



EXPERT UPDATE



IRS Safe Harbors – Determining Full-Time Employees for Employer Pay or Play



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Health Reform is changing the definition of full-time employee for many companies starting 13 months from now. Until 2014, employers will continue to have the freedom to define full-time as they wish. The Act will require, beginning January 1, 2014, that Applicable Large Employers provide affordable, minimum value health coverage to all employees working full-time, which as a result of reform, is defined as working an average of thirty hours or more per week. Applicable Large Employers will be subject to an assessable payment (penalty) if affordable, minimum value coverage is not provided to full-time employees. This health reform provision is altering the definition of full-time for many employers and the requirement to provide health coverage to those working 30 hours or more will impose an administrative burden on some companies, especially those that have a large number of employees who are working variable hours (i.e., variable hour employees). This new requirement to provide coverage to employees working an average of 30 hours per week will be equally onerous for businesses that employ a seasonal workforce that is not part-time.

Back in late August 2012, the IRS, DOL and HHS jointly issued administrative guidance on what is considered excessive waiting periods for health plan coverage. In addition to clarification on applying waiting periods, the guidance also illustrates much needed information for determining what constitutes a full-time employee with respect to the Affordable Care Act's employer shared responsibility ("play or pay") provision.

After considering comments, the IRS has adopted voluntary safe harbors that employers may use to determine whether employees should be treated as full time. Applicable Large Employers may establish a “look-back period” or “measurement period” to determine average hours worked. If it is determined that certain employees are working full-time, health coverage will need to be offered for a duration equal in length to the measurement period. This is called the “stability period”. Regulators are providing some latitude to employers so that they can design a measurement and stability period that works best for their operation and aligns properly with their health plan renewal. IRS Notice 2012-58, 2012-41, contains a description of the safe harbors, clarification and examples employers may follow as they establish their procedures for monitoring hours worked. Employers can rely on these safe harbors, and the guidance contained in previous notices, at least through the end of 2014.

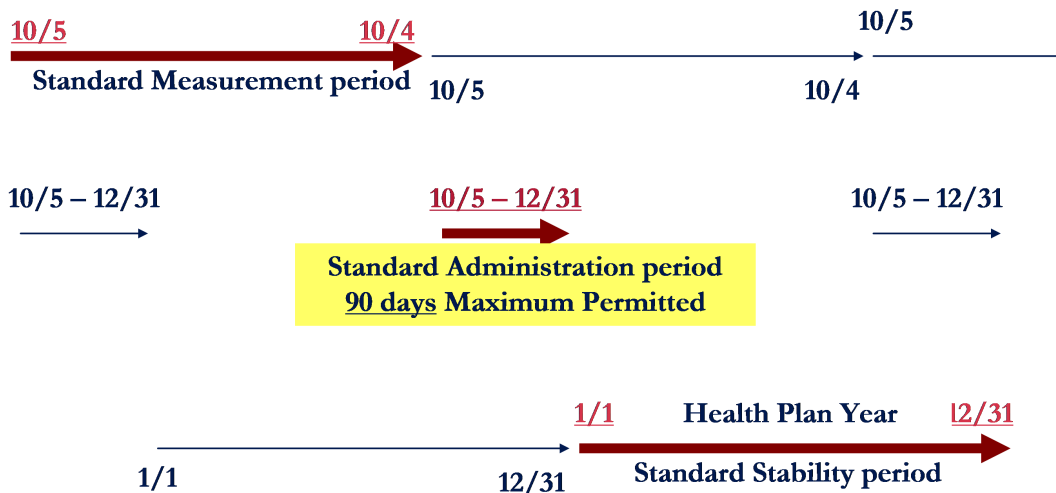
Key elements contained in the IRS safe harbors

Current (Ongoing) Variable Hour and Seasonal Employees:

- Measurement periods and stability periods of no less than three months and no greater than 12 months can be established for ongoing employees. These periods for ongoing employees are called "standard measurement" and "standard stability" periods.
- Employers have the option to use a specified administrative period of no greater than 90 days in conjunction with a look-back/measurement period and stability period for ongoing employees.
- There is a transition period that applies so that new hires can eventually be treated as ongoing employees.

Illustration of a Standard Measurement Period, Administrative Period and Standard Stability Period for Ongoing Employees:

Clarification: Exhibit altered to reflect 90 day limit on Administration Period



Newly Hired Variable Hour or Seasonal Employees:

- Employers will not be subject to an assessable payment (penalty) if new employees who are reasonably expected to work full-time at 30 or more hours per week are required to wait the initial three months of employment for health coverage. Health Reform requires that employers provide health coverage within 90 days following the date an employee is considered full-time.
- An employee is considered a variable hour employee if based on the facts and circumstances it cannot be determined that the employee is reasonably expected to work at least 30 hours per week.
- Employers have the option to use a look-back (measurement) period of no less than three months and no more than 12 months to determine whether a variable hour or seasonal employee is working full-time at an average of 30 hours or more. This period for newly hired or newly eligible employees is called the "initial measurement" period.
- The period of time employees are entitled to be covered on the plan as a result of being found full-time during the initial measurement period is called the "initial stability" period. This same initial stability period applies for those

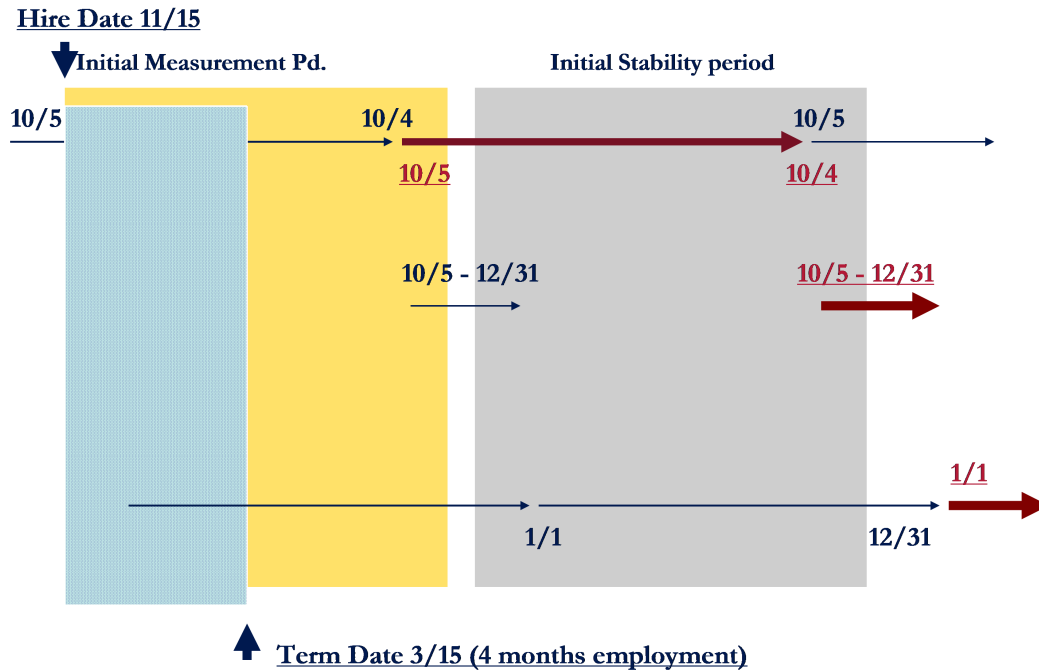
employees who are found to be working less than 30 hours and therefore not entitled to health coverage.

- The initial stability period can be the same duration as the initial measurement period or it can be one month longer than the initial measurement period.
- An administrative period of up to 90 days can be used to determine full-time status. This administrative period follows the initial measurement period.
- The initial measurement period and the administrative period combined may not extend beyond the last day of the first calendar month beginning on or after the employee's one year anniversary (i.e., no more than 13 months and a fraction). Many employers will establish a 12 month initial measurement period, a one month administrative period and then a 12 month initial stability period.
- Employees and dependents are not considered eligible for minimum essential coverage under the plan during any period when coverage is not offered, including any measurement period or administrative period prior to when coverage takes effect.
- The initial stability period for new hires must be the same length as the standard stability period for ongoing employees.

Under the look-back/stability period safe harbor, an employer may determine each employee's full-time status by looking back at a defined period of no less than three consecutive months and no greater than 12 consecutive calendar months. This initial measurement period, as selected by the employer, can be used to determine whether certain employees are to be treated as full-time. **Employers are not permitted to use this measurement period as a reason to delay coverage for new hires that are reasonably expected to work full-time.** Employees who are determined to be full-time after the completion of the initial measurement period should be offered coverage during the initial stability period. If it is found that an employee is not working full-time during the initial measurement period, that employee will not be entitled to health benefits during the initial stability period that follows.

Illustration of an Initial Measurement Period, 1 Month Administrative Period and Initial Stability Period for a New Hire. The Standard Stability Period overlaps

Clarification: Exhibit altered to reflect 90 day limit on Administration Period



Transition from New Hire to Ongoing Employee

Once an employee, who has been employed for an initial measurement period, has been employed for an entire STANDARD measurement period, the employee must be tested for full-time status, beginning with that standard measurement period, at the same time and under the same conditions as other ongoing employees. It is important to note that an employee determined to be full-time during the initial measurement period must be treated as full-time for the entire duration of the initial stability period, even if the employee is found to be working less than 30 hours during the overlapping standard measurement period. In this situation, the employee would remain on the plan during the initial stability period, but at the conclusion of this initial stability period, would be removed from the plan. Going forward, this employee will be tested for hours worked during the standard measurement period like all other employees. Conversely, new employees covered by the plan during the initial stability period, who are found to be working full-time during the overlapping

standard measurement period, can continue to be enrolled on the plan, covered on the first day of the standard stability period like all other ongoing employees.

Example –

John Smith was hired on March 1, 2014, at ABC Company and he was told that his work hours would fluctuate. Based on the facts and circumstances of John's position, ABC Company could not guarantee that he would work an average of 30 hours or more per week. As a result that ABC Company could not reasonably expect John to work full-time, John was labeled a "variable hour" employee. ABC Company has established a 12 month initial measurement period (see gold section in the chart). At the conclusion of the initial measurement period, ABC Company HR staff will evaluate his hours worked. They will be evaluating his hours during the one month "administrative period" that they have established for new hires. During this administrative period it is determined that John has worked an average of 32 hours during the initial measurement period. John is offered coverage on April 1, 2015 and is guaranteed coverage for the twelve month initial stability period (see gray section on chart).

At the point in which John has been employed for an entire standard measurement period, his hours will be evaluated along with every other current employee. The standard measurement period ABC Company has established for current employees is October 1st to September 30th of each year. Assume that it is determined that John has NOT worked an average of thirty hours during this standard measurement period. John will continue to have coverage during the remainder of his initial stability period. He will be terminated from the plan on March 31, 2016, and because he was found to be part-time during the standard measurement period, he will not be entitled to coverage during the standard stability period like other current employees who are found to be full-time. Going forward each year, John's hours will continue to be evaluated based on the hours he works during the standard measurement period.

Seasonal Employee

The Affordable Care Act addressed the meaning of seasonal worker in the context of whether an employer meets the definition of large employer. The statute does not address how the term "seasonal" employee might be defined for purposes of determining whether a new employee of an Applicable Large Employer is reasonably expected to work full-time and therefore be entitled to health coverage. As a result of this, at least through the end of 2014, employers are permitted to use a reasonable good faith interpretation of the term "seasonal employee" for purposes of this IRS Notice.

Please refer to the IRS Notice in the links below for more details and examples:

Notice 2012-58: www.irs.gov/pub/irs-drop/n-12-58.pdf

Announcement 2012-41: http://www.irs.gov/irb/2012-44_IRB/ar06.html

Internal Revenue Bulletin for Announcement 2012-41:

www.irs.gov/pub/irs-irbs/irb12-41.pdf

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