



# Health Care Reform in Indian Country

Self-Governance Communication & Education

Self-Governance Tribes Striving Towards Excellence in Health Care

## Issue Brief and Update for Tribes and Tribal Leaders

### Tribal Employers under the ACA's Employer Shared Responsibility Payment Rules: ALE Member Pay-or-Play Guide<sup>1</sup>

September 30, 2016

The Affordable Care Act (ACA) requires all employers that employ more than 50 full-time employees<sup>2</sup> (called applicable large employers, or ALEs) to offer minimum essential health insurance coverage to their full-time (FT) employees and dependents or make shared responsibility payments to the federal government. This requirement is set out in the Treasury Department's Employer Shared Responsibility Payment Rules, also known informally as the "pay or play" rules.<sup>3</sup> The rules apply to all employers, including Tribal governments.

Under the rules, there are two different types of shared responsibility payments:

- If an ALE fails to offer minimum essential coverage to at least 95% of its FT employees and their dependents, it might result in a shared responsibility annual payment of \$2,000 per eligible employee (with annual adjustments to the amount). ("§4980H(a) payments")
- If an ALE offers minimum essential coverage, but that coverage either is not affordable or does not provide minimum value, it might result in a shared responsibility annual payment of \$3,000 (with annual adjustments) per FT employee who receives a premium tax credit. ("§4980H(b) payments")

Both of these payments are assessed on a pro-rated monthly basis and are triggered if at least one employee obtains a premium tax credit for purchasing health insurance coverage through the Marketplace.<sup>4</sup>

There are special rules for ALEs that are made up of multiple entities (called ALE members). For purposes of determining whether an employer meets the 50 FT "ALE" threshold, the rules provide that all employees from each ALE member *collectively* must be counted together if they are under sufficient common control, according to the "controlled group" rules<sup>5</sup> set out in Sections 414(b), (c), (m) and (o) of the Internal Revenue Code.<sup>6</sup> But for purposes of assessing §4980H shared responsibility payments, the rules treat each ALE member *individually*.

<sup>1</sup> This issue brief does not constitute legal advice. Tribes are encouraged to consult with a tax attorney and / or accountant.

<sup>2</sup> Calculation also includes counting hours of non-full-time employees.

<sup>3</sup> 26 C.F.R. § 54.4980H-2.

<sup>4</sup> Shared responsibility payments are calculated in accordance with certain conditions. See generally, "Types of Employer Payments and How They Are Calculated: Basic Information," IRS (Dec. 1, 2015), available at <https://www.irs.gov/affordable-care-act/employers/types-of-employer-payments-and-how-they-are-calculated>

<sup>5</sup> 26 C.F.R. § 54.4980H-1(a)(16)

<sup>6</sup> 26 U.S.C. § 414. The controlled group rules are targeted at companies and partnerships, and provide detailed rules for determining common control based on stock ownership and corporate structure. In general, corporations that are commonly owned and controlled or part of the same family must be treated as being under a single ALE.

Under the rules, each ALE member is responsible for making its own decision as to how to meet the requirements of the rules, as well as for making its own shared responsibility payment.<sup>7</sup>

The rules do not spell out how Tribal departments, enterprises, or business units are to be treated, or whether they will consider the Tribe as a single employer. Instead, the rules contain a placeholder indicating that special rules for determining ALE membership for governments will be developed at a later date.<sup>8</sup> Until those rules are developed, **the IRS has said that governments can apply a “reasonable, good faith interpretation” of the controlled group rules to determine whether a Tribal governmental entity or department can be treated as an ALE member for purposes of the pay or play provisions; and as such, is able to decide whether to “pay or play” independently of other ALE members.**

In the instructions for Forms 1094-C and 1095-C, the IRS has provided a potentially applicable example for many Tribes. The instructions provide an example in which a county government is identified as an ALE made up of several ALE members: School District, Police Department, and County General Office.<sup>9</sup> For this county government, the School District could meet the ACA’s employer coverage requirements by “paying” (making assessable payments for each FT employee), and the Police Department and County General Office could meet these requirements by “playing” (offering coverage to FT employees and their dependents).

In another relevant example, the U.S. Office of Personnel Management (OPM) has issued guidance to federal agencies to assist them in complying with the reporting requirements of the rules.<sup>10</sup> In that guidance, OPM defines all of the federal government’s civilian departments that are eligible for the Federal Employees Health Benefits Program (FEHBP) as the collective ALE, and each Cabinet-level department, independent agency, board, and commission as the ALE members.<sup>11</sup> OPM states that each ALE member is responsible for complying with the reporting requirements under the rule and for any shared responsibility payments owed. While this guidance does not cover how Tribal governments should interpret the rule, or how the IRS might interpret the rule, it serves as an indicator of how one federal agency has interpreted the rule.

It is important to keep in mind, however, that there is at least some risk that the IRS might not accept a Tribe’s classification of one or more of its enterprises, departments, or business units as an ALE member responsible for its own shared responsibility payment, and instead treat the Tribe as a whole as a single ALE. If that was to occur, the failure of one Tribal business unit to offer minimum essential coverage could trigger penalties based on the Tribe’s total number of employees, not just those of the Tribal business unit not offering coverage.

#### Additional Resources:

<https://www.irs.gov/affordable-care-act/employers/determining-if-an-employer-is-an-applicable-large-employer>  
<https://www.irs.gov/affordable-care-act/employers/aca-information-center-for-applicable-large-employers-ales>

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<sup>7</sup> 26 C.F.R. §54.4980H-4(d).

<sup>8</sup> 26 C.F.R. § 54.4980H-1(a)(5); 26 C.F.R. § 54.4980H-2(b)(4).

<sup>9</sup> IRS, 2015 instructions for Forms 1094-C and 1095-C. <https://www.irs.gov/instructions/i109495c/ar01.html>

<sup>10</sup> Office of Personnel Management Benefits Administration Letter No. 14-207 (Oct. 3, 2014).

<sup>11</sup> In a separate guidance document specifically addressed to Tribes, OPM indicated that Tribes participating in FEHBP are permitted to offer FEHBP coverage to certain “business units” of a Tribe and not others. See OPM, “Fact Sheet: New Flexibility for Tribal Employer Participation in the FEHB Program,” effective Nov. 20, 2014.