



Health Care Reform

LEGISLATIVE BRIEF

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Employer Penalties – IRS 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.

The Internal Revenue Service (IRS) and other federal agencies have been issuing guidance on ACA implementation issues, including ACA's employer penalty provisions. Additional guidance is expected in the future to clarify technical details regarding how ACA's employer penalty will apply to large employers.

On Aug. 31, 2012, the IRS issued [Notice 2012-58](#) to describe safe harbor methods and rules that employers may use to determine which employees are treated as full-time employees for purposes of ACA's employer penalty. The IRS provided this guidance so that employers can avoid making month-to-month determinations of full-time status. However, the IRS's safe harbor methods are fairly complex and technical. To help explain the safe harbors, IRS Notice 2012-58 also includes numerous examples. The examples address the safe harbor methods for ongoing employees and new variable hour and seasonal employees.

Employers may rely on the safe harbor methods and rules outlined in IRS Notice 2012-58 at least **through the end of 2014**. This reliance covers a measurement period that begins in 2013 or 2014 and the associated stability period, which may extend into 2014, 2015 or 2016. According to the IRS, employers will not be required to comply with any future guidance that is more restrictive on these issues until at least Jan. 1, 2015.

This National Insurance Services, Inc. Legislative Brief contains the examples from IRS Notice 2012-58.

EXAMPLE – ONGOING EMPLOYEES

Facts - Employer A 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 A's group health plan, only an ongoing employee who works full-time (an average of at least 30 hours per week) during the standard measurement period is offered coverage during the stability period associated with that measurement period.

Employer A 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 worked full-time 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.

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Tom Smith and Greta Jones have been employed by Employer A for several years, continuously from their start date. Tom worked full-time during the standard measurement period that begins Oct. 15 of Year 1 and ends Oct. 14 of Year 2 and for all prior standard measurement periods. Greta also worked full-time for all prior standard measurement periods, but is not a full-time employee during the standard measurement period that begins Oct. 15 of Year 1 and ends Oct. 14 of Year 2.

Conclusions - Because Tom Smith was employed for the entire standard measurement period that begins Oct. 15 of Year 1 and ends Oct. 14 of Year 2, he is an ongoing employee with respect to the stability period running from Jan. 1 through Dec. 31 of Year 3. Because Tom worked full-time during that standard measurement period, Tom must be offered coverage for the entire Year 3 stability period (including the administrative period from October 15 through December 31 of Year 3). Because Tom worked full-time during the prior standard measurement period, he would have been offered coverage for the entire Year 2 stability period, and if enrolled would continue such coverage during the administrative period from Oct. 15 through Dec. 31 of Year 2.

Because Greta Jones was employed for the entire standard measurement period that begins Oct. 15 of Year 1 and ends Oct. 14 of Year 2, Greta is also an ongoing employee with respect to the stability period in Year 3. Because Greta did not work full-time during this standard measurement period, she is not required to be offered coverage for the stability period in Year 3 (including the administrative period from Oct. 15 through Dec. 31 of Year 3). However, because Greta worked full-time during the prior standard measurement period, she would be offered coverage through the end of the Year 2 stability period, and if enrolled would continue such coverage during the administrative period from Oct. 15 through Dec. 31 of Year 2.

Employer A complies with the standards of the IRS's safe harbor 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 coverage offer is an offer of minimum essential coverage that is affordable within the meaning of § 36B(c)(2)(c)(i) (or is treated as affordable coverage under the Form W-2 safe harbor) and that provides minimum value within the meaning of § 36B(c)(2)(c)(ii).

New Variable Hour 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 Kim Lang on May 10, 2014. Kim's initial measurement period runs from May 10, 2014, through May 9, 2015. Kim works an average of 30 hours per week during this initial measurement period. Employer B offers coverage to Kim for a stability period that runs from July 1, 2015 through June 30, 2016.

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Conclusion – Kim Lang works an average of 30 hours per week during her initial measurement period and Employer B uses (1) an initial measurement period that does not exceed 12 months; (2) an administrative period totaling not more than 90 days; and (3) 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 Kim’s start date.

Accordingly, from Kim’s start date through June 30, 2016, Employer B is not subject to any payment under § 4980H with respect to Kim, because Employer B complies with the standards for the initial measurement period and stability periods for a new variable hour employee. Employer B also complies with PHS Act § 2708 (ACA’s 90-day waiting period limitation). Employer B must test Kim Lang again based on the period from Oct. 15, 2014 through Oct. 14, 2015 (Employer B’s first standard measurement period that begins after Kim’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 Kim Lang on May 10, 2014. Kim’s initial measurement period runs from May 10, 2014, through April 9, 2015. Kim works an average of 30 hours per week during this initial measurement period. Employer B offers coverage to Kim for a stability period that runs from July 1, 2015 through June 30, 2016.

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 Kim Lang on May 10, 2014. Kim’s initial measurement period runs from June 1, 2014, through April 30, 2015. Kim works an average of 30 hours per week during this initial measurement period. Employer B offers coverage to Kim for a stability period that runs from July 1, 2015 through June 30, 2016.

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 Kim Lang on May 10, 2014. Kim’s initial measurement period runs from June 1, 2014, through May 31, 2015. Kim works an average of 30 hours per week during this initial measurement period. Employer B offers coverage to Kim for a stability period that runs from Aug. 1, 2015 through July 31, 2016.

Conclusion – Employer B does not satisfy the standards for the safe harbor method for variable hour and seasonal employees because the combination of the initial partial month delay, the 12-month initial measurement period, and the 2-month administrative period means that the coverage offered to Kim does not become effective until after the first day of the second calendar month following the first anniversary of Kim’s start date. Accordingly, Employer B is potentially subject to a payment under § 4980H and fails to comply with PHS Act § 2708 (90-day waiting period limitation).

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Example 5 (*Continuous Full-Time Employee*)

Facts - Same as Example 1. In addition, addition, Employer B tests Kim Lang again based on Kim's hours from Oct. 15, 2014 through Oct. 14, 2015 (Employer B's first standard measurement period that begins after Kim's start date), determines that Kim worked an average of 30 hours a week during that period, and offers Kim coverage for July 1, 2016 through Dec. 31, 2016. (Kim already has an offer of coverage for the period of Jan. 1, 2016 through June 30, 2016 because that period is covered by the initial stability period following the initial measurement period, during which Kim was determined to be a full-time employee.)

Conclusion - Employer B is not subject to any payment under § 4980H and complies with PHS Act § 2708 (90-day waiting period limitation) for 2016 with respect to Kim Lang.

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

Facts - Same as Example 1. In addition, Employer B tests Kim Lang again based on her hours from Oct. 15, 2014 through Oct. 14, 2015 (Employer B's first standard measurement period that begins after Kim's start date), and determines that Kim worked an average of 28 hours a week during that period. Employer B continues to offer coverage to Kim through June 30, 2016 (the end of the stability period based on the initial measurement period during which Kim was determined to be a full-time employee), but does not offer coverage to Kim for the period of July 1, 2016 through Dec. 31, 2016.

Conclusion - Employer B is not subject to any payment under § 4980H and complies with PHS Act § 2708 (90-day waiting period limitation) for 2016 with respect to Kim Lang, provided that it offers coverage to Kim from July 1, 2015 through June 30, 2016 (the entire stability period associated with the initial measurement period).

Example 7 (*Initially Non-Full-Time Employee*)

Facts - Same as Example 1, except that Kim Lang works an average of 28 hours per week during the period from May 10, 2014 through May 9, 2015 and Employer B does not offer coverage to Kim in 2015. Employer B tests Kim again based on her hours from Oct. 15, 2014 through Oct. 14, 2015 (Employer B's first standard measurement period that begins after Kim's start date).

Conclusion - From Kim Lang's start date through the end of 2015, Employer B is not subject to any payment under § 4980H, because it complies with the standards for the measurement and stability periods for a new variable hour employee with respect to Kim Lang. PHS Act § 2708 (90-day waiting period limitation) does not apply to Kim Lang during this period because, pursuant to the plan's eligibility conditions, Kim does not become eligible during this period for coverage under the plan. Accordingly, Employer B also complies with PHS Act § 2708 with respect to Kim during this period.

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

Facts - Same as Example 7. In addition, Employer B tests Kim Lang again based on her hours from Oct. 15, 2014 through Oct. 14, 2015 (Employer B's first standard measurement period that begins after Kim's start date), determines that Kim works an average of 30 hours per week during this standard measurement period, and offers coverage to Kim for 2016.

Conclusion - Employer B is not subject to any payment under § 4980H and complies with PHS Act § 2708 (90-day waiting period limitation) for 2016 with respect to Kim Lang.

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.

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Example 9

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 Brad Jonas on May 10, 2014. Brad's initial measurement period runs from May 10, 2014, through Nov. 9, 2014, during which Brad works an average of 30 hours per week. Employer C offers coverage to Brad for a stability period that runs from Jan. 1, 2015 through June 30, 2015

Conclusion - Employer C uses (1) an initial measurement period that does not exceed 12 months; (2) an administrative period totaling not more than 90 days; and (3) 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 Brad Jonas' start date.

From Brad's start date through June 30, 2015, Employer C is not subject to any payment under § 4980H, because Employer C complies with the standards for the measurement and stability periods for a new variable hour employee with respect to Brad Jonas. Employer C also complies with PHS Act § 2708 (90-day waiting period limitation). Employer C must test Brad again based on his hours during the period from Nov. 15, 2014 through May 14, 2015 (Employer C's first standard measurement period that begins after Brad's start date).

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

Facts - Same as Example 9. In addition, Employer C tests Brad Jonas again based on his hours during the period from Nov. 15, 2014 through May 14, 2015 (Employer C's first standard measurement period that begins after Brad's start date), during which period Brad works an average of 28 hours per week. Employer C continues to offer coverage to Brad through June 30, 2015 (the end of the initial stability period based on the initial measurement period during which Employer C worked an average of 30 hours per week), but does not offer coverage to Brad from July 1, 2015 through Dec. 31, 2015.

Conclusion - Employer C is not subject to any payment under § 4980H and complies with PHS Act § 2708 (90-day waiting period limitation) with respect to Brad Jonas for 2015.

Seasonal Employees

Example 11 (*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 Kristin Smart, a ski instructor, on Nov. 15, 2014 with an anticipated season during which Kristin will work running through March 15, 2015. Employer D determines that Kristin is a seasonal employee based upon a reasonable good faith interpretation of that term.

Kristin's initial measurement period runs from Nov. 15, 2014, through Nov. 14, 2015. Kristin works 60 hours per week from Nov. 15, 2014 through March 15, 2015, but is not reasonably expected to average 30 hours per week for the 12-month initial measurement period. Accordingly, Employer D does not treat Kristin as a full-time employee, and does not offer Employee S coverage.

Conclusion. Employer D uses (1) an initial measurement period that does not exceed 12 months; (2) an administrative period totaling not more than 90 days; and (3) a combined initial measurement period and administrative period that does not extend beyond the final day of the first calendar month that begins on or after the one-year anniversary of an employee's start date. Accordingly, from Kristin Smart's start date through Nov. 14, 2015,

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Employer D is not subject to any payment under § 4980H, because Employer D complies with the standards for the initial measurement period and stability periods for a new seasonal employee with respect to Kristin.

PHS Act § 2708 (90-day waiting period limitation) does not apply to Kristin Smart during this period because, pursuant to the plan's eligibility conditions, Kristin does not become eligible during this period for coverage under the plan. Accordingly, Employer D also complies with PHS Act § 2708 with respect to Kristin during this period.

Source: Internal Revenue Service