

COVID-19 – Look-Back Measurement Method Implications

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Applicable large employers (ALEs), those employers with 50 or more full-time equivalents (FTEs), are required to offer medical coverage to full-time employees in order to avoid potential penalties under §4980H. Full-time status for this purpose is determined using either the monthly measurement method or the look-back measurement method. For ALEs using the look-back measurement method, there may be some unexpected implications for employees who request leave or whose hours are temporarily reduced related to COVID-19. It may also affect employees who are terminated from employment and later rehired.

General Rules

Under the look-back measurement method, ALEs may average hours of service over a period of 3–12 months (the employer's choice) to determine full-time status. If the employee averages full-time hours of service during the measurement period, the employee is then considered full-time for a corresponding stability period (generally matching the length of the measurement period). In other words, the employee will remain benefit eligible for the duration of the corresponding stability period, regardless of hours worked during that time (subject to certain exceptions). It is common for employers to use a 12-month measurement and stability period; however, some employers prefer a 6-month cycle to provide additional flexibility.

If there is a break in service (e.g. temporary reduction in hours or leave, or a termination of employment followed by a rehire), the length of the break may impact the application of the look-back measurement method.

The break in service rules require an employee who is rehired or reinstated within less than 13 weeks (26 weeks for an educational organization) to be treated as a "continuing employee." For a continuing employee:

- If the employee was previously covered before the break in service, coverage must be made available as soon as administratively possible if the employee is considered full-time upon rehire (on the 1st of the month following rehire).
- The measurement and stability periods continue as if the employee had never left, although no hours of service are credited during the break in service unless it was a leave of absence due to FMLA, USERRA, or jury duty ("special unpaid leave"). If the leave was "special unpaid leave," and the employee is considered a continuing employee, the employer is required to either exclude the leave or to impute hours for the leave when measuring hours to determine full-time status.

On the other hand, if the break in service was 13 weeks (26 weeks for an educational organization) or longer, the employee may be treated as a new hire, allowing the employer to impose a new waiting period or initial measurement period as applicable upon a rehire or return to work (no "special unpaid leave" rules apply requiring the employer to exclude the leave or impute hours when the employee may be treated as a new hire).

Plan Eligibility During a Reduction in Hours, Leave of Absence or Furlough

If employment is not terminated, but there is a reduction in hours or a temporary leave of absence, it's necessary to consider plan eligibility rules and any applicable leave policies in order to properly administer benefits.

For an ALE using the look-back measurement method, employees may remain eligible for benefits, at least for the duration of the current stability period. Under §4980H rules, those employees who averaged full-time hours in the previous measurement period are considered eligible for the corresponding stability period (e.g. plan year), even during a reduction in hours, unless employment is terminated. If employment is terminated, the employee is no longer eligible for coverage and COBRA should be offered.

Some ALEs using the look-back measurement method have chosen not to perfectly align plan eligibility rules with the §4980H rules. For example, some employers might terminate eligibility immediately upon a reduction in hours and offer COBRA continuation coverage rather than continuing to offer coverage through the remainder of the stability period. This runs the risk of a penalty under §4980H(b) if the continuation coverage is not considered

“affordable”, but the penalty of approximately \$320 per month (in 2020) if the employee waives continuation coverage and instead enrolls in subsidized coverage through a public Exchange may be a risk the employer is willing to take.

Plan Eligibility Following a Break in Service

Upon rehire or a return to regular hours following a temporary leave of absence or termination of employment, eligibility for coverage may depend upon the length of the break as well as whether the employee was enrolled prior to the break in service.

For employees who previously waived coverage, there is no obligation to offer coverage again upon a return to service or rehire because §4980H rules only require an annual opportunity to enroll or waive medical coverage. The employer could choose to be more generous and offer another opportunity to enroll following a break in service, subject to any limitations in its plan eligibility rules or imposed by the carrier (or stop-loss vendor), but would not be required to make another offer of coverage until the next open enrollment period.

For employees whose coverage was terminated during the break in service, an offer of medical coverage must be made no later than 1st of the month following return or rehire to avoid potential penalties under §4980H if the break in service was less than 13 weeks. If the break was 13 weeks or longer, the employer could impose a new waiting period or initial measurement period as applicable. NOTE: For educational organizations, the rules is 26 rather than 13 weeks.

Counting Hours of Service

ALEs are generally required to count all hours that are paid or payable, including paid leave as required under federal or state mandates or offered under employer policies. ALEs are not typically required to count any time that is unpaid, unless the unpaid leave is protected under FMLA, USERRA or as jury duty (“special unpaid leave”).

With that being said, because hours are averaged over the measurement period for ALEs using the look-back measurement method, a reduction in hours, temporary leave of absence or termination of employment followed by rehire due the COVID-19 public emergency could negatively impact an employee’s eligibility in the upcoming plan year. It’s possible the IRS will provide guidance in the upcoming months requiring employers to adjust averages for those employees with reduced hours or breaks in service related to COVID-19, but without that, the rules would apply as follows:

- For employees who continue to work, but hours are temporarily reduced, the employee may average part-time over the measurement period depending upon the length of time hours are reduced.
- For employees who take a leave of absence of less than 13 weeks (26 weeks for educational organizations) and therefore the measurement period continues:
 - If the employee continues to receive pay (even partial pay) during the leave of absence, hours will be credited during the leave of absence just like if the employee was actively working.
 - If the leave is unpaid, but the leave is protected under FMLA (e.g. due to a serious health condition of the employee or a family member), the leave must be excluded from the measurement period or hours must be imputed during such time as if the employee was being paid.
 - If the leave is unpaid and not considered “special unpaid leave,” no hours of service are credited during the leave of absence, which may cause the employee to average part-time hours during the measurement period.
- For employees who are terminated and rehired within less than 13 weeks (26 weeks for educational organizations), the measurement period continues with no hours of service credited during the break in employment, which may cause the employee to average part-time hours during the measurement period.

- For employees who take an unpaid leave of absence or are terminated and rehired after 13 weeks or more, the employees are considered new hires allowing the employer to impose a new waiting period or initial measurement period as applicable.

Without guidance allowing or requiring employers to adjust averages, employees who are normally considered full-time eligible employees may not be eligible for coverage for the upcoming plan year. Employers who want to offer coverage in spite of employees not averaging full-time hours in the previous measurement period related to COVID-19 should coordinate with the carrier (or stop-loss vendor) before choosing to offer coverage to such individuals to ensure there are no issues with claims coverage.

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