



“Pay or Play” Penalty

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“Pay or Play” Penalty – Examples for Determining Full-time Status

Under section 4980H of the Affordable Care Act (ACA), large employers may be subject to a penalty if they do not offer health coverage, or if they offer coverage that is unaffordable or does not provide minimum value, effective in 2014. Employers with **50 or more full-time employees**, including full-time equivalents, on business days during the preceding calendar year are considered large employers. ACA defines a full-time employee as an employee who is employed on average for at least **30 hours** of service per week.

On Jan. 2, 2013, the Internal Revenue Service (IRS) issued proposed regulations on ACA’s employer penalty provisions. Although the proposed regulations are not final, employers may rely on them until further guidance is issued. The proposed regulations provide guidance on an optional safe harbor method for identifying full-time employees for purposes of determining and calculating an employer’s potential liability for a shared responsibility payment.

The proposed regulations also include important transition relief. Employers that intend to utilize the look-back measurement method for determining full-time status for 2014 will need to begin their measurement periods in 2013 to have corresponding stability periods in 2014. The IRS recognizes that employers that intend to adopt a 12-month measurement period and a 12-month stability period will face time constraints.

Under the proposed regulations’ transition relief, solely for purposes of stability periods beginning in 2014, employers may adopt a transition measurement period that:

- Is shorter than 12 months, but not less than 6 months long; and
- Begins no later than July 1, 2013, and ends no earlier than 90 days before the first day of the first plan year beginning on or after Jan. 1, 2014.

For example, an employer with a calendar year plan could use a measurement period from April 15, 2013, through Oct. 14, 2013 (six months), followed by an administrative period ending on Dec. 31, 2013. An employer with a fiscal year plan beginning April 1 that also elected to implement a 90-day administrative period could use a measurement period from July 1, 2013, through Dec. 31, 2013 (six months), followed by an administrative period ending on March 31, 2014.

To help explain the optional method for identifying full-time employees, the proposed regulations include numerous examples. The examples address the methods for ongoing employees and new variable hour and seasonal employees.

EXAMPLE – ONGOING EMPLOYEES

Facts - Employer W, a large employer, chooses to use a 12-month stability period that begins Jan. 1 and a 12-month standard measurement period that begins Oct. 15. Consistent with the terms of Employer W’s group health plan, only employees classified as full-time employees using the look-back measurement method are eligible for coverage. Employer W chooses to use an administrative period between the end of the standard measurement period (Oct. 14) and the beginning of the stability period (Jan. 1) to:

- Determine which employees were employed on average 30 hours of service per week during the measurement period;
- Notify them of their eligibility for the plan for the calendar year beginning on Jan. 1 and of the coverage available under the plan;



- Answer questions and collect materials from employees; and
- Enroll those employees who elect coverage in the plan.

Previously-determined full-time employees already enrolled in coverage continue to be offered coverage through the administrative period. Employee A and Employee B have been employed by Employer W for several years, continuously from their start date. Employee A was employed on average 30 hours of service per week during the standard measurement period that begins Oct. 15, 2015 and ends Oct. 14, 2016 and for all prior standard measurement periods. Employee B also was employed on average 30 hours of service per week for all prior standard measurement periods, but is not a full-time employee during the standard measurement period that begins Oct. 15, 2015 and ends Oct. 14, 2016.

Conclusions - Because Employee A was employed for the entire standard measurement period that begins Oct. 15, 2015 and ends Oct. 14, 2016, Employee A is an ongoing employee with respect to the stability period running from Jan. 1, 2017 through Dec. 31, 2017. Because Employee A was employed on average 30 hours of service per week during that standard measurement period, Employee A is offered coverage for the entire 2017 stability period (including the administrative period from Oct. 15, 2017 through Dec. 31, 2017).

Because Employee A was employed on average 30 hours of service per week during the prior standard measurement period, Employee A is offered coverage for the entire 2016 stability period and, if enrolled, would continue such coverage during the administrative period from Oct. 15, 2016 through Dec. 31, 2016.

Because Employee B was employed for the entire standard measurement period that begins Oct. 15, 2015 and ends Oct. 14, 2016, Employee B is also an ongoing employee with respect to the stability period in 2017. Because Employee B did not work full-time during this standard measurement period, Employee B is not required to be offered coverage for the stability period in 2017 (including the administrative period from Oct. 15, 2017 through Dec. 31, 2017). However, because Employee B was employed on average 30 hours of service per week during the prior standard measurement period, Employee B is offered coverage through the end of the 2016 stability period and, if enrolled, would continue such coverage during the administrative period from Oct. 15, 2016 through Dec. 31, 2016.

Employer W complies with the proposed regulations’ methodology for ongoing employees because the measurement and stability periods are no longer than 12 months, the stability period for ongoing employees who work full-time during the standard measurement period is not shorter than the standard measurement period, the stability period for ongoing employees who do not work full-time during the standard measurement period is no longer than the standard measurement period, and the administrative period is no longer than 90 days.

EXAMPLES OF NEW VARIABLE HOUR AND SEASONAL EMPLOYEES

The examples that follow illustrate how the safe harbor rules apply to variable hour employees and seasonal employees. In all of the following examples, the large employer offers all of its full-time employees (and the dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan. The coverage is affordable within the meaning of § 36B(c)(2)(c)(i) (or is treated as affordable coverage under one of the affordability safe harbors) and that provides minimum value within the meaning of § 36B(c)(2)(c)(ii).

New Variable Employees with an Administrative Period

In Examples 1-8, the new employee is a new variable hour employee. The employer has chosen to use a 12-month standard measurement period for ongoing employees starting Oct. 15 and a 12-month stability period associated with that standard measurement period starting Jan. 1. Thus, during the administrative period from Oct. 15 through Dec. 31 of each calendar year, the employer continues to offer coverage to employees who qualified for coverage for that entire calendar year based upon working on average at least 30 hours per week during the prior standard measurement period. Also, the employer offers health plan coverage only to full-time employees (and their dependents).



Example 1 (12-Month Initial Measurement Period Followed by 1+ Partial Month Administrative Period)

Facts - For new variable hour employees, Employer B uses a 12-month initial measurement period that begins on the start date 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 B hires Employee Y on May 10, 2015. Employee Y’s initial measurement period runs from May 10, 2015, through May 9, 2016. Employee Y has an average of 30 hours of service per week during this initial measurement period. Employer B offers coverage to Employee Y for a stability period that runs from July 1, 2016 through June 30, 2017.

Conclusion - Employee Y has an average of 30 hours of service per week during his initial measurement period and Employer B uses an initial measurement period that does not exceed 12 months; an administrative period totaling 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 Y’s start date.

Accordingly, from Employee Y’s start date through June 30, 2017, Employer B is not subject to any payment under section 4980H with respect to Employee Y, because Employer B complies with the standards for the initial measurement period and stability periods for a new variable hour employee. Employer B must test Employee Y again based on the period from Oct. 15, 2015 through Oct. 14, 2016 (Employer B’s first standard measurement period that begins after Employee Y’s start date).

Example 2 (11-Month Initial Measurement Period Followed by 2+ Partial Month Administrative Period)

Facts - Same as Example 1, except that Employer B uses an 11-month initial measurement period that begins on the start date and applies an administrative period from the end of the initial measurement period until the end of the second calendar month beginning after the end of the initial measurement period. Employer B hires Employee Y on May 10, 2015. Employee Y’s initial measurement period runs from May 10, 2015, through April 9, 2016. Employee Y has an average of 30 hours of service per week during this initial measurement period. Employer B offers coverage to Employee Y for a stability period that runs from July 1, 2016 through June 30, 2017.

Conclusion - Same as Example 1.

Example 3 (11-Month Initial Measurement Period Preceded by Partial Month Administrative Period and Followed by 2-Month Administrative Period)

Facts - Same as Example 1, except that Employer B uses an 11-month initial measurement period that begins on the first day of the first calendar month beginning after the start date and applies an administrative period that runs from the end of the initial measurement period through the end of the second calendar month beginning on or after the end of the initial measurement period. Employer B hires Employee Y on May 10, 2015. Employee Y’s initial measurement period runs from June 1, 2015, through April 30, 2016. Employee Y has an average of 30 hours of service per week during this initial measurement period. Employer B offers coverage to Employee Y for a stability period that runs from July 1, 2016 through June 30, 2017.

Conclusion - Same as Example 1.

Example 4 (12-Month Initial Measurement Period Preceded by Partial Month Administrative Period and Followed by 2-Month Administrative Period)

Facts – For new variable hour employees, Employer B uses a 12-month initial measurement period that begins on the first day of the first month following the start date and applies an administrative period that runs from the end of the initial measurement period through the end of the second calendar month beginning on or after the end of the initial measurement period. Employer B hires Employee Y on May 10, 2015. Employee Y’s initial measurement period runs from June 1, 2015, through May 31, 2016. Employee Y has an average of 30 hours of service per week during this initial measurement period. Employer B offers coverage to Employee Y for a stability period that runs from Aug. 1, 2016 through July 31, 2017.



Conclusion - Employer B does not satisfy the standards for the look-back measurement method under the proposed regulations because the combination of the initial partial month delay, the 12-month initial measurement period, and the two month administrative period means that the coverage offered to Employee Y does not become effective until after the first day of the second calendar month following the first anniversary of Employee Y’s start date. Accordingly, Employer B is potentially subject to a payment under section 4980H.

Example 5 (Continuous Full-Time Employee)

Facts - Same as Example 1; in addition, Employer B tests Employee Y again based on Employee Y’s hours of service from Oct. 15, 2015 through Oct. 14, 2016 (Employer B’s first standard measurement period that begins after Employee Y’s start date), determines that Employee Y has an average of 30 hours of service a week during that period, and offers Employee Y coverage for July 1, 2017 through Dec. 31, 2017. (Employee Y already has an offer of coverage for the period of Jan. 1, 2017 through June 30, 2017 because that period is covered by the initial stability period following the initial measurement period, during which Employee Y was determined to be a full-time employee.)

Conclusion - Employer B is not subject to any payment under section 4980H for 2017 with respect to Employee Y.

Example 6 (Initially Full-Time Employee, Becomes Non-Full-Time Employee)

Facts - Same as Example 1; in addition, Employer B tests Employee Y again based on Employee Y’s hours of service from Oct. 15, 2015 through Oct. 14, 2016 (Employer B’s first standard measurement period that begins after Employee Y’s start date), and determines that Employee Y has an average of 28 hours of service a week during that period. Employer B continues to offer coverage to Employee Y through June 30, 2017 (the end of the stability period based on the initial measurement period during which Employee Y was determined to be a full-time employee), but does not offer coverage to Employee Y for the period of July 1, 2017 through Dec. 31, 2017.

Conclusion - Employer B is not subject to any payment under section 4980H for 2016 with respect to Employee Y, provided that it offers coverage to Employee Y from July 1, 2016 through June 30, 2017 (the entire stability period associated with the initial measurement period).

Example 7 (Initially Non-Full-Time Employee)

Facts - Same as Example 1, except that Employee Y has an average of 28 hours of service per week during the period from May 10, 2015 through May 9, 2016 and Employer B does not offer coverage to Employee Y in 2016. ***Conclusion*** - From Employee Y’s start date through the end of 2016, Employer B is not subject to any payment under section 4980H, because Employer B complies with the standards for the measurement and stability periods for a new variable hour employee with respect to Employee Y.

Example 8 (Initially Non-Full-Time Employee, Becomes Full-Time Employee)

Facts - Same as Example 7; in addition, Employer B tests Employee Y again based on Employee Y’s hours of service from Oct. 15, 2015 through Oct. 14, 2016 (Employer B’s first standard measurement period that begins after Employee Y’s start date). Employer B determines that Employee Y has an average of 30 hours of service per week during this standard measurement period, and offers coverage to Employee Y for 2017.

Conclusion - Employer B is not subject to any payment under section 4980H for 2017 with respect to Employee Y.

New Variable Hour Employees with an Administrative Period and Six-Month Standard Measurement Period and Stability Period

In Examples 9 and 10, the new employee is a variable hour employee and the employer uses a six-month standard measurement period, starting each May 15 and Nov. 15, with six-month stability periods associated with those standard measurement periods starting Jan. 1 and July 1.



Example 9 (Initially Full-Time Employee)

Facts - For new variable hour employees, Employer C uses a six-month initial measurement period that begins on the start date and applies an administrative period that runs from the end of the initial measurement period through the end of the first full calendar month beginning after the end of the initial measurement period. Employer C hires Employee Z on May 10, 2015. Employee Z’s initial measurement period runs from May 10, 2015, through Nov. 9, 2015, during which Employee Z has an average of 30 hours of service per week. Employer C offers coverage to Employee Z for a stability period that runs from Jan. 1, 2016 through June 30, 2016.

Conclusion - Employer C uses an initial measurement period that does not exceed 12 months; an administrative period totaling not more than 90 days; and a combined initial measurement period and administrative period that does not last longer than the final day of the first calendar month beginning on or after the one-year anniversary of Employee Z’s start date. From Employee Z’s start date through June 30, 2016, Employer C is not subject to any payment under section 4980H, because Employer C complies with the standards for the measurement and stability periods for a new variable hour employee with respect to Employee Z. Employer C must test Employee Z again based on Employee Z’s hours of service during the period from Nov. 15, 2015 through May 14, 2016 (Employer C’s first standard measurement period that begins after Employee Z’s start date).

Example 10 (Initially Full-Time Employee, Becomes Non-Full-Time Employee)

Facts - Same as Example 9; in addition, Employer C tests Employee Z again based on Employee Z’s hours of service during the period from Nov. 15, 2015 through May 14, 2016 (Employer C’s first standard measurement period that begins after Employee Z’s start date), during which period Employee Z has an average of 28 hours of service per week. Employer C continues to offer coverage to Employee Z through June 30, 2016 (the end of the initial stability period based on the initial measurement period during which Employee Z has an average of 30 hours of service per week), but does not offer coverage to Employee Z from July 1, 2016 through Dec. 31, 2016.

Conclusion - Employer C is not subject to any payment under section 4980H with respect to Employee Z for 2016.

Seasonal Employees

Example 11 (Seasonal Employee, 12-Month Initial Measurement Period; 1+ Partial Month Administrative Period).

Facts - Employer D offers health plan coverage only to full-time employees (and their dependents). Employer D uses a 12-month initial measurement period for new variable hour employees and seasonal employees that begins on the start date and applies an administrative period from the end of the initial measurement period through the end of the first calendar month beginning after the end of the initial measurement period.

Employer D hires Employee S, a ski instructor, on Nov. 15, 2015 with an anticipated season during which Employee S will work running through March 15, 2016. Employer D determines that Employee S is a seasonal employee based upon a reasonable good faith interpretation of that term. Employee S’s initial measurement period runs from Nov. 15, 2015, through Nov. 14, 2016. Employee S is expected to have 50 hours of service per week from Nov. 15, 2015 through March 15, 2016, but is not reasonably expected to average 30 hours of service per week for the 12-month initial measurement period.

Conclusion - Employer D cannot determine whether Employee S is reasonably expected to average at least 30 hours of service per week for the 12-month initial measurement period. Accordingly, Employer D may treat Employee S as a variable hour employee during the initial measurement period.



Variable Hour Employees

Example 12 (Variable Hour Employee)

Facts - Employer E is in the trade or business of providing temporary workers to numerous clients that are unrelated to Employer E and to one another. Employer E is the common law employer of the temporary workers based on all of the facts and circumstances. Employer E offers health plan coverage only to full-time employees (including temporary workers who are full-time employees) and their dependents. Employer E uses a 12-month initial measurement period for new variable hour employees and new seasonal employees that begins on the start date and applies an administrative period from the end of the initial measurement period through the end of the first calendar month beginning after the end of the initial measurement period.

Employer E hires Employee T on Jan. 1, 2015 and anticipates that it will assign Employee T to provide services for various clients. As of the beginning of the initial measurement period, Employer E reasonably expects that, over the initial measurement period, Employee T is likely to be offered short-term assignments with several different clients, with significant gaps between the assignments and that the assignments will differ in the average hours of service per week (meaning averaging both above and below 30 hours of service per week), all depending on client needs and Employee T’s availability. The number of actual assignments that Employee T will be offered, the number that Employee T will accept, the duration of assignments, the length of the gaps between assignments, and whether various assignments will result in Employee T being employed on average at least 30 hours of service per week during the assignment, are all uncertain.

Conclusion - Employer E cannot determine whether Employee T is reasonably expected to average at least 30 hours of service per week for the 12-month initial measurement period. Accordingly, Employer E may treat Employee T as a variable hour employee during the initial measurement period.

Example 13 (Variable Hour Employee)

Facts - Employee A is hired on an hourly basis by Employer Y to fill in for employees who are absent and to provide additional staffing at peak times. Employer Y expects that Employee A will average 30 hours of service per week or more for A’s first few months of employment, while assigned to a specific project, but also reasonably expects that the assignments will be of unpredictable duration, that there will be gaps of unpredictable duration between assignments, that the hours per week required by subsequent assignments will vary, and that A will not necessarily be available for all assignments.

Conclusion - Employer Y cannot determine whether Employee A is reasonably expected to average at least 30 hours of service per week for the initial measurement period. Accordingly, Employer Y may treat Employee A as a variable hour employee.

Change in Employment Status

Example 14 (Change in employment from variable hour employee to non-variable hour employee)

Facts - For new variable hour employees, Employer A uses a 12-month initial measurement period that begins on the start date 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, 2015. Employer A’s initial measurement period runs from May 10, 2015, through May 9, 2016, with the optional administrative period ending June 30, 2016. At Employee Z’s May 10, 2015 start date, Employee Z is a variable hour employee. On Sept. 15, 2015, Employer A promotes Employee Z to a position that can reasonably be expected to average at least 30 hours of service per week.

Conclusion - For purposes of determining Employer A’s potential liability under section 4980H, Employee Z must be treated as a full-time employee as of Jan. 1, 2016, because that date is the earlier of the first day of the fourth calendar month following the change in position (Jan. 1, 2016) or the first day of the calendar month after the end of the initial measurement period plus the optional administrative period (July 1, 2016).

Source: Internal Revenue Service