

Issue Brief

Employer Shared Responsibility Final Regulations Determining Employee Full-Time Status

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The recently released IRS final regulations on the Affordable Care Act (ACA) 4980H employer shared responsibility rules (often called the “pay or play” rules) largely formalized the rules previously described in proposed regulations originally released in January 2013. The new rules, however, contain important new guidance and clarifications regarding the definition of a full-time employee, including employer’s use of the optional look-back measurement period approach and counting hours of service.

Background

The ACA employer shared responsibility rules apply only to applicable large employers (ALE). An ALE is generally an employer with at least 50 full-time equivalents (FTEs) during the preceding calendar year. 4980H provides that an ALE is subject to an assessable payment (usually referred to by employers as a penalty) if (i) the employer fails to offer the opportunity to enroll in minimum essential coverage (MEC) to its full-time employees (and their dependents), or (ii) the employer offers the opportunity to enroll in MEC but one or more full-time employees is certified as having received a subsidy when purchasing individual health insurance through a public Exchange.

A full-time employee can qualify for ACA subsidies only if:

- (1) The employee is not eligible for the employer plan;
- (2) The employer’s plan is unaffordable (as defined by the ACA) for employee-only coverage; or
- (3) The plan is not a minimum value plan (generally a plan with at least a 60% actuarial value).

To minimize the risk of paying a 4980H penalty, employers must accurately determine which employees must be considered full-time for ACA purposes. Employers have the option of determining full-time status on a month-by-month basis or by implementing a look-back measurement period approach described in IRS regulations.

Understanding Hours of Service

When determining full-time status, it is necessary to consider all “hours of service” (any time for which the employee is paid or entitled to payment), not just hours actually worked. Employers may choose to calculate hours of service on a monthly basis or by using the optional look-back measurement method.

Many employers believed that the hours of service rules applied only if the employer used the look-back measurement period approach to defining “full-time employee.” The final regulations make clear that employers using a monthly determination of full-time status must also consider hours of service, as defined in the regulations, not just hours worked.

Irregular Positions Subject to Hours of Service Rules

An important clarification in the final regulations is that there are no special provisions or exceptions for certain types of employees, including:

- Short-term employees hired directly by the employer (separate special rules apply for employees hired through a staffing firm/PEO who are not common-law employees)
- High-turnover positions
- Paid interns

Consequently, employers must consider hours of service for these types of employees in the same manner as for any other employee, and some may earn full-time status depending on their particular situation.

Exemptions

The final rules provide a few exemptions for which employers are not required to count any hours of service even if there is some compensation involved:

- Bona fide volunteers – any volunteer who is an employee of a government entity or a 501(c) tax exempt organization whose only compensation is in the form of:
 - (i) reimbursement for (or reasonable allowance for) reasonable expenses incurred in the performance of services by volunteers; or
 - (ii) reasonable benefits (including length of service awards), and nominal fees, customarily paid by similar entities in connection with the performance of services by volunteers;
- Federal or state work-study students;
- Unpaid interns; and
- Some members of religious orders who are subject to a vow of poverty.

Determining Hours of Service for Employees Not Paid on an Hourly Basis

Hourly employees are tracked by counting actual hours of service from records of hours worked and non-worked hours for which payment is made or due. For non-hourly employees, tracking actual hours of service can be difficult. Until further guidance is issued, employers are required to use a reasonable method of crediting hours of service that is consistent with shared responsibility rules. The final rules provide guidance for a few specific non-hourly positions. The guidance related to these positions provides some insight into what may be considered reasonable by employers for other non-hourly positions until further guidance is issued.

- On-call hours – Employers must credit an employee with an hour of service for any on-call hour for which payment is made or due by the employer, for which the employee is required to remain on-call on the employer's premises, or for which the employee's activities while remaining on-call are subject to substantial restrictions that prevent the employee from using the time effectively for his or her own purposes.
- Adjunct faculty – The regulations provide an example of a reasonable method, crediting adjunct faculty with 2 1/4 hours of service per week for each hour of teaching or classroom time plus an hour of service per week for each additional hour outside of the classroom the faculty member spends performing duties he or she is required to perform (such as required office hours or required attendance at faculty meetings).
- Layover Hours in the Airline Industry – The employer must credit hours of service for a layover if the employee receives compensation for the layover or if the layover is counted by the employer toward required service. If the employee does not receive additional compensation for the layover, it would be reasonable for an employer to credit an employee with 8 hours of service for each day on which an employee is required to stay overnight for business purposes.

Using the Look-Back Measurement Period Method

The final rules formally adopted the optional look-back measurement method first introduced in IRS proposed regulations and guidance, which employers may use as an alternative to determining full-time status on a monthly basis. The rules describe two different types of measurement periods: a standard measurement period that applies to ongoing employees, and an initial measurement period that may be applied to new hire variable-hour, seasonal and part-time employees.

Employers must generally apply a measurement period uniformly for all employees. An employer may differentiate (i) between using the monthly method versus the look-back measurement method, or (ii) the length or dates for the measurement period for the following categories of employees:

- Hourly vs. salaried employees
- Union vs. non-union employees (or employees under separate collectively bargained agreements)
- Employees in different states
- Different entities within a controlled group or affiliated service group

Practical tip: Employers are not allowed to apply a different approach within categories of employees. For example, an employer could not use a measurement period for just some of its non-union hourly employees (e.g. just the variable-hour or seasonal employees). However, in most cases this rule will have relatively little impact on most employees. Consider hourly employees who regularly work more than 30 hours per week; these employees would be considered full-time regardless of whether the employer uses a monthly or a look-back measurement period approach.

Applying the Standard Measurement Period Approach to Ongoing Employees

When determining full-time status using a look-back measurement period, any employee who has been employed for one full standard measurement period is considered an ongoing employee. Until a full-time employee has been employed for one full standard measurement period, full-time employee status is based on the employee's hours of service each month (measured monthly).

Standard Measurement Period

Employers may use a 3-12 month measurement period to measure hours of service and determine full-time status. The measurement period need not be based on calendar months, but instead may be based on the period that begins on any date of the calendar month and ends on the immediately preceding date in the following calendar month (e.g. March 15 to April 14). This provision allows employers to design measurement periods that align more closely with non-calendar month payroll periods.

Practical tip: Most employers are choosing to use a 12-month measurement period because it requires that the measurement occur only once a year and allows health coverage to be offered in alignment with an annual group health plan year. Those employers who choose to use a shorter measurement period (e.g. 3 months) will be required to measure every 3 months and offer/drop coverage accordingly.

Standard Stability Period

Generally, the employee full-time determination made during the measurement period applies for a corresponding stability period, which must be as long as the measurement period but no less than 6 months. A stability period must be based on calendar months.

Practical tip: Most employers will choose to align the stability period with the group health plan year.

For an employer using a 12-month measurement period, any employee with 1,560 hours of service (30 hrs x 52 weeks) during the measurement period must be considered full-time as long as he or she remains employed during the corresponding stability period, regardless of the number of employee hours of service during the stability period.

Standard Administrative Period

An employer is allowed to implement an administrative period between the end of the measurement period and the beginning of the stability period. The standard administrative period cannot exceed 90 calendar days.

12 Month Standard Measurement Period Example

Assume a 12-month measurement/stability period and a 2-month administrative period. A typical measurement and stability may be structured as follows:

Example 1: Calendar plan year

Standard Measurement Period: Nov 1 – Oct 31

Standard Administrative Period: Nov 1 – Dec 31

Standard Stability Period: Jan 1 – Dec 31

Example 2: Non-calendar plan year with a May 1 plan year

Standard Measurement Period: Mar 1 – Feb 28

Standard Administrative Period: Mar 1 – Apr 30

Standard Stability Period: May 1 – Apr 30

Variable-Hour and Seasonal Employees

The final rules clarified that only variable-hour, seasonal and part-time employees may be subject to an initial measurement period of up to 12 months upon hire. Note: for part-time employees, this is unlikely to matter given that they will generally not ever achieve full-time status unless there is a change in employment status.

Variable-Hour Employees – A variable-hour employee is one who meets this guideline: “Based on the facts and circumstances at the start date, it cannot be determined that the employee is reasonably expected to work at least 30 hours per week for entire measurement period.”

The final rules provide examples of factors an employer may consider when making the determination between variable-hour and full-time. These factors are not meant to be all-inclusive; rather, they provide guidance on how an employer may make a reasonable determination regarding an employee’s status as a variable-hour employee. The factors are:

- Whether the employee is replacing an employee who was or was not a full-time employee;
- The extent to which employees in comparable positions are, or are not, full-time employees; and
- Whether the job was advertised, communicated or otherwise documented (for example, through a contract or job description) as requiring hours of service that would average 30 hours of service per week.

Seasonal Employees – A seasonal employee is defined under the final rules as an employee in a position for which the customary annual employment is 6 months or less, and that period of employment begins each calendar year in approximately the same part of the year, such as summer or winter.

Applying the Initial Measurement Period to New Hire Variable-Hour and Seasonal Employees

Initial Measurement Period

Variable-hour and seasonal employees (as well as part-time employees) can be subject to an initial measurement period of 3-12 months to determine full-time status. The initial measurement period can begin any time from date of hire to the first of the month following date of hire.

Practical tip: We expect many employers to use first of the month following date of hire to begin the initial measurement period. This arrangement will allow the employer to determine full-time status for all employees hired during a given month at the same time.

Initial Stability Period

Generally, the full-time determination made during the initial measurement period applies for the initial stability period, which must be as long as the measurement period but no less than 6 months.

Initial Administrative Period

For new employees earning full-time status during the initial measurement period, coverage must be offered no later than 13 months plus a partial month after the date of hire. Therefore, an employer using a 12-month initial measurement period is only allowed a maximum of a “1+ a partial month” administrative period.

12-Month Initial Measurement Period Example

Assume initial measurement period starts on the first of the month following hire date.

Initial periods for new variable-hour employee hired Mar 15, 2015

Initial Measurement Period: Apr 1, 2015 – Mar 31, 2016

Initial Administrative Period: Apr 1-30, 2016

Initial Stability Period: May 1, 2016 – Apr 30, 2016

Break in Service Rules

The final regulations contain guidance employers must consider in circumstances when an employee experiences a short period of time with no hours of service. This “break in service” could be a short termination of employment, or a period when the employee has no hours of service such as during an unpaid leave. The break in service rules determine whether an employee can be treated as a new hire or must be treated as an ongoing employee when returning to service.

In general, if an employee resumes employment after a break in service of at least 13 consecutive weeks (26 for educational organizations) with no hours of service, the employer can treat the employee as a new employee. If the break in service is less than the minimum (13 or 26 weeks), the employee may still be treated as a new employee due to what is called the “rule of parity.” The rule of parity states that an employee can be treated as new employee if the break in service is (i) at least 4 weeks long, and (ii) longer than the weeks of employment prior to the break.

However, if the break does not meet the break in service rules, the employee is treated as a continuing employee. Typically, a new employee has a waiting period or is subject to an initial measurement period before receiving an offer of coverage. If according to the break in service rules the employee must be treated as a “continuing employee,” the individual cannot be subject to a new waiting period or initial measurement period, but rather must be returned to the position he or she held at the time of departure as soon as is administratively possible.

The final rules clarify that these rules apply regardless of whether the employer determines full-time status on a monthly basis or by using the optional look-back measurement method. The final rules also amended the rule to be 13 (rather than 26) weeks, except for educational organizations.

Changes in Employment Status

Under the look-back measurement method, generally if the change in employment status results in a change in hours of service, that change would not take effect until the end of the corresponding stability period.

Change in Status during a Stability Period

The final rules provide an exception to this general rule for those employees who were full-time upon hire and who then changed status to part-time. For such employees, the employer is allowed to apply the monthly measurement method to an employee within 3 months of the change if the employee actually averages fewer than 30 hours of service per week for each of the 3 months following the change in employment status.

Changes during the Initial Measurement Period (new variable-hour/seasonal/part-time hires)

If employees are moved to a full-time position during their initial measurement period, the individuals must be offered coverage the earlier of (a) the 1st of the fourth month following the status change to full-time, or (b) the beginning of the initial stability period.

Summary

Now that final regulations have been issued, ALEs must work to implement any employment policies and procedure changes necessary to define and identify full-time employees so as to mitigate the risk of 4980H penalties. Many employers who already offer health coverage to a broad cross section of employees will find that relatively minor adjustments need to be made. However, as has been the case since the proposed rules were released over a year ago, employers who have not previously offered health coverage to some employees with 30 hours of service per week face a much more challenging transition.

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