The IRS has not specifically spelled out how employers should handle reporting responsibilities in merger and acquisition situations. The shared responsibility regulations defined an employer as follows:

**Employer.** The term employer means the person that is the employer of an employee under the common-law standard. See § 31.3121(d)-1(c). For purposes of determining whether an employer is an applicable large employer, all persons treated as a single employer under section 414(b), (c), (m), or (o) are treated as a single employer. Thus, all employees of a controlled group of entities under section 414(b) or (c), an affiliated service group under section 414(m), or an entity in an arrangement described under section 414(o), are taken into account in determining whether the members of the controlled group or affiliated service group together are an applicable large employer. For purposes of determining applicable large employer status, the term employer also includes a predecessor employer (see paragraph (a)(36) of this section) and a successor employer.

Unfortunately, paragraph (a)(36) of the designated section is reserved. The IRS offers no definition of predecessor or successor employer as it applies to shared responsibility or the reporting obligations.

Employers that experience a merger or acquisition will still need to decide how to handle reporting. Without direct guidance, employers need to make judgment calls on how to handle reporting. Organizations may choose to allocate responsibility for reporting in the purchase agreement to clearly delineate responsibility to the parties involved.

Mergers and acquisitions can become quite complex. This overview is our understanding of how to handle reporting for a merger and acquisition. We recommend you consult your M & A attorney for further guidance in this area.

**Applicable Large Employer Status**

If all parties involved in a merger and acquisition meet ALE status prior to the transaction, it is clear the “pay or play rules” and reporting should apply prior to and after the transaction. Remember, an ALE is an applicable large employer. An ALE is an employer who averaged 50 or more full-time and full-time employee equivalents in the previous calendar year.

**Type of Sale Should Dictate Responsibility**

In these situations, it is easy to see that the “play or pay” rules and reporting rules will apply, but who is responsible? That question will be determined by the details of the sale.

**Stock Sale**

For example, assume ACME Company acquires XYZ Company in stock sale. The facts of the sale are as follows:

- ACME and XYZ are part of the same IRS controlled after the sale.
- XYZ, however, maintains its separate EIN post-sale and continues to exist as a separate legal entity, post-sale.
This is pretty straightforward. **ACME and XYZ will report for the full calendar year under their separate EINs.** However, for the months following the sale date, ACME will list XYZ on Page 3 of the 1094-C as part of their Aggregate ALE group. XYZ will also be required to list ACME as part of their Aggregate ALE group on Page 3 of the 1094-C.

**Asset Sale**

Let’s change the example to indicate an asset sale. ACME Company purchases the assets of XYZ Company. The facts of the sale are as follows:

- Post-sale XYZ ceases to exist.
- It is clear from the sale date on; ACME is responsible for reporting the XYZ employees that are now employee of ACME Company.

**But who is responsible for reporting on XYZ’s employees prior to the date of sale?** In this case, it will likely be determined by who issues the W-2s.

- If XYZ issues W-2’s for the time period prior to the date of sale, then XYZ should issue the 1095-Cs.
- In some cases, as part of the sale, ACME may take responsibility for issuing W-2’s for the entire calendar year – pre- and post-date of sale. If this is the case, then ACME should issue the 1095-Cs for the entire calendar year for XYZ employees. If this is how the situation will be handled ACME needs to ensure they receive the information needed to complete the forms. If the plan is self-funded this would include detailed month to month information on who is covered under the plans.

Take care here. If the purchasing organization assumes certain liabilities when purchasing the assets, the purchasing organization may want to handle the reporting requirements if there is any potential for them to assume penalties for XYZ failing to submit 1095-Cs to the IRS and employees.

**What if ALE purchases a Non-ALE?**

In this example, ABC Company has 400 full-time employees. Mid-year they purchase Alfred E. Neumann Company that has only 30 full-time and full-time equivalent employees. The facts of the sale are as follows:

- In this case, Alfred E Neumann Company is not subject to the “pay or play” rules or reporting requirements prior to date of sale. As of the date of sale, they would be considered an ALE.
- If the sale is an asset sale, the former Alfred E Neumann employees that become employees of ABC Company are reported as full-time employees under ABC Company. For the time prior to the date of sale, they would reported as not employees.
- If it is a stock sale and Alfred E Neumann Company retains their tax ID post sale and continues to exist as a separate legal entity, they would need to complete 1094-C’s and 1095-C’s. It appears that employers would only be required to report information after the date of sale. ABC would be listed on page 3 as an ALE member. It is not clear what codes should be entered prior to date of sale in this situation. It may be permissible to report not an employee or not a full-time employee.

**What if a Non-ALE purchases a Non-ALE?**

This is a little less clear. Determination of whether an employer is an ALE is based on the average of full-time and full-time equivalent employees during the previous calendar year. However, regulations seem
to indicate the if the combined entity or IRS control group has 50 or more employees; they would be considered an ALE as of date of sale. The same rules apply as the previous example.

**New Wrinkle – Determining Full-Time Status**

Not only does an employer in a merger or acquisition situation need to be concerned with the “pay or play” rules and the reporting obligations, they also need to keep an eye on determining full-time status.

Organizations have two permissible methods to determine if employees work 30 or more hours per week. The monthly measurement method allows employers to count hours of service month to month. The look-back measurement methods allows employers to set a time period to measure hours worked and then apply that status during a set stability period.

When organizations are merged or acquired, this may mean assimilating different measurement methods or different time periods set in the look-back measurement method.

The easiest situation to deal with is the stock sale where the organizations maintain separate tax IDs and continue to operate as separate entities, even though they are part of the same IRS control group. In this situation, each organization can maintain their pre-sale approach to measuring full-time employees.

It appears that employers have two options when determining how to measure full-time status, post-sale.

**Option 1 – Treat Acquired Employees like Transferred Employees**

Treat employees of the acquired organization as if they transferred positions in the organization that have 2 different measurement methods or the same measurement method but in the case of look-back measurement period, different measurement and stability periods.

If the selling organization and the acquiring organization both use the monthly measurement method, transferred employees will continue to use the monthly measurement method.

If the employees were look-back measured, it gets a little more complicated. If the acquired employee is in a stability period with the selling organization, then the acquiring organization can retain that status until the end of the stability period. The acquiring organization can then merge the employee into their measurement/stability periods. This may involve being able to secure hours of work from a period of time with the selling organization, such that the employee has continuous ability to maintain coverage if working full-time.

**Example:** Selling Organization (SO) and Acquiring Organization (AO) Use Different Measurement Periods.

SO uses a 12-month standard measurement period beginning each October 15 and a 12-month standard stability period beginning each January 1. AO uses a 12-month standard measurement period beginning each April 15 and a 12-month standard stability period beginning each July 1. Alice is a long-time employee of SO who averages less than 30 hours of service per week during the period from October 15, 2014 through October 14, 2015, and averages 30 or more hours of service per week during the period from April 15, 2015 through April 14, 2016. SO merges into AO on March 30, 2016.
AO elects to follow the approach described in Part III. A of Notice 2014-49 with respect to employees acquired from SO in the merger, including Alice. At the time of the merger on March 30, 2016, Alice is in a stability period with respect to SO, in which she is treated as a non-full-time employee because she averaged less than 30 hours of service per week during SO’s standard measurement period (October 15, 2014 through October 14, 2015). For the period from March 30, 2016 through December 31, 2016 (the end of the standard stability period with respect to SO in which the acquisition occurs), Alice retains her status as a non-full-time employee.

As of January 1, 2017 (the date immediately following the end of the stability period with respect to SO in which the acquisition occurs), Alice’s status is determined under the look-back measurement method applicable to AO. Alice must be treated as a full-time employee starting January 1, 2017, because she averaged 30 or more hours of service per week during the measurement period beginning April 15, 2015 through April 14, 2016, which has a stability period of July 1, 2016 through June 30, 2017. (Note that the measurement period from April 15, 2015 through April 14, 2016 takes into account Alice’s hours of service with both SO and AO. Alice remains a full-time employee through June 30, 2017, and thereafter her status will continue to be determined using AO’s measurement and stability periods. In other words, her status for the stability period starting July 1, 2017 will be determined based on hours credited from April 15, 2016 to April 14, 2017.

Option 2 – Use a Transition Period

Continue to apply measurement and stability period of the selling organization for a transition period. After the transition period, apply the acquiring organizations measurement, administrative and stability periods.

Example: Applying the Measurement Method of the Acquired Organization During a Transition Period. Same facts as in Example 1 above, except AO elects to continue applying the measurement method used by SO during a transition period with respect to employees acquired from SO in the merger, including Alice. The transition period begins on March 30, 2016 (the transaction’s closing date) and ends on December 31, 2018. (The first standard measurement period that would have applied to Alice had the transaction not occurred and that would have begun after the closing date is the standard measurement period beginning October 15, 2016 and ending October 14, 2017; the stability period following that standard measurement period is the period beginning January 1, 2018 and ending December 31, 2018.) Assume Alice averages 30 or more hours of service per week using SO’s standard measurement periods from October 15, 2015 through October 14, 2016 and October 15, 2016 through October 14, 2017.

At the time of the merger on March 30, 2016, Alice is in a stability period with respect to SO, in which she is treated as a non-full-time employee because she averaged less than 30 hours of service per week during SO’s standard measurement period (October 15, 2014 through October 14, 2015). Thus, Alice retains her status as a non-full-time employee until the end of the related stability period ending on December 31, 2016. Alice must be treated as a full-time employee for the period starting January 1, 2017 through December 31, 2018 since her status is determined based on the hours credited using
SO’s measurement periods (October 15, 2016 through October 14, 2017), in which Alice averaged 30 or more hours per week.

To transition, Alice’s status is determined using AO’s measurement and stability periods. Thus, Alice’s hours must be measured during AO’s standard measurement period running from April 15, 2016 through April 14, 2017. Alice’s full-time will be applied starting July 1, 2018. If Alice drops to part-time, coverage would end on December 31, 2018. Alice would be measured going forward from April 15 to April 15th with a stability running July – July.

Can we treat acquired employees as new hires?

IRS guidance to date is not clear on whether or not an employer can treat employees gained via a merger as new hire under the “pay or play” rules. If you choose this route, it is in your benefit interest to consult an attorney on potential risks.

If acquired employees are treated as new hires, the acquiring organization would treat them under its measurement method in the same manner as any other newly hired employees. This might include, for example, starting a new waiting period under the acquiring organization’s health plan and, in the case of part-time, variable-hour, or seasonal employees, starting a new initial measurement period, if the acquiring organization is using the look-back measurement method.

Concluding Thoughts

Mergers and acquisitions were difficult enough without the added complexity introduced by the “pay or play” rules. Unfortunately, HR is often brought into the process at the late stages of the purchase.

It is critical the responsibility for “pay or play” requirements is addressed with the sale. In some circumstances, the merger and acquisition impact could be minimal. For example, a stock sale where the selling entity maintains their EIN and continues to exist as a separate legal entity post-sale will have minimum impact.
However, with other types of sales, the impact of an acquisition can be significant on buying organization. For example, consider an asset sale where the selling organization ceases to have employees after the date of sale. The acquired company has agreed to issue W-2s for the entire year of the sale for employees acquired as part of the sale. The acquiring company will need historical data from the seller to effectively code the 1095-Cs. If the sellers’ plan was self-funded, they will also need specific information on all member covered by the plan. It is important as an acquiring organization that if you are going to issue W-2s for the entire year for acquired employees, that you have access to all the data you need to also complete the 1095-Cs.

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