

# Health Care Reform Management Alert Series

## Safe Harbor Methods for Determining Full-Time Employees



Issue 43

*This is the forty-third issue in our series of alerts for employers on selected topics on health care reform. (Click [here](#) to access our general Summary of Health Care Reform and other issues in this series.) This series of Health Care Reform Management Alerts is designed to provide an in-depth analysis of certain aspects of health care reform and how it will impact your employer-sponsored plans.*

The IRS has issued Notice 2012-58 which provides safe harbor methods that employers may use to determine which employees are treated as full-time employees for purposes of the shared-responsibility (“Play or Pay”) penalties imposed by the Patient Protection and Affordable Care Act (PPACA) for failing to provide health coverage that satisfies certain requirements.

### Background

As described in Issues [26](#) and [34](#), beginning in 2014, large employers with 50 or more full-time employees (including full-time equivalents) will be subject to a penalty if one or more full-time employees enrolls in health insurance through a State Exchange and receives a premium tax credit or cost-sharing reduction (a “Subsidy”) because:

1. the employer doesn’t offer minimum essential coverage to its full-time employees; or
2. the health coverage offered by the employer either does not provide minimum value or is unaffordable to the employee.

Accordingly, each large employer will need to offer minimum essential coverage providing minimum value that is affordable to its full-time employees or incur a monthly penalty payable to the IRS.

The calculation of the applicable monthly penalty payable under item numbers 1 or 2 above is based on either the total number of full-time employees (excluding the first 30 employees), or the total number of full-time employees receiving Subsidies, respectively. Consequently, the issue of who is a full-time employee is critical to determining an employer’s exposure to the monthly penalty.

### Definition of Full-Time Employees

According to PPACA and guidance previously issued, a full-time employee means, with respect to any month, a common law employee who completes on average at least 30 hours of service per week (according to guidance, at least 130 hours of service in a calendar month).

- **Hourly Employees.** Employers would need to calculate the actual hours of service by counting hours worked and hours for which the hourly employee is entitled to payment.
- **Non-Hourly Employees.** Employers may (i) count actual hours worked by the employee and hours for which the employee is entitled to payment, (ii) credit an employee with eight hours of service for each day an employee works (or is credited for) an hour of service, or (iii) credit an employee with 40 hours of service per week for each week in which the employee works (or is credited for) an hour of service.

## Guidance from Notice 2012-58: Methods for Determining Full-Time Employees

The IRS recognizes the practical difficulties in determining full-time employees on a monthly basis, including the inability to forecast who is a full-time employee and consequently, avoid penalty. Thus, in Notice 2012-58, the IRS confirmed the use of the “Look-back/Stability Period Method” as a safe harbor alternative for determining whether a current employee is a full-time employee. This method is similar to the method described in previous guidance issued by the IRS (See [Issue 36](#) for more details). Notice 2012-58 also describes a safe harbor method for determining the full-time status of new employees who are variable hour or seasonal workers.

- **Current Employees.** The Look-back/Stability Period Method permits the employer to determine whether the employee is a full-time employee by looking back at the *standard measurement period* (not less than 3 months and up to 12 months).

If the employee averaged at least 30 hours per week during the standard measurement period, then the employer would treat the employee as a full-time employee during the subsequent *stability period* (not less than six months and no shorter than the standard measurement period), regardless of the number of hours the employee works during the stability period. The employer would need to offer health coverage to the full-time employee for the stability period to avoid the penalty.

Notice 2012-58 also permits an *administrative period* (up to 90 days) between the standard measurement period and the stability period for the employer to determine the employees who will be eligible for health coverage, to notify these employees, and to enroll the employees. The administrative period does not reduce or lengthen the measurement period or the stability period and instead, overlaps with the previous stability period.

The Notice clarifies that employers may use measurement and stability periods that differ in length, or in their start and end dates, for the following categories of employees:

1. Collectively bargained and non-collectively bargained employees;
  2. Salaried and hourly employees;
  3. Employees of different entities; and
  4. Employees located in different states.
- **New Employees Expected to Work Full-Time.** For new employees who are reasonably expected to work full-time on their start date, an employer will not be subject to penalty for failing to offer coverage to the employee during his or her initial three calendar months of employment as long as the employer offers coverage to the employee at or before the conclusion of the initial three calendar months of employment.
  - **New Employees Who are Variable Hour or Seasonal Workers.** For new variable hour and seasonal employees, the employer may use an *initial measurement period* (not less than 3 months and up to 12 months) to determine whether the new employee is a full-time employee. An employee is a variable hour employee if based on the facts and circumstances at the start date, the employer cannot determine that the employee is reasonably expected to work on average at least 30 hours per week (even if the employee is initially expected to work at least 30 hours per week for a limited period of time such as during a holiday season). An employee is a seasonal worker if the work is of the kind exclusively performed at certain seasons or periods of the year.

If the variable hour or seasonal worker is determined to be a full-time employee during the initial measurement period, then the employee will need to be treated as full-time employee for the stability period.

Like the safe harbor method for current employees, the employer may use an administrative period up to 90 days with the initial measurement period, but the administrative period combined with the measurement period may not extend beyond the last day of the first calendar month starting on or after the one-year anniversary of the employee's start day.

## Examples Using the Standard Measurement Period, Stability Period, Administrative Period and Initial Measurement Period

### Example 1 - Standard Measurement Period

For current employees (not new employees) who are variable hour and seasonable employees, Employer A uses a 12-month standard measurement period starting October 15 and a 12-month stability period starting January 1. The administrative period is from October 15 through December 31. Employer A only offers health coverage to full-time employees.

- Employer A tests Employee Y for full-time employee status based on Employee Y's hours from October 15, 2013 through October 14, 2014 (the standard measurement period). From October 15, 2014 through December 31, 2014 (the administrative period), Employer A calculates Employee Y's hours of service, determines that Employee Y works an average of 30 hours per week during the standard measurement period, and offers Employee Y enrollment in the health coverage for January 1, 2015 through December 31, 2015 (the stability period).
- Employer A is not subject to a penalty for 2015 with respect to Employee Y.

### Example 2 - Initial Measurement Period

For new variable hour employees, Employer A uses a 12-month initial measurement period that begins on the start day and applies an administrative period from the end of the initial measurement period through the end of the first calendar month beginning on or after the end of the initial measurement period.

- Employer A hires Employee Z on May 10, 2014. Employee Z's initial measurement period runs from May 10, 2014 through May 9, 2015. From May 10, 2015 to July 1, 2015 (the administrative period), Employer A calculates Employee Z's hours of service, determines that Employee Z works an average of 30 hours per week during this initial measurement period, and offers Employee Z enrollment in health coverage. Employer A offers coverage to Employee Z for a stability period that runs from July 1, 2015 through June 30, 2016.
- Employer A will need to test Employee Z again based on the period from October 15, 2014 through October 14, 2015, which is Employer A's first standard measurement period that begins after Employee Z's start date.
- Employer A is not subject to a penalty from Employee Z's start date through June 30, 2016.
- Employer A uses an initial measurement period that does not exceed 12 months, an administrative period of not more than 90 days, and a combined initial measurement period and administrative period that does not last beyond the final day of the first calendar month beginning on or after the one-year anniversary of Employee Z's start date.

## Next Steps

Employers will need to decide if they will take advantage of these safe harbor methods and select their measurement periods, stability periods and administrative periods. Coordinating health coverage eligibility and enrollment with these time periods may require changes to the health plans eligibility and enrollment provisions as well as HRIS systems. Employers may rely upon these safe harbors through January 1, 2015.

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