Employer Mandate:
Identifying Full-time Employees to Whom the Employer Must Offer Coverage

The employer mandate requires employers to identify and offer coverage to full-time employees - those working 30 hours of service per week.

Beginning in 2015, the Patient Protection and Affordable Care Act (PPACA) employer mandate (also known as the "employer shared responsibility" provision or the "pay or play" provision) generally requires large employers to offer coverage to all full-time employees and their dependents, or risk paying a penalty. Employers need to understand the possible impact of the employer mandate on plan designs, contribution strategies and workforce planning. This white paper assumes that the employer is subject to the employer mandate and focuses on which employees are full-time employees to whom the employer must offer coverage. The paper does not address measurement periods for seasonal and variable hour employees. A separate white paper titled "Employer Mandate: Measurement Periods for Variable Hour and Seasonal Employees" is available. Contact your advisor for a copy.

Determining Which Employees Are Full-time

Generally, under the employer mandate, employers must offer coverage to substantially all full-time employees, defined as those who are employed on average at least 30 hours of service per week (or 130 hours of service per month). Importantly, "hours of service" includes hours for which an employee is paid even when no work is performed (e.g., vacation or other paid time off (PTO), illness, holiday, leave, military, jury duty, etc.).

For most companies, this determination will be straightforward. Simply count the employee's service hours, as follows:

Hourly Employees

The employer must calculate actual hours of service from records of hours worked and hours for which payment is made or due. Employers are likely already tracking these hours to pay these employees.

Non-hourly and Salaried Employees

The employer must calculate hours of service by using one of three methods:

A) Actual hours of service from records of hours worked and hours for which payment is made or due.

B) A days-worked equivalency whereby the employee is credited with eight hours of service for each day for which the employee would be required to be credited with at least one hour of service.

C) A weeks-worked equivalency whereby the employee is credited with 40 hours of service for each week for which the employee would be required to be credited with at least one hour of service.

When choosing one of the three methods described for non-hourly employees, an employer is not required to use the same method for all non-hourly employees. The employer may apply different methods for different classifications of non-hourly employees, provided the classifications are reasonable and consistently applied. Whatever the method, the result may not substantially understate an employee's hours in a manner that would cause the employee not to be treated as full-time.

Most employers are likely already tracking employees' hours of service for purposes of PTO or leave rights. For example, most large employers are already required to track hours for purposes of protected leave under the federal Family and Medical Leave Act (FMLA) or choose to track hours for purposes of the employer's PTO plan. If, however, an employer is not currently tracking employees' hours of service, it will have to implement some sort of system to do so (perhaps through a third-party payroll vendor). Whatever the system, employers will need to track employees' hours on a monthly basis, since the employer mandate penalties are calculated on a monthly basis.

Special Rules for Employees with Nontraditional Work Schedules

While the general rule of counting hours for hourly and salaried employees is fairly straightforward, its application to some types of businesses and employees may be more complicated. For example, employers who are in the retail, restaurant, construction and landscaping industries may have high employee turnover, and it may be difficult to track their hours. In addition, commission-based employees and employees with unique work schedules may not fit neatly into the above categories for hourly or salaried employees.

Special rules apply to these nontraditional employees, including variable-hour and seasonal employees, short-term employees, teachers and adjunct faculty, commission-based employees, staffing and leased employees, and rehired employees. As mentioned previously, a white paper that discusses seasonal and variable-hour employees, including the use of measurement periods, is available from your advisor. Guidelines for tracking hours for the other types of nontraditional employees are outlined below.

New Short-term Employees

New short-term employees whose work or service hours are known to be full-time at the time of hire will generally be considered full-time employees for purposes of the employer mandate. For example, if the employer hires an intern who will work 30 hours or more per week for five months, the intern will be considered a full-time employee. In other words, the employer cannot treat the intern as a variable-hour employee (and thereby use a measurement period for the intern), since the intern's schedule is known at the time of hire to be full time, and therefore must offer coverage to the intern.

That said, employers can implement a 90-day waiting period to exclude employees from coverage for the first 90 days of employment. Specifically, employers will not be liable for a penalty if the employee is excluded under a 90-day waiting period (so long as the employee is offered coverage thereafter). Therefore, the employer could avoid the penalty for the first 90 days under a waiting period, but then would have to consider the employee as a full-time employee for any full-time employment period beyond the 90 days. In the above example, the intern would not be considered a full-time employee for the first three months (i.e., 90 days) of the internship, but would be a full-time employee for the last two months of the internship (and therefore must be offered coverage to avoid a penalty).

Teachers and Adjunct Faculty

Considering the traditional summer and winter breaks in academic school years, work schedules of teachers present a clear challenge for educational institutions that are attempting to determine full-time status of their teachers and faculty. The regulations differentiate between teachers on paid and unpaid leave during the traditional break in the academic school year. If the leave is paid, then the employer must follow the general "hours of service" rule outlined above: Hours of service include hours for which the employee is paid even if the employee is not actually working.

If the traditional break is a period of unpaid leave, then the employer may use two alternative methods to calculate the employee's hours. Under the first method, the employer would simply disregard the employment break and use the average over the remaining school year. Under the second method, the employer would credit the employee with hours of service during the employment break on a rate equal to the average weekly rate at which the employee is credited during the rest of the school year. Essentially, under either method, an employer will not be able to use the employment break as a way to lower a teacher's overall average hours of service per week.

For adjunct faculty, employers will need to use a reasonable method of crediting hours. The regulations clarify that a reasonable method would need to take into account not only classroom hours, but also class preparation time.

Commission-based Employees

As with adjunct faculty, employers with commission-based employees will need to use a reasonable method of crediting hours for those employees. The regulations clarify that a reasonable method for commission-based employees would include travel and preparation time (among other things), not just the time in sales meetings.

Staffing and Leased Employees and Independent Contractors

Employers that use temporary employee staffing or leasing companies face special issues when determining full-time status. The first step is to determine whether the employees are employees of the recipient employer (the employer leasing or using the temporary staffing employees) or the staffing/leasing company itself. This is called the "common-law employer" analysis, which turns on which entity has the right to control the employee's work — a facts and circumstances analysis that is beyond the scope of this paper. This is generally the same analysis applicable to the issue of misclassification of independent contractors.

Whether it is the recipient employer or the staffing/leasing company, the common-law employer will be considered the employer for purposes of the employer mandate. At that point, the common-law employer will need to determine whether the employee is working 30 hours or more per week. If so, then the employee, whether leased or staffed, would be considered a full-time employee and must be offered coverage.

Importantly, employees that satisfy a very specific definition of a "leased employee" may be excluded from consideration as full-time employees. That definition – found in Internal Revenue Code Section 414(n)(2) – generally requires that the employee perform services for the recipient on a substantially full-time basis for a period of at least one year, and such services are performed under primary direction or control by the recipient. Thus, a recipient employer could exclude a leased employee from full-time consideration, if the employee meets that definition.

Finally, the IRS is aware of structures to evade application of the employer mandate and intends to publish an anti-abuse rule. If an individual performs service as an employee of an employer, and also performs the same or similar service for that employer as an employee of a staffing agency, then all the hours of service are attributable to the recipient employer.

Rehired Employees

A special rule applies where the employee is terminated but rehired shortly thereafter. If an employee does not earn an hour of service for 26 consecutive weeks and is rehired, then the employee's status (as a full-time, variable or seasonal employee) will be redetermined at the time of rehire. So, in essence, an employee must be rehired 26 weeks (approximately 6.5 months) after termination to exclude any prior hours of service in making the full-time status determination. This special rule would prohibit an employer from firing employees at or around 90 days to avoid the application of the mandate (since employers generally will not be liable for a penalty for the first 90 days of employment if a 90-day waiting period is implemented), and would also come into play for measurement periods for seasonal and variable-hour employees.

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Employer Mandate: Measurement Periods for Variable Hour and Seasonal Employees

Measurement periods allow employers to average the hours of variable hour and seasonal employees over a period of time to determine full-time status.

Beginning in 2015, PPACA's employer mandate generally requires large employers to offer coverage to all full-time employees (FTEs), defined as those working at least 30 weekly or 130 monthly hours, and their dependents, or risk a penalty. Employers face special challenges in identifying which of their employees are FTEs, particularly for those with irregular or seasonal work schedules, such as landscaping and construction companies, hotels, restaurants, retail and similar businesses. Employers with these types of employees may choose to implement "measurement periods" to determine whether the employee actually works enough hours to be considered an FTE for purposes of the employer mandate.

"Variable Hour" and "Seasonal" Defined

Before discussing the details relating to measurement periods, it's important to understand the definition of "variable hour" and "seasonal" employees.

A "variable hour" employee is one whose schedule cannot be definitively known in advance. In other words, the employee's hours vary such that it is not possible to determine in advance whether the employee will work 30 weekly (or 130 monthly) hours or more during their period of employment.

A "seasonal" employee is one who performs labor that, by its nature, is not performed continuously throughout the year and may only be performed at certain times during the year. The determination is focused on the type and duration of the work performed, and employers are permitted to use a reasonable, good faith interpretation of the "seasonal" definition. Examples of a seasonal employee may include a holiday seasonal retail store employee, a ski instructor or a golf course maintenance worker.

Importantly, the following would not likely be considered variable hour or seasonal employees: a non-seasonal, short-term full-time employee; a part-time, intern or per diem employee working full-time hours; and employees hired into high-turnover positions who are working full-time hours.

Measurement and Stability Periods Generally

For variable hour and seasonal employees, employers have the option to use measurement periods to determine if the employee is an FTE to whom they must offer coverage. (In the alternative, employers can track hours and determine FTE status on a monthly basis.) Generally, a measurement period is a period of between three and 12 months (the employer can choose) during which the employer measures the average weekly or monthly work hours of the employee. If, during that measurement period, an employee works 30 hours or more per week (or 130 hours per month) on average, then that employee becomes eligible for coverage (i.e., is treated as an FTE) during a subsequent coverage period, called a "stability" period. Employers may also implement an "administrative" period between the measurement and stability periods, wherein the employer calculates the hours during the measurement period, notifies eligible employees of FTE status and provides an opportunity for them to elect coverage during an open enrollment. The measurement periods vary for ongoing employees (standard periods) versus newly hired employees (initial periods).

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Ongoing Employees

General Parameters for Standard Periods (Ongoing Employees)	
Measurement Period	3-12 consecutive months
Stability Period	Same as standard measurement period, but at least 6 months
Administrative Period	Up to 90 days

Below are two examples of how the ongoing employee standard measurement periods might work with a six-month measurement period (counting hours monthly) and a 12-month measurement period with an administrative period and a calendar-year plan.

Example 1: Six-month Standard Measurement and Stability Periods, Counting Hours Monthly

6-month Standard Measurement Period						6-month Standard Stability Period					
Hours Worked Per Month						Hours Worked Per Month: N/A					
Jan.	Feb.	March	April	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
146	119	104	158	129	150	n/a	n/a	n/a	n/a	n/a	n/a
FT	PT	PT	FT	PT	FT	Full-time Employee					

In the above example, the employee averages 134.3 hours per month (sum of total six months' hours divided by six) during the six-month measurement period. Therefore, the employee is considered an FTE eligible for coverage in the plan during the subsequent six-month stability period (regardless of the number of hours the employee actually works during that stability period).

Example 2: 12-month Standard Measurement Period with an Administrative Period and a Calendar-year Plan

12-month Standard Measurement Period	Administrative Period	12-month Standard Stability Period
Oct. 15, 2013 – Oct. 15, 2014	Oct. 15, 2014 – 2015	2015 – 2016

To coordinate a measurement period with an employer's calendar year plan and allow time for an administrative period , the employer could implement a 12-month standard measurement period that ends within 90 days of the beginning of the calendar year plan. The administrative period during which the employer can determine which employees averaged 30 hours or more, offer them coverage, and conduct an open enrollment period (which could coincide with the open enrollment period for its other, non-variable and non-seasonal employees). In the above example, the 12-month standard measurement period would run from Oct. 15, 2013 through Oct. 14, 2014, with the administrative period running Oct. 15, 2014 through Dec. 31, 2014. Any employees that average 30 hours or more during the standard measurement period would be offered coverage that begins on Jan. 1, 2015, and runs through 2015 (coinciding with the employer's calendar year plan), and would remain covered through 2015 regardless of how many hours actually worked during 2015. Conversely, an employee that does not average 30 hours or more during the standard measurement period is not an FTE and therefore is not offered coverage during 2015 (and the employer is not liable for a penalty on their behalf).

When do employers need to implement a standard measurement period for ongoing employees?
Employers will first need to implement measurement periods for ongoing variable hour or seasonal employees to determine which employees are FTEs in time for the Jan. 1, 2015, effective date of the employer mandate. This means employers will need to implement some sort of measurement period in 2014.

Going forward from 2014, measurement and stability periods will begin to overlap: Employees will eventually be in both measurement and stability periods at the same time. Employers must remember that a measurement period generally determines eligibility for the entire subsequent stability period, regardless of the actual hours the employee may work during that subsequent stability period. Thus, for example, in the chart below, Measurement Period A determines eligibility for Stability Period A, Measurement Period B determines eligibility for Stability Period B, etc.

Overlap of Measurement and Stability Periods

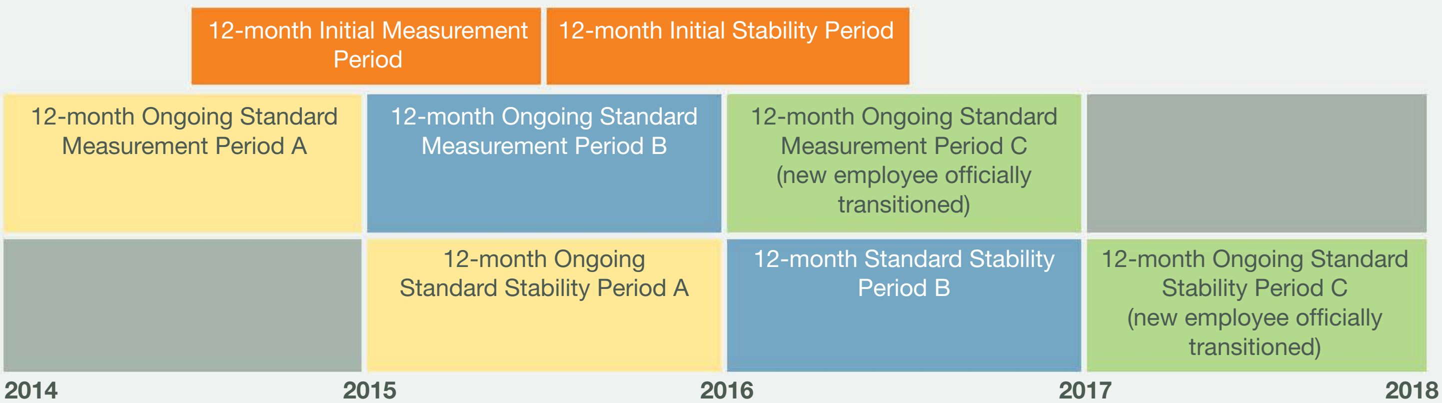
2014 – 2015	2015 – 2016	2016 – 2017	2017 – 2018	2018 – 2019
Measurement Period A	Measurement Period B	Measurement Period C	Measurement Period D	
	Stability Period A	Stability Period B	Stability Period C	Stability Period D

New Employees

General Parameters for Initial Periods (New Employees)	
Measurement Period	3-12 consecutive months
Stability Period	The longer of 6 months or the standard stability period length
Administrative Period	Up to 90 days, but combined initial measurement and administrative periods may not exceed 13 months after hire date

For new employees, the measurement periods (called "initial" periods) become slightly more complicated. This is because the dates of the initial measurement periods are not set dates. Rather, they may begin on any date between the new employee's hire date and the first of the month thereafter. In addition, each new employee will have their own initial measurement period, resulting in many different initial measurement periods (although employers could group together new employees hired during one month and begin their measurement periods all together on the first of the month thereafter). New employees will eventually transition into the standard measurement and stability periods for ongoing employees, as they become ongoing employees. The chart below outlines the interplay between 12-month initial and standard periods.

Interplay Between Initial and Standard Periods



As outlined in the above chart, a new employee is measured both during the 12-month initial measurement period (which determines FTE status for the subsequent 12-month initial stability period), and during the first standard measurement period beginning after his/her hire date (i.e., 12-month Standard Measurement Period B, which determines FTE status for 12-month Standard Stability Period B). Eventually the new employee becomes an ongoing employee and is measured exclusively through the standard periods in place for ongoing employees.

Change in Status and Rehires

Special rules apply for employees who experience a change in employment status during a measurement period or who are terminated but later rehired. On change in status, if the employee was hired as a variable hour or seasonal employee, but was thereafter moved to full-time status, then the employee is considered an FTE on the first day of the fourth month following the status change (or, if earlier and the employee averages 30 hours or more per week during the initial measurement period, then the first day of the first month following the end of that measurement period).

On rehires, generally an employee will retain FTE or non-FTE status during an entire stability period for as long as the employee continues to be employed by the employer (called a "continuing employee"). If not considered a continuing employee, the employee is considered a new employee and enters into a new initial measurement period upon rehire.

There are two methods of determining when an employee returning to work following a period of absence (including a termination) will be considered a new employee. Under the first method, if rehired after at least 26 consecutive non-working weeks (approximately 6 1/2 months), the employee is considered a new employee. Under the second method (which applies for periods of absence less than 26 weeks), if the absence was at least four weeks and exceeds the number of weeks of employment immediately preceding the absence, the employee may be treated as a new employee.

If the employee is not considered a new employee under those two methods, then upon rehire the employee will be considered a continuing employee, meaning that the employer treats the rehired employee as if the employee never left (i.e., full-time or non-full-time status during the measurement or stability period is retained).

Additional Resources

- IRS Notice 2012-58
- Employer Mandate Proposed Guidance

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