

# FYI<sup>®</sup> In-depth

For your information<sup>®</sup>

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## IRS Issues final regulations on employer shared responsibility requirements

The employer shared responsibility requirements — commonly called the employer mandate — are one of the most significant provisions that employers need to address under the Affordable Care Act (ACA). Failure to satisfy these requirements could subject employers to significant assessments starting in 2015. The IRS has published final regulations that detail the requirements.

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### Background

Beginning in 2015, applicable large employers (i.e., employers that employ on average at least 50 full-time employees on business days during the preceding calendar year) may be subject to one of two "shared responsibility" assessable payments under section 4980H of the Internal Revenue Code:

- An employer that fails to offer minimum essential coverage (MEC) to its full-time employees and their dependents may be subject to a nondeductible "play or pay" assessable payment if at least one full-time employee enrolls in marketplace coverage and receives a premium tax credit or cost-sharing reduction. The "play or pay" assessment is one-twelfth of \$2,000 for each calendar month the employer fails to offer MEC times the number of employer's full-time employees, disregarding the first 30 full-time employees. The \$2,000 assessment is indexed in 2015 and future years.
- An employer that offers MEC to its full-time employees and their dependents may be subject to a nondeductible "play and pay" assessable payment for each full-time employee who enrolls in marketplace coverage and receives a premium tax credit or cost-sharing reduction because the employer coverage fails to provide "minimum value" or is "unaffordable." The "play and pay" assessment is one-twelfth of \$3,000 for each calendar month in which a full-time employee receives a marketplace subsidy. The \$3,000 assessment is indexed in 2015 and future years.

On January 2, 2013, the IRS published proposed regulations on the employer shared responsibility requirements under the ACA. (See our [January 30, 2013 For Your Information](#).) On July 2, 2013, the Department of the Treasury announced that the employer obligation to comply with the shared responsibility requirement would be deferred for one year to 2015 because the process for reporting the information necessary to enforce the requirement had not yet been finalized. (See our [July 2, 2013 For Your Information](#).) During the last two months,

the IRS has addressed the employer mandate by issuing final regulations on both the employer's shared responsibility obligations and on how employers will report the information that the agency needs to enforce the shared responsibility requirements in 2015. This FYI discusses the shared responsibility requirements as set out in the [final regulations](#). The reporting requirements are described in our [March 6, 2014 For Your Information](#).

## Concept of full-time employee

Any discussion of the shared responsibility provisions has to begin with the concepts of "full-time employee" and "hours of service." The number of full-time employees in an employer's workforce is used to determine its status as an "applicable large employer" and whether it may be subject to a shared responsibility assessable payment. The status of an individual as a full-time employee may also affect whether an employer is subject to, and the amount of, an assessment.

### First things first ...

Any discussion of the shared responsibility provisions has to begin with the concepts of "full-time employee" and "hours of service."

Generally, a full-time employee is an employee who, for a given calendar month, either averages at least 30 hours of service per week or has worked at least 130 hours of service during that month. For purposes of the shared responsibility requirements, an employee is a worker who is considered an employee under generally applicable common-law principles. Common-law employees are generally individuals whose work is directed and controlled by an employer and for whom an employer would be required to report and pay employment taxes. ([See IRS publication 15-A](#).) Leased employees, sole proprietors, partners in a partnership, and 2% S corporation shareholders are not considered employees.

**Buck comment.** It will be important to determine whether workers characterized as independent contractors who are not offered medical coverage may, in fact, be common-law employees. In the final regulations, the IRS declined to provide relief from the assessments for previously misclassified employees.

## Hours of service taken into account in determining full-time employee status

An hour of service means each hour for which an employee is paid or is entitled to payment. This includes periods during which no services are performed, such as vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty, or a leave of absence.

All hours of service performed by an employee for members of a controlled group are taken into account in determining status as a full-time employee. Until further guidance is issued, government and church entities may use a reasonable, good faith interpretation of controlled group rules. Hours of service worked outside of the US are not counted, regardless of the residency or citizenship of the individual.

### **Methods for crediting hours of service**

In determining whether an employee works on average at least 30 hours a week, employees compensated on an hourly basis must be credited with their actual hours of service. An employer may use actual hours or

equivalencies of 8 hours per day or 40 hours per week to determine hours of salaried employees, as long as the method does not result in the understatement of hours. For example, an employer may not use an 8 hours of service a day equivalency for a salaried employee working 10 hour days three days a week since the employee would only be credited with 24 hours of service for a week while working 30 hours.

An employer can use different methods for different categories of non-hourly employees, as long as the categories are reasonable and consistently applied, and may change the method for each calendar year.

### ***Exclusions from definition of hours of service***

Hours of service performed in certain capacities will not be counted in determining full-time status:

- **Student employees.** Hours of service performed by students under federal or state-sponsored work-study programs will not be counted in determining if the students are full-time employees. Service performed by students under an internship or externship program will count as hours of service for the outside employer and not the educational institution.
- **Volunteer employees.** Hours of service for “bona fide volunteers” of a government entity or tax-exempt organization are not counted as hours of service if the volunteer does not receive compensation other than (1) reimbursement of reasonable expenses, and (2) reasonable benefits and nominal fees customarily paid in connection with performance of service by volunteers.
- **Members of religious orders.** Until further guidance is issued, a religious order is permitted not to count as an hour of service certain work performed by individuals subject to a vow of poverty as members of that order.

### ***Application of hours of service to certain employees***

The preamble to the final regulations includes guidance on the application of the hours of service definition to certain categories of employees whose hours of service are challenging to identify or track, or present special difficulties under the regulations. The guidance is instructive towards other situations not covered in the regulations. Until further guidance is issued, a reasonable method of crediting hours of service is required, based on the relevant facts and circumstances.

- **Adjunct faculty.** A “bright line” method in the guidance allows credit for: (1) 2¼ hours of service per week for each hour of teaching or classroom time, plus (2) an hour of service per week for each additional hour outside the classroom the faculty member spends performing required duties (such as office hours or attendance at faculty meetings). This method can be relied upon at least through the end of 2015. The guidance also confirms that employers can use other reasonable methods that reflect both classroom and non-classroom time until final guidance is issued.
- **On-call hours.** A reasonable method must be used for on-call hours (hours for which an employee has been directed by the employer to remain available to work). The preamble states that it is not reasonable to fail to credit an hour of service for any on-call hour for which one of the following applies:
  - Payment is made or due by the employer
  - The employee is required to remain on-call on the employer’s premises

- The employee's activities while remaining on call are subject to substantial restrictions
- **Commissioned salespeople.** The guidance states that a method would not be reasonable if it did not take into account travel time for a commissioned traveling salesperson.
- **Layover hours for airline industry.** The guidance states that it would be unreasonable for an employer not to credit layover hours if the employee receives compensation for the layover hours or if the layover hours are counted by the employer towards the employee's required hours of service to earn his or her regular compensation. If the employee does not receive compensation or hours are not counted towards regular compensation, it would be reasonable to credit an employee with 8 hours of service for each day on which the employee is required to stay away from home (or 16 hours for an overnight stay), as long as that does not substantially understate the employee's actual hours.

## Determining applicable large employer status

The shared responsibility provisions apply only to "applicable large employers." An applicable large employer is one that employed on average at least 50 full-time employees, including full-time equivalent employees, during the preceding calendar year. The number of full-time equivalent employees (FTEs) for a calendar month is determined by adding the number of hours of service for each employee who was not a full-time employee during that month, up to a maximum of 120 hours per employee, and dividing the total number by 120. The average is determined by adding the total number of full-time employees and full-time equivalent employees employed during each month of that calendar year and then dividing by 12. For this purpose, full-time employees are determined using the monthly measurement method described below. Seasonal workers, defined as workers who provide services on a seasonal basis, including retail workers employed exclusively during holiday seasons, are taken into account in determining the number of full-time employees and full-time equivalent employees. However, they may be disregarded if the number of full-time and full-time equivalent employees exceeded 50 for 120 days or less during the preceding calendar year and those in excess of the 50 during that period were seasonal workers.

**Buck comment.** The concept of "seasonal workers" is used only for purposes of determining applicable large employer status and should not be confused with "seasonal employees," which describes certain employees who may not have to be treated as full-time even though they are expected to average at least 30 hours of service a week at their start date.

When an employer is a member of a controlled group, all employees of the controlled group are taken into account when determining whether the 50 full-time employee threshold is reached. Until further guidance is issued, government and church entities may use a reasonable, good faith interpretation of controlled group rules. An employer that did not exist in the preceding calendar year will be considered a large employer for the current calendar year if it is reasonably expected to employ at least an average of 50 full-time employees and FTEs on business days during the current calendar year.

### **Transition relief for 2015**

The final regulations permit an employer to use a period of at least six consecutive calendar months in 2014, rather than the entire 2014 calendar year, for determining its status as an applicable large employer in 2015. This

is intended to give an employer sufficient time to become familiar with the applicable large employer determination method and apply it for the first time.

The final regulations also exempt employers with 50 to 99 full-time employees (including FTEs) on business days during 2014 from the employer shared responsibility requirements and assessments for 2015. Thus, only employers who employed on average at least 100 or more full-time employees and FTEs in 2014 will be treated as applicable large employers in 2015. To be eligible for this transition relief, the employer must not:

- Reduce the size of its workforce or overall hours of service during the period starting February 9, 2014 and ending December 31, 2014 in order to satisfy the workforce size condition of fewer than 100 full-time employees
- Eliminate or materially reduce health coverage offered as of February 9, 2014 through the end of the 2015 plan year

Although employers with 50 to 99 full-time employees are exempt from the employer shared responsibility requirements for 2015, they are still subject to the section 6056 reporting requirements. (See our [March 6, 2014 For Your Information](#).) The employer will certify that it is eligible for the transition relief in the section 6056 IRS transmittal form (Form 1094-C) for 2015.

## Identifying full-time employees for assessable payment purposes

The final regulations provide two methods for identifying full-time employees:

- **Monthly measurement method.** This is the method contemplated under the Code section 4980H but was not addressed in the proposed regulations. An employee's status as full-time is determined on a retrospective basis at the end of each calendar month using his or her hours of service for the month.
- **Look-back measurement method.** This is the optional alternative approach set out in the proposed regulations. Under this method, an employee's status as full-time is determined prospectively by averaging his or her hours of service over a prior measurement period.

### **Monthly measurement method**

Under the monthly measurement method, any employee credited with at least 130 hours of service during a calendar month will be considered a full-time employee for that month for purposes of the shared responsibility requirements. There is no separate identification of seasonal, part-time, or variable hour employees.

**Use of weekly periods.** In lieu of counting hours within a calendar month, an employer can count hours of service credited to an employee over successive weekly periods that better tie into payroll or other recordkeeping periods. For this purpose, a "week" is defined as any period of seven consecutive days applied

### **A monthly measurement method example ...**

An employee who works 130 hours in May will be a full-time employee for May and the employer could potentially be subject to an assessment for that employee for that month. If the employee then works only 100 hours in June, he or she will not be full-time employee for June and the employer would not be subject to an assessment for that month.

consistently for each calendar month of the year. Because either the first day or the last day of the calendar month generally must fall within the period used, the hours for some calendar months will be determined using 4-week periods and some using 5-week periods. For calendar months calculated using 4-week periods, an employee with at least 120 hours of service would be a full-time employee. For calendar months using 5-week periods, at least 150 hours of service would be a full-time employee.

**Unpaid leave and employment breaks.** Under the monthly measurement method, periods during which an employee is on unpaid leave, including FMLA or USERRA, or on other employment breaks are simply treated as no hours of service in the calendar month.

**Buck comment.** Under the look-back measurement method described below, there are special unpaid leave rules. Those rules do not apply under the monthly measurement method because hours of service in a calendar month are based on actual hours of service and not averaging over a prior measurement period.

### ***Look-back measurement method***

Under the look-back measurement method, an employer determines “in advance” whether an employee will be a full-time employee for purposes of the shared responsibility assessments. The final regulations largely follow the proposed regulations and set out rules for applying the look-back measurement method to both on-going employees and new hires.

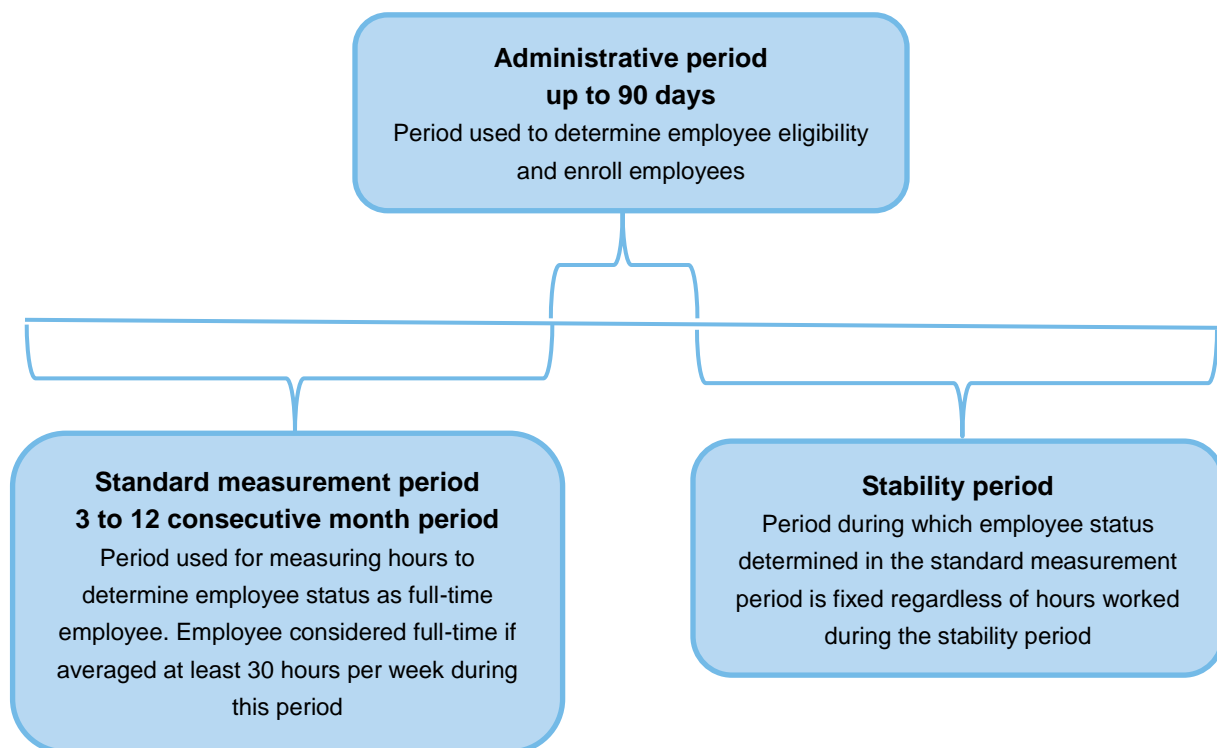
**Ongoing employees.** Ongoing employees are those who have been employed for at least one “standard measurement period.” To determine an ongoing employee’s status as a full-time employee, the employer counts the hours of service credited to the employee over a standard measurement period that is not less than three consecutive months, nor more than 12 consecutive months. The measurement period does not need to be based on calendar months. As an administrative accommodation, employers may use the beginning and end of payroll periods as the beginning and end of the measurement period, provided the payroll periods are one week, two weeks, or semi-monthly in duration.

The number of hours of service credited to the employee during the measurement period will determine whether the employee will be treated as a full-time employee during a subsequent associated “stability period,” which must be based on calendar months.

- **Determined to be a full-time employee.** An employee who averaged at least 30 hours of service a week (or 130 hours a month) during a standard measurement period will be treated as a full-time employee throughout the subsequent stability period, regardless of the employee’s actual hours of service or any change in employment status during the stability period. In this case, the duration of the stability period must be the greater of six months or the length of the standard measurement period.
- **Determined to be a non-full-time employee.** An employee who fails to meet the hour threshold during the standard measurement period may be treated as a “non-full-time” employee throughout the subsequent stability period, regardless of the employee’s actual hours of service or any change in employment status during the stability period. In this case, the duration of the stability period cannot exceed the length of the standard measurement period.

The employer may use an “administrative period” of up to 90 days between the end of the standard measurement period and the beginning of the associated stability period in which to determine the employee’s full-time status and to offer health coverage to those determined to be full-time. The interaction of the measurement, administrative and stability periods is illustrated below:

#### Look-back measurement method for ongoing employees



**Buck comment.** Educational organizations typically function on the basis of an academic year, which includes periods when the organization is not in session or has limited activities. To address this, the regulations provide an averaging method to reflect employment breaks that generally results in an employee who works full-time during the active portions of the academic year being treated as a full-time employee for purposes of the shared responsibility requirements.

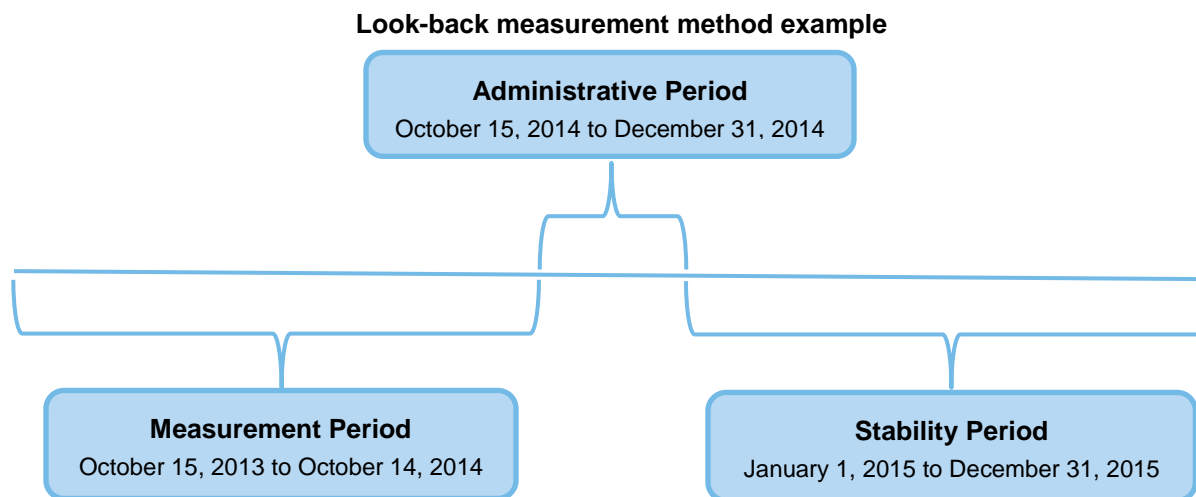
**Use of different measurement and stability periods for different categories of employees.** The standard measurement period and stability period used by an employer generally must be uniform for all ongoing employees. However, an employer can use different measurement, stability, and administrative periods for the following categories of employees:

- Each group of collectively bargained employees covered by a separate bargaining agreement
- Collectively bargained and non-collectively bargained employees

- Salaried and hourly employees
- Employees whose primary places of employment are in different states

An employer may change its standard measurement and stability periods each year but cannot make a change for a given year once the standard measurement period has begun.

**Buck comment.** Employers may want to consider coordinating the ongoing employee administrative and stability periods with the plan year for the health plan. The example below illustrates this approach for a 2015 calendar year plan:



**New employees.** The treatment of a new employee under the look-back measurement method generally depends on the employer’s reasonable expectation at an employee’s start date regarding the number of hours the employee will average per week. New employees will fall into one of four categories:

- **New full-time employee.** An employee who at his or her start date, based on facts and circumstances, is reasonably expected to work on average at least 30 hours a week must be treated as a new full-time employee. For this purpose, “start date” is the date on which an employee must first be credited with an hour of service. The final regulations clarify that short-term or temporary employees who are reasonably expected to work at least 30 hours a week are considered to be full-time employees even though their anticipated period of employment may be less than 12 months.
- **Seasonal employee.** An employee who is expected to work at least 30 hours per week and would otherwise be a new full-time employee may be treated as a seasonal employee if the customary annual employment for the employee’s position is six months or less. For this purpose, “customary” means that the period of employment for the position generally begins at the same time of year, such as winter or summer. The regulations note that an employee may still be considered seasonal if, due to unusual business conditions, employment extends beyond six months in a particular year.



- **New part-time employee.** An employee who at his or her start date is reasonably expected to work on average fewer than 30 hours a week is considered to be a new part-time employee.
- **Variable hour employee.** An employee is considered a “variable hour employee” if, at the start date, it cannot be determined that the employee is reasonably expected to be employed on average at least 30 hours per week during the initial measurement period because the employee’s hours are variable or otherwise uncertain.

The final regulations provide that an employer cannot use a measurement/stability period for new full-time employees — for purposes of the shared responsibility requirements, their status is determined on a monthly basis so they are considered to be full-time employees for each calendar month in which they average at least 30 hours of service a week. However, an employer may use a measurement/stability period for determining the full-time status of new seasonal, part-time, and variable hour employees. The approach is similar in concept to that used for ongoing employees, but more complicated.

For new non-full-time employees, an employer may use an “initial measurement period” of between three and 12 months that begins on any date between the employee’s start date and the first day of the calendar month following the start date. Although an employer may use an administrative period of up to 90 days, if the initial measurement period does not begin on the employee’s start date, the period between the start date and the beginning of the initial measurement period counts towards the 90 day maximum.

**Buck comment.** An employer may want to use the first of the month following an employee’s start date to begin the initial measurement period. This will permit an employer to simplify administration by combining new hires into twelve monthly groups. However, this approach reduces the remaining administrative period between the end of the initial measurement period and the start of the stability period to at most 59 days.

The stability period must start no later than the first day of the second calendar month beginning on or after the one-year anniversary of the employee’s start date. The stability period must be based on calendar months.

The number of hours of service credited to the employee during his or her initial measurement period will determine whether the employee will be treated as a full-time employee during the associated stability period as follows:

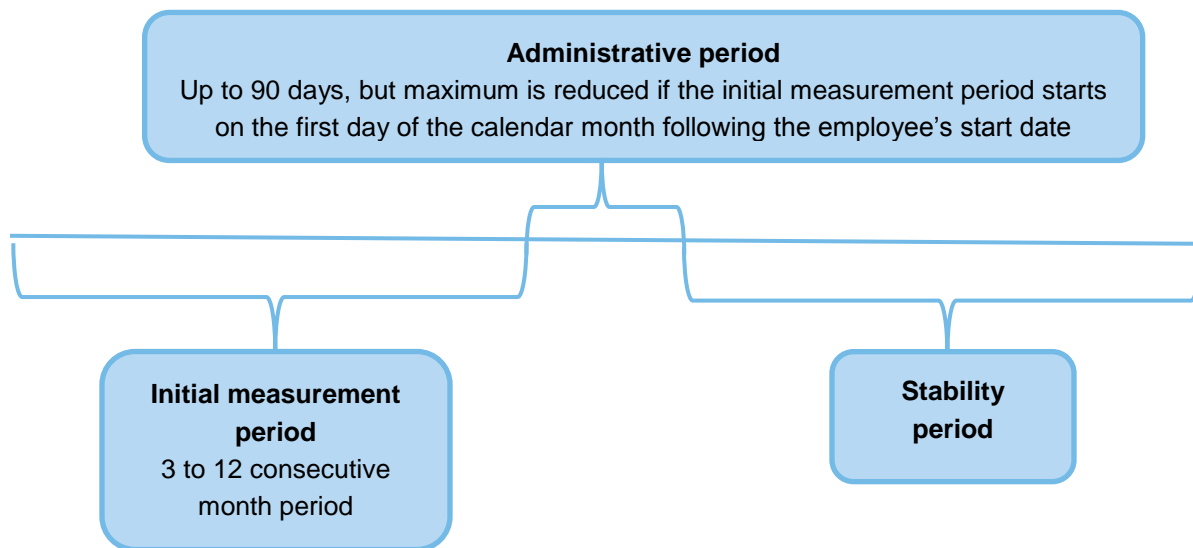
- **Determined to be a full-time employee.** An employee who is determined to be a full-time employee during the initial measurement period is treated as a full-time employee during the subsequent stability period, regardless of the employee’s actual hours of service or any change in employment status during the stability period. In this case, the duration of the stability period must be the same length as the stability period for ongoing employees.
- **Determined to be a non-full-time employee.** If the employee is determined to be a non-full-time employee during the initial measurement period, the employee will be considered to be a non-full-time employee during the subsequent stability period. In this case, the stability period can be no more than one month longer than the initial measurement period and cannot exceed the remainder of the first entire

standard measurement period (plus any associated administrative period) for which a variable hour employee, seasonal employee, or part-time employee has been employed.

An employer can use different initial measurement, stability, and administrative periods for the same categories of employees as outlined above for ongoing employees:

- Each group of collectively bargained employees covered by a separate bargaining agreement
- Collectively bargained and non-collectively bargained employees
- Salaried and hourly employees
- Employees whose primary places of employment are in different states

#### New variable hour, seasonal, or part-time employees



#### Limited non-assessment periods

A discussion of when coverage must begin to avoid potential assessments is discussed in the [Limited non-assessment periods](#) section below.

After a new employee, including a new full-time employee, has been employed by an employer for a standard measurement period, the employee is considered to be an ongoing employee and must have his or her hours measured on the same basis as other ongoing employees.

An employee who has a change in employment status during the initial measurement period, so that he or she is now reasonably expected to work at least 30 hours a week, must be treated as a full-time employee beginning on the first day of the calendar month following the change. However, the employer generally will not be subject to an assessment with respect to that employee as long as coverage is offered by the earlier of (1) the first day of the fourth calendar month following the change to full-time

status, or (2) the first day of the applicable stability period if the employee had been credited with requisite hours to be full-time during the initial measurement period.

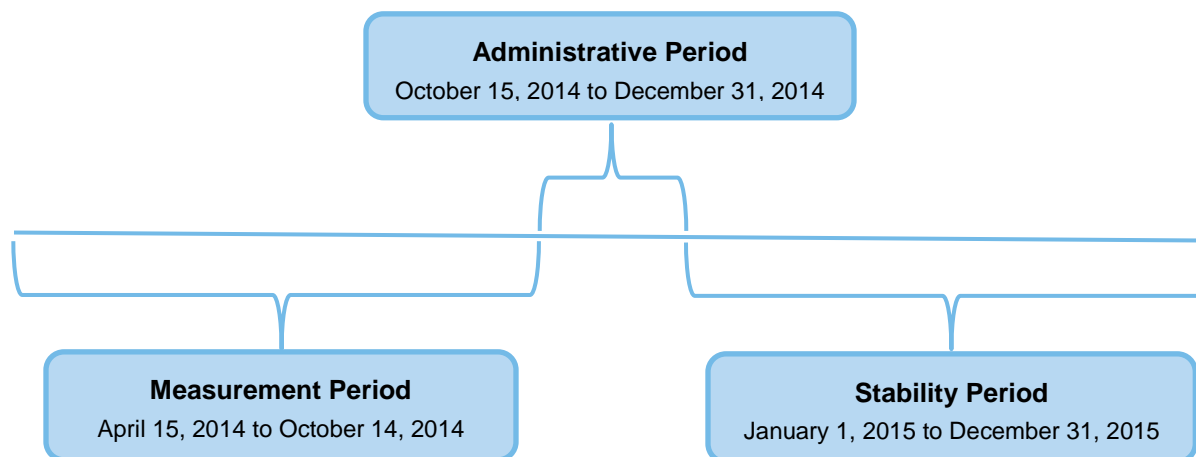
**Transition relief for 2015 stability periods.** Because the stability period generally cannot be shorter than the measurement period, employers that want to use a 12-month measurement period for 2015 with a corresponding 12-month stability period will have had to already begun counting hours. The final regulations provide that solely for the purpose of stability periods beginning in 2015, employers can use a transition measurement period that meets these conditions:

- Is shorter than 12 months, but no less than six months
- Begins no later than July 1, 2014
- Ends no earlier than 90 days before the first day of the plan year beginning on or after January 1, 2015

**Buck comment.** This is significant transition relief of which employers who want to use a 12-month measurement and stability period may want to take advantage for 2015. However, employers still need to implement procedures quickly for collecting data on employee work hours, if they are not already tracked.

This transition relief applies to individuals who were employees as of the first day of the transition measurement period. For example, an employer with a calendar year plan could use a six-month measurement period starting April 15, 2014, with an administrative period starting October 15, 2014, as shown below:

#### 2015 transition relief — look-back measurement method example



#### **Rehired and continuing employees**

An employer may treat a rehired employee as a new employee if the employee has a “break-in-service” (i.e., is not credited with an hour of service) of at least 13 consecutive weeks. Under a “rule of parity,” an employer may treat a shorter-term employee as a new hire if the employee’s break in service is at least (1) four weeks but less than 13 weeks in duration, and (2) as long as the employee’s preceding period of employment. The same rules apply to educational organizations except that the break-in-service must be at least 26 consecutive weeks.

**Treatment as a new employee.** If the rehired employee may be treated as a new hire, an employer using the look-back measurement period may disregard the employee's pre-break hours of service in determining full-time employee status for the measurement period in which the break occurs. An employer using the monthly measurement period would simply begin counting the employee's hours beginning with the next full month of employment. However, if the rehired "new" employee is a full-time employee, the employer generally will not be subject to an assessment with respect to that employee if the employee is offered coverage by the first day of the fourth calendar month following the employee's rehire date.

**Treatment as a continuing employee.** An employee who has had a break-in-service but cannot be treated as a new hire is referred to in the regulations as a "continuing employee." An employer using the look-back measurement method (but not monthly measurement method) must count the hours of service credited to a continuing employee before his or her break period and must do one of the following for any periods of special unpaid leaves (FMLA, USERRA, jury duty) if applicable:

- Exclude the special leave period in determining the employee's average hours of service during measurement period
- Credit the employee with hours during the special unpaid leave period at the average rate for the weeks in the measurement period when employee was not on unpaid special leave

If the employee returns to employment during a stability period in which he or she must be treated as a full-time employee, the employer must offer the employee coverage by the first day of calendar month following resumption of services in order to avoid a potential assessment.

An employer using the monthly measurement method similarly must offer coverage to a continuing full-time employee by the first day of the next calendar month to avoid potential liability.

### ***Use of different measurement methods for different categories of employees***

An employer may apply either the monthly measurement method or the look-back measurement method separately to the following categories of employees:

- Each group of collectively bargained employees covered by a separate bargaining agreement
- Collectively bargained and non-collectively bargained employees
- Salaried and hourly employees
- Employees whose primary places of employment are in different states

These are the same employee categories for which an employer can use different measurement, stability, and administrative periods.

**Buck comment.** Only the above categories are permitted, and an employer cannot use the look-back measurement method for variable hour employees while using the monthly measurement method for

### Limited non-assessment periods

A discussion of when coverage must begin to avoid potential assessments is discussed in the [Limited Non-Assessment Periods](#) section below.

employees with more predictable hours of service. This limits the flexibility of these methods. Employers will need to determine which method is the most appropriate for their workforce and eligibility provisions. The monthly measurement method may be particularly useful for employers with limited numbers of non-benefit-eligible part-time, temporary, and seasonal employees, or who offer benefits to part-time employees.

## “Play or pay” shared responsibility assessments

An applicable large employer that fails to offer minimum essential coverage (MEC) to “substantially all” of its full-time employees (and their dependents) may be subject to the \$2,000 “play or pay” assessment beginning in 2015 if it has at least one full-time employee who receives subsidized marketplace coverage.

### ***Offer of MEC***

The proposed regulations required an employer to offer coverage to at least 95% of its full-time employees in order to satisfy the “substantially all” requirement. They also provided that in determining the amount of the assessment, the first 30 full-time employees would be disregarded. The final regulations make some favorable changes to these requirements for 2015 (and for calendar months in 2016 that are part of a plan year beginning in 2015):

- Employers can avoid the assessment if they provide coverage to as few as 70% of their full-time employees, rather than 95%.
- The number of full-time employees that can be disregarded in calculating the monthly assessment is increased from 30 to 80 full-time employees.

**Buck comment.** The relaxation of this requirement to 70% will greatly ease the compliance efforts for many large employers in 2015, and provide them with additional time to comply with the more stringent 95% requirement beginning in 2016. Nonetheless, employers will still need to measure hours to determine full-time employees in 2015, and may be subject to the \$3,000 “play and pay” payment for full-time employees who are not offered coverage, including full-time employees in the 30%.

### “Play or pay” assessable payment

The employer must either “play” by providing coverage or “pay” a monthly assessable payment equal to the number of full-time employees employed during the calendar month reduced by 30 (80 in 2015), multiplied by one-twelfth of \$2,000.

### ***Dependent coverage***

Employers must also offer dependents of full-time employees the opportunity to enroll in MEC or be subject to the “play or pay” assessable payment. Dependents include the employee’s biological children and adopted children under age 26, but not the employee’s spouse. A child is treated as a dependent for the entire calendar month during which he or she attains age 26.

The final regulations provide transition relief for employers that do not currently offer coverage for dependent children coverage, or do not cover a required category of children. If an employer takes steps during the 2014 or

2015 plan years toward offering dependent coverage, no assessment will be imposed for failure to offer coverage to dependents in the 2015 plan year.

### “Play and pay” shared responsibility requirement

An applicable large employer that offers MEC to its full-time employees and their dependents will potentially be subject to the “play and pay” \$3,000 payment beginning in 2015 for any full-time employees who enroll in marketplace coverage and receive a premium tax credit or cost-sharing reduction. This can occur in the following situations:

- The employer coverage is unaffordable, i.e., the required employee contribution for employee-only coverage exceeds 9.5% of the employee's household income for the taxable year.
- The employer coverage does not provide minimum value (i.e., the plan's share of the total allowed costs is less than 60% of the costs).
- The employer offers coverage to at least 95%, but less than 100%, of its full-time employees, and one of the full-time employees not offered coverage enrolls in marketplace coverage.

For employers with multiple coverage options, only one option needs to satisfy the affordability and minimum value requirements to avoid the assessable payment.

**Buck comment.** Most typical employer medical plans easily satisfy the 60% minimum value requirement. Whether employee contributions are unaffordable will be the primary driver of this assessment.

#### **Affordability**

Because an employer generally will not know the employee's household income, the proposed regulations included three safe harbor approaches that employers can use to determine affordability for purposes of the employer “play and pay” assessment. The final regulations include the same safe harbors with some modifications:

- **Form W-2 wages safe harbor.** Affordability is based solely on wages paid by the employer as reported in Box 1 of the employee's Form W-2. If the employee annual contribution for employee-only coverage for the lowest cost plan that provides minimum value does not exceed 9.5% of the Form W-2 amount, the employer coverage would be deemed affordable. This determination would be made retrospectively at the end of the year. Adjusted W-2 amounts and employee contributions are used for employees who did not work the entire calendar year for the employer.

#### “Play and pay” assessable payment

An employer who “plays” by providing coverage may still have to “pay” an assessable payment for each full-time employee who enrolls in marketplace coverage and receives a premium tax credit. The monthly assessable payment is equal to the number of full-time employees who receive subsidies during the calendar month, multiplied by one-twelfth of \$3,000.

- **Rate-of-pay safe harbor.** Affordability for hourly employees is based on the employee's rate of pay as of the beginning of the coverage period (usually the first day of the plan year), or the employee's lowest hourly rate of pay in the calendar month. The monthly wage equals the hourly rate of pay for the month times 130 hours, regardless of hours worked. For a non-hourly employee, the employee's monthly salary is used.

If the employee's monthly contribution for employee-only coverage for the lowest cost plan that provides minimum value does not exceed 9.5% of his or her monthly wages, the employer coverage will be deemed affordable. Note that this safe harbor is not available for non-hourly employees if the employer reduces wages for the applicable group during the year, but it can be used for hourly employees if an hourly employee's rate of pay is reduced.

- **Federal poverty line (FPL) safe harbor.** Affordability is based on the federal poverty line (FPL) for a single individual. If the employee contribution for self-only coverage for the lowest cost plan that provides minimum value does not exceed 9.5% of the FPL, the employer coverage will be considered affordable for all employees. An employer can use the FPL guidelines in effect six months before the beginning of the plan year.

**Buck comment.** For example, the 2014 FPL in the 48 contiguous states for a single individual is \$11,670. (Alaska and Hawaii have higher FPLs.) Calendar year plans can use the 2014 FPL to determine affordability for the 2015 plan year. If the annual employee contribution for self-only coverage is not greater than \$1,108.65 (9.5% of the \$11,670), or \$92.38 a month, the employer coverage would be deemed affordable.

The use of these safe harbors is optional. An employer can also choose to use a different safe harbor for any reasonable category of employees, as long as the basis is uniform and consistent for all employees in a category. The final regulations clarify that reasonable categories of employees include specified job categories, nature of compensation, geographic location, and similar bona fide business categories.

Note that the safe harbors are only used for determining affordability for purposes of the employer payment and do not affect the employee's eligibility for marketplace subsidies, which will still be based on the employee's household income.

**Buck comment.** The rate-of-pay and FPL safe harbors are designed-based methods that can be used prospectively without analyzing an employee's hours and wages. While the other two safe harbors will likely support higher employee contribution levels, the FPL safe harbor provides a simple approach to determine quickly if a coverage option is affordable for all employees, or to design a coverage option that will be affordable for all employees. In addition, an employer that uses the FPL safe harbor may qualify for simplified section 6056 reporting for its employees. (See our [March 6, 2014 For Your Information](#).)

### Should an employer make coverage “affordable” to avoid the “play and pay” assessment?

Some employers are considering reducing employee contributions to make their plan affordable and avoid the “play and pay” assessment. However, the employer cost of reducing employee contributions could exceed any potential shared responsibility assessments that the employer would pay. Employers may also find that paying the \$3,000 annual assessment for employees who enroll in subsidized marketplace coverage is less than the cost of reducing employee contributions. Many employees may also find “unaffordable” employer coverage more attractive than marketplace coverage.

### Limited Non-Assessment Periods

Generally, an employer is potentially subject to a shared responsibility payment for each month in which it fails to offer a full-time employee minimum essential coverage that is affordable and provides minimum value. However, the final regulations provide that employer shared responsibility assessments will not apply with respect to an otherwise eligible employee during the following “limited non-assessment periods” provided that coverage providing minimum value is offered within certain timeframes. The limited non-assessment periods are:

- The first three full calendar months of employment for (1) a new employee who is reasonably expected to be a full-time employee under the look-back measurement period, or (2) under the monthly measurement method, an employee who is otherwise eligible for an offer of coverage as a full-time employee
- The employee’s initial measurement period (and the associated administrative period)
- A period of time after an employee experiences a change to full-time employee status during the initial measurement period

For employees expected to be full-time at their start date under the look-back measurement method or who are eligible as full-time employees under the monthly measurement method, the limited non-assessment period will apply only if coverage is offered by first day of the fourth calendar month following the employee’s start date or the date the employee otherwise became eligible for coverage. For this purpose, an employee is considered otherwise eligible for coverage once he or she has satisfied the substantive conditions for eligibility other than satisfaction of a waiting period. If coverage is not offered by that time, the employee will be taken into account as a full-time employee for purposes of the \$2,000 “play or pay” assessment for the first three full calendar months following the start date or satisfaction of the eligibility requirements

**Buck comment.** This means that the employee would be counted in determining whether coverage was offered to at least 95% of the employer’s full-time employees (70% in 2015). The employee could also trigger an assessment if he or she enrolled in subsidized marketplace coverage.

If the coverage offered does not provide minimum value, an employer could potentially be subject to the \$3,000 “play and pay” assessment for those three calendar months.



For employees determined to be full-time after the initial measurement period, the limited non-assessment period will apply only if coverage is offered by the first day of the associated stability period. If coverage is not offered, the employee will be taken into account as a full-time employee for the “play or pay” shared responsibility assessment purposes (\$2,000 annual maximum) for each calendar month during the initial measurement period and any administrative period. In addition, if coverage that otherwise would have been available to the employee during the initial measurement period and that is offered for the stability period does not provide minimum value, the employer could potentially be subject to the “play and pay” shared responsibility assessment (\$3,000 annual maximum) for the same period.

**Buck comment.** While coverage must provide minimum value for the limited non-assessment period to apply, the coverage does not have to be “affordable.”

### **Separate assessment of shared responsibility payments within controlled group**

While determination of applicable large employer status is made on a controlled group basis, the assessment of the shared responsibility payments will be determined on a member-by-member basis within the controlled group. Therefore, shared responsibility payments will be “computed and assessed separately for each applicable large employer member, taking into account that member’s offer of coverage and based on that member’s number of full-time employees.” Each employer member can independently decide which measurement method to use to determine full-time employees, including using differing measurement and stability periods under the look-back measurement method.

**Buck comment.** Each employer member in the controlled group will be able to develop its own compliance strategy. However, it is important to note that the nondiscrimination requirements under section 105(h) for self-funded plans still apply, and the ACA also includes similar nondiscrimination requirements for insured plans. The nondiscrimination rules under 105(h) appear to limit an employer’s ability to offer coverage to some members of a controlled group, while not offering coverage to other members, unless done on a nondiscriminatory basis.

The final regulations provide that an offer of coverage by one applicable large employer member to an employee is treated as an offer of coverage by all applicable large group members. For a full-time employee who performs services for two or more applicable large group members during the same calendar month, the member for whom the employee has the greatest number of hours of service for that calendar month is the member that treats the employee as a full-time employee for assessable payment determinations under the employer shared responsibility provisions.

### Should an employer offer coverage to non-eligible employees to avoid the “play and pay” assessment?

The shared responsibility assessment is often called a penalty. However, an employer complies with the shared responsibility requirements by either providing coverage to its full-time employees or by paying the assessment. While providing coverage to current non-eligible employees will avoid the \$3,000 “play and pay” assessment, the cost of providing coverage to these employees could exceed the cost of the \$3,000 assessment. Employers should review the marginal cost of paying the assessment over the cost of providing employer coverage.

### Transition relief for non-calendar year plans

The January 1, 2015 effective date of the shared responsibility requirements presents special issues for employers with non-calendar year plans. To address these concerns, the preamble of the final regulations outlines transition relief for non-calendar year plans that were in effect as of December 27, 2012, and where the plan year was not subsequently modified to begin at a later calendar date.

The guidance provides three transition rules that apply for the period before the first day of the non-calendar year plan year beginning in 2015. The relief is provided for employees who, no later than the first day of the 2015 plan year, are offered coverage that is affordable and provides minimum value.

#### ***Pre-2015 eligibility transition guidance***

This transition rule applies to employees who would be eligible for coverage effective the first day of the 2015 plan year under the eligibility terms of the plan in effect on February 9, 2014 (the date the final regulations were issued). Under this rule, if the employee is offered coverage that is affordable and provides minimum value no later than the first day of the 2015 plan year, no shared responsibility assessable payment will be due for that employee with respect to the period prior to the first day of the 2015 plan year.

**Buck comment.** This rule only provides relief from the \$3,000 “play and pay” payment for employees already eligible for the employer plan, and for whom that coverage was either unaffordable or did not provide minimum value.

#### ***Significant Percentage Transition Guidance***

These two rules apply to employees who would first be eligible for coverage under the employer plan on the first day of the 2015 plan year.

The *All Employees* rule is based on all employees of the employer. The transition relief is provided if the employer:

- Had, as of any date in the 12 months ending February 9, 2014, at least one quarter of its employees covered under the non-calendar year plan(s), or

- Offered coverage under the plan(s) to one third or more of its employees during the open enrollment period that ended most recently before February 9, 2014.

The *Full-time Employees* rule is based on the full-time employees of the employer. The transition relief is provided if the employer:

- Had, as of any date in the 12 months ending February 9, 2014, at least one third of its full-time employees covered under the non-calendar year plan(s), or
- Offered coverage under the plan(s) to one half or more of its full-time employees during the open enrollment period that ended most recently before February 9, 2014.

Under both rules, no shared responsibility assessable payment will be due for an employee with respect to the period prior to the first day of the 2015 plan year if the employee is offered coverage that is affordable and provides minimum value no later than the first day of the 2015 plan year. If the employer maintains two or more non-calendar year plans with the same plan year, they would be combined for each of these rules.

**Buck comment.** These two rules help provide relief from both the \$2,000 “play or pay” and the \$3,000 “play and pay” shared responsibility assessments for full-time employees not previously eligible for coverage before the first day of the 2015 plan year. It appears that this percentage transition guidance rule can be used separately for applicable large group members within a controlled group.

## Multiemployer plans

Similar to the proposed regulations, the final regulations provide special interim guidance for employers that contribute to multiemployer plans. An employer will not be treated as failing to offer MEC to a full-time employee if:

- The employer is required to make a contribution to a multiemployer plan for a full-time employee pursuant to a collective bargaining agreement or related participation agreement.
- Coverage under the multiemployer plan is offered to the full-time employee (and the employee’s dependents).
- The coverage offered to the full-time employee is affordable and provides minimum value.

The employer is responsible for identifying its full-time employees and would pay any assessable payment. Any future guidance that limits the scope of this interim guidance will be applied prospectively and will not apply any earlier than January 1 of the calendar year beginning at least six months after the date of issuance of the guidance.

## Section 6056 reporting

Large employers subject to the “shared responsibility” provisions of the ACA must report information to the IRS about the health care coverage provided to full-time employees under the Code Section 6056 reporting requirement. A statement is also provided to the individual. This reporting will support the IRS enforcement of the employer shared responsibility provisions discussed above. The individual statement will be used by employees

to determine eligibility for the individual premium tax credit. Collecting and preparing the required information will be a significant effort for many employers. (See our [March 6, 2014 For Your Information](#).)

Employers eligible for the non-calendar year plan transition relief discussed above will remain subject to the section 6056 reporting for the entire 2015 calendar year, including the period before the first day of the plan year because this information is needed by the IRS and individual for the administration of the premium tax credit.

## In closing

Employers now have the guidance needed to finalize their employer shared responsibility compliance strategy. Implementing the appropriate measurement method, and collecting and reporting the required data will be a significant effort for many employers.

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