

section II.C.4. of the preamble. Comments are invited on any remaining issues relating to teachers, other educational organization employees, or industries with comparable circumstances.

4. Employees Compensated on a Commission Basis, Adjunct Faculty, Transportation Employees and Analogous Employment Positions

One commenter expressed concern the hours of service framework underlying the measurement and stability periods did not reflect the wide variety of workplaces, schedules, and specific work patterns in different industries and sectors of the economy, and that, consequently, the look-back method could be misused to treat employees long considered full-time employees as not full-time employees. A number of commenters requested special rules for employees whose compensation is not based primarily on hours and employees whose active work hours may be subject to safety-related regulatory limits (for example, salespeople compensated on a commission basis or airline pilots whose flying hours are subject to limits). Generally, the commenters suggest determining whether such employees are full-time employees for purposes of section 4980H by using hourly standards that, for the relevant industries or occupations, would be equivalent to the 30-hour and 130-hour standards applicable to other employees. Thus, for example, some commenters noted that educational organizations generally do not track the full hours of service of adjunct faculty, but instead compensate adjunct faculty on the basis of credit hours taught. Some comments suggested that hours of service for adjunct faculty should be determined by crediting three hours of service per week for each course credit taught. Others explained that some educational organizations determine whether an adjunct faculty member will be treated as a full-time employee by comparing the number of course credit hours taught by the adjunct faculty member to the number of credit hours taught by typical non-adjunct faculty members working in the same or a similar discipline who are considered full-time employees. Commenters on behalf of airline pilots noted that the number of hours of service that a pilot is permitted to operate an aircraft is limited under Federal law. The commenters requested that the guidance provide lower hourly standards for pilots that would be treated as equivalent to the 30-hour per week or 130-hour per month standard, or

alternatively establish a special rule treating pilots as full-time employees regardless of their hours of service.

The rules for counting hours of service and applying equivalents contained in the proposed regulations should assist in addressing some of the concerns raised in the comments. The Treasury Department and the IRS are continuing to consider, and invite further comment on, how best to determine the full-time status of employees in the circumstances described in the preceding paragraph and in other circumstances that may present similar difficulties in determining hours of service. Further guidance to address potentially common challenges arising in determining hours of service for certain categories of employees may be provided in the final regulations, or through Revenue Procedures, or other forms of subregulatory guidance.

Until further guidance is issued, employers of employees in positions described in the first paragraph of this section II.B.4. of this preamble (and in other positions that raise similar issues with respect to the crediting of hours of service) must use a reasonable method for crediting hours of service that is consistent with the purposes of section 4980H. A method of crediting hours would not be reasonable if it took into account only some of an employee's hours of service with the effect of recharacterizing, as non-fulltime, an employee in a position that traditionally involves more than 30 hours of service per week. For example, it would not be a reasonable method of crediting hours to fail to take into account travel time for a travelling salesperson compensated on a commission basis, or in the case of an instructor, such as an adjunct faculty member, to take into account only classroom or other instruction time and not other hours that are necessary to perform the employee's duties, such as class preparation time.

C. Look-Back Measurement Method for Determination of Full-Time Employees

As described in section III.A. of this preamble, the assessable payment under section 4980H(a) and section 4980H(b) is computed for each applicable large employer member. The potential section 4980H(a) liability of an applicable large employer member is determined by reference to the number of full-time employees employed by that member for a given calendar month, and its potential section 4980H(b) liability is determined by reference to the number of full-time employees of that member with respect to whom an applicable premium tax credit or cost-sharing

reduction is allowed or paid for a given calendar month. Section 4980H(c)(4)(A) provides that "[t]he term 'full-time employee' means, with respect to any month, an employee who is employed on average at least 30 hours of service per week." As explained in Notice 2011-36 and subsequent notices, determining full-time employee status on a monthly basis may cause practical difficulties for employers, employees, and Affordable Insurance Exchanges (Exchanges). For employers, these difficulties include uncertainty and inability to predictably identify which employees are full-time employees to whom coverage must be provided to avoid a potential section 4980H liability. This problem is particularly acute if employees have varying hours or employment schedules (for example, employees whose hours vary from month to month). A month-by-month determination may also result in employees moving in and out of employer coverage (and potentially Exchange coverage) as frequently as monthly. This result would be undesirable from both the employee's and the employer's perspective, and would also create administrative challenges for the Exchanges.

To address these concerns, and to give employers flexible and workable options and greater predictability, Notice 2011-36, Notice 2012-17, and Notice 2012-58 outlined a potential optional look-back measurement method as an alternative to a month-by-month method of determining full-time employee status. See the discussion in the Background section of this preamble. The response to this look-back measurement method generally was favorable. Most commenters supported the general structure of the method, although, some expressed concern that the potential difficulties in identifying full-time employees were overstated, that the look-back measurement method might be manipulated by employers, and that there was a need to prescribe rules that would address special workplace situations to ensure that certain classes of employees would be treated as full-time employees even though their hours might not result in full-time employee treatment under the look-back measurement method described in Notice 2012-58. After considering all of the comments on the notices, the Treasury Department and the IRS have incorporated in the proposed regulations the optional look-back measurement method described and cross-referenced in Notice 2012-58,