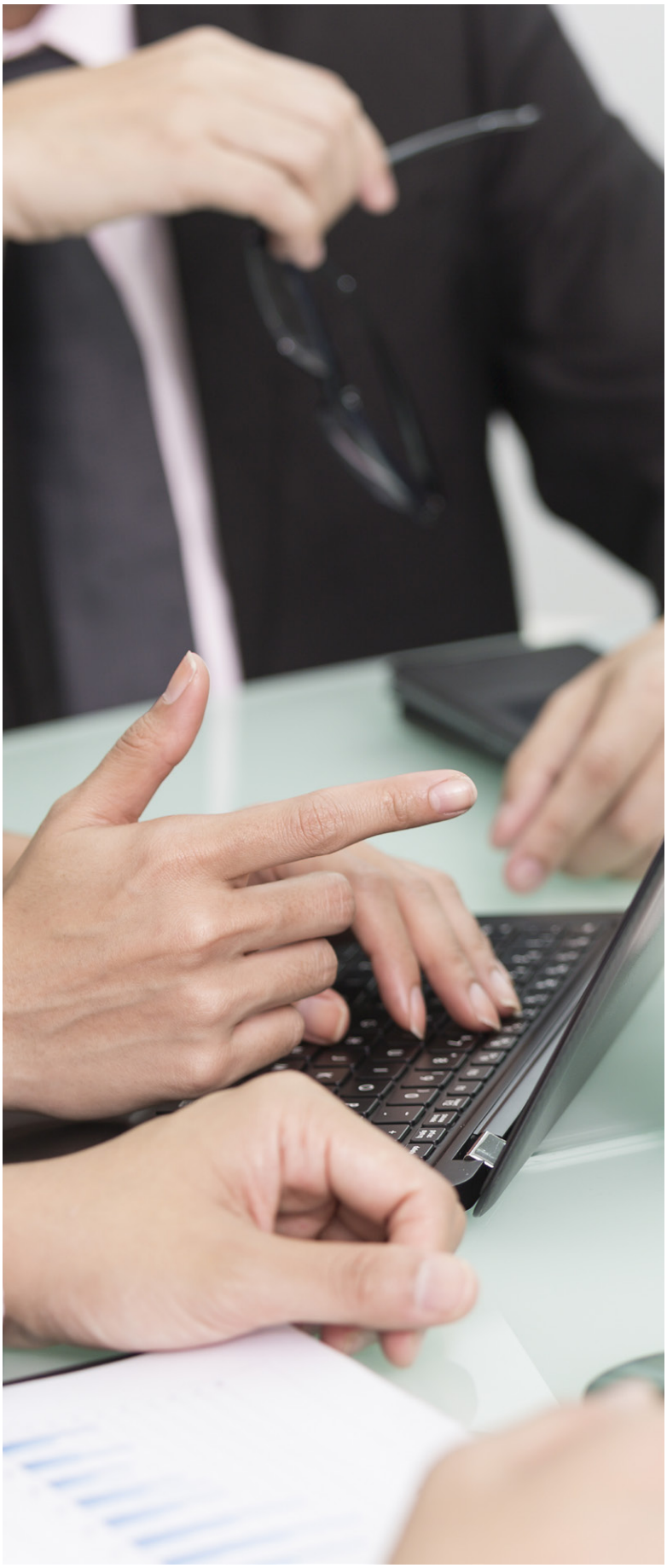
For 2016: $3,240 × 50 FTEs = $162,000

Hours Of Service (Q&A-14)

Background. An FTE is an employee who is employed an average of at least 30 hours of service per week (or 130 hours of service a month) with an ALE. An hour of service is defined as:

- each hour for which an employee is paid, or entitled to payment, for the performance of duties for the employer; and
- each hour for which an employee is paid, or entitled to payment by the employer for a period of time during which no duties are performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence.

With respect to hours where an employee is paid or entitled to payment when no duties are performed, the existing regulations reference an hours of service definition from Department of Labor regulations. However, the extent to which these regulations are incorporated for purposes of the employer mandate has been unclear.



New Guidance. The IRS intends to issue regulations that will adopt a "source of payment rule" for purposes of determining whether an hour of service must be credited when no duties are performed by the employee.

Specifically, if the employer contributes toward the payment, directly or indirectly then an hour of service must be counted. This is the case regardless of whether the payment is made by or due from the employer directly, or indirectly through, among others, a trust fund or insurer to which the employer contributes or pays premiums, and regardless of whether contributions made or due to the trust fund, insurer, or other entity are for the benefit of particular employees or are on behalf of a group of employees in the aggregate.

Moreover, hours of service are counted without limitation if there is a single continuous period where the employee performs no duties if the hours of service would otherwise qualify as hours of service under the Employer Penalty. There is a limited exception for educational organizations.

The guidance provides the following specific examples to consider when identifying hours of service.

An hour of service includes:
Disability payments (e.g., LTD or STD) when the benefit is included as taxable income to the employee and the recipient employee retains status as an employee of the employer.

An hour of service does not include:
Any hours after the individual terminates employment with the employer.
Payments made solely for the purpose of complying with workers' compensation.
Payments from a state or local government to the employee in the form of workers compensation wage replacement benefits provided the employee is not performing services for the employer.
Payments made solely for the purpose of complying with unemployment insurance laws.
Payments made solely for the purpose of complying with disability insurance laws.
Payments made to reimburse an employee for medical or medically-related expenses.
A disability payment (e.g., STD or LTD) where the employee paid for the coverage with after-tax contributions.

Rehire Rules For Educational Organizations (Q/A-16)

Background. Under the applicable measurement method, rehired employees may be treated as new hires if there is a break in service of at least 13 weeks. Educational organizations must use 26 weeks instead of 13 weeks.

Additionally, educational organizations that use the look back measurement method to identify full-time employees must credit hours of service (up to 501) for any employment break.

New Guidance. In light of concern that some educational organizations are attempting to avoid application of the 26-week rule and the employment break rule by, for example, using a third-party staffing agency for certain individuals providing service, the regulators propose amending the existing rules to extend application of these special rules in certain circumstances in which the services are being provided to one or more educational organizations, even if the employer is not an educational organization and even if the employee is not a teacher.

For example, the special rule would apply to an employer with respect to a bus driver who is primarily placed to provide bus driving services, or a cafeteria worker who is primarily placed to provide services in a cafeteria, at one or more educational organizations and who is not provided a meaningful opportunity to provide services during one or more months of the calendar year (for example, the summer recess period).

In contrast, an employer that primarily places bus drivers or cafeteria workers at educational organizations would not apply the special rule to an employee if the individual was offered a meaningful opportunity to provide services during all months of the year (for example, in the case of a cafeteria worker, by working at a hospital cafeteria during the summer recess period of the educational organization at which the individual generally is placed).

This change will apply as of the effective date specified in the regulations (when issued), but in no event this be effective before the first plan year beginning after the date on which the proposed regulations are issued.