
[IRS to Look for Governmental Entities Disaggregating to Avoid ALE Status.]

For governmental entities seeking to apply reasonable controlled group rules as required by the employer healthcare mandate, the IRS will be most concerned with whether they are disaggregating to avoid being considered an applicable large employer, according to Stephen Tackney, deputy associate chief counsel (employee benefits), IRS Office of Associate Chief Counsel (Tax-Exempt and Government Entities).

Final regulations on the Affordable Care Act's employer shared responsibility provisions released in February require that all employees of a controlled group be taken into account when determining whether the members of the controlled group or affiliated service group together are an applicable large employer. However, state or local governmental entities are left to apply a reasonable, good-faith interpretation of the controlled group rules.

If the entity is being reasonable and not just trying to avoid the section 4980H penalty through an unreasonable attempt to separate government purposes, the IRS is unlikely to take issue with that approach, Tackney said on a March 25 webcast sponsored by the American Bar Association's Joint Committee on Employee Benefits and the American College of Employee Benefits Counsel. He added that entities may want to look to ownership standards for tax-exempt entities for additional insight.

It will take some time before the IRS can provide more guidance on this issue, Tackney said. Before officials can write the aggregation rules, they must have a definition of a government entity that would carry over for that purpose, he said.

Kathryn Johnson, senior attorney, IRS Office of Associate Chief Counsel (TE/GE), said it is possible for an employee to qualify for the section 36B premium tax credit without subjecting an employer to an assessable payment under section 4980H(b). The section 4980H regs include some affordability safe harbors that aren't tied directly to section 36B and instead allow employers to look at other data they have access to, she said. Therefore, it's possible that an employer could offer coverage that is affordable within one of those safe harbors even if the employee gets a premium tax credit from purchasing insurance on an exchange, she said.

Tackney said that one example is when an employer bases affordability on information from a Form W-2 but the employee has other things, such as losses or alimony payments, that lower his income to the point of qualifying for a credit.

Regarding the relationship between the three-month limited assessment period in the final regs and the one-month orientation period allowed under the 90-day rule of section 2708, Tackney said the orientation period does not count as part of the waiting period in cases when an individual must make it through orientation before beginning his job. He said the "first day of the fourth month" requirement in the three-month rule could basically be equated with the 90-day waiting period.

by [Jaime Arora]