7-23-2014

Large Employers Must Apply the Same Measurement Method to All Employees in the Same Category

Lisa Klinger, J.D. and Susan Grassli, J.D.
www.leavitt.com/healthcarereform.com

Under Employer Shared Responsibility provisions of the Affordable Care Act (ACA), large employers who do not offer Minimum Essential Coverage to substantially all full-time employees and their dependents face potential penalties. To avoid all penalties, the employer coverage offered must also be "affordable" and provide "minimum value".

"Substantially all" full-time employees is defined in 2015 as at least 70% of all employees who work at least 30 hours per week (or at least 130 hours per month). For 2016 and beyond, the threshold increases to 95%. It is important, therefore, for large employers to identify exactly who their full time employees are in order to avoid the penalties.

Two Measurement Methods to Determine Full-Time Status

The final regulations (issued February 10, 2014) provide two "Measurement Methods" employers can use to determine full-time status:

- Monthly Measurement Method
- Look-Back Measurement Method

Under the Monthly Measurement Method, if an employee has at least 130 hours of service in any calendar month, that employee is full time for that month. An employer who does not offer coverage to an eligible full-time employee will be subject to a penalty if at least one full-time employee qualifies for a tax credit to buy coverage in a Health Insurance Exchange. Under this method, employees whose hours vary could theoretically go in and out of coverage each month.

Under the Look-Back Measurement Method, an employer tracks each employee's hours during a specified Look- Back measurement period, calculates the average hours per month over the period, and offers coverage (or faces potential penalties for not offering coverage) during the associated Stability Period to employees who were full-time during the Look Back Period.

The final regulations specify the following two rules regarding Measurement Methods.

Rule #1: Same Measurement Method for All Employees in the Same Category

Employers must use same Measurement Method for all employees in the same category, and there are only four permissible categories:

- Salaried employees vs hourly employees
- Employees whose primary places of employment are in different States

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

Thus, the first decision a large employer must make is which Measurement Method will apply for which categories of employees? For many employers, the primary categories will be salaried and hourly. For example, an employer could elect to use the Monthly Method for all salaried employees (even those with variable hours) and to use the Look Back Method for all hourly employees (even those who consistently work at least 130 hours per month). Alternatively, an employer could elect to use one Measurement Method for all employees. For example, an employer could elect to use the Look Back Measurement Method for all employees.

This "Rule #1" is a change from the proposed regulations (issued December 27, 2012). The proposed regulations seemed to allow employers to apply the Monthly Measurement Method to employees who consistently worked full-time or who consistently worked part-time, and to apply the Look Back Measurement Method to variable hour and seasonal employees. The final regulations clarify that this is not allowed. The preamble to the final regulations explains the reason for this change, saying that allowing the employer to change measurement methods for a particular employee each year *brings an excessive level of subjectivity to the determination of an employee's classification as a full-time employee*.

Rule #2: Employers Must Use Monthly Measurement Method for Newly-Hired Full-time Employees

The final regulations also provide an exception to the general rule stated above: An employer **must** use the Monthly Measurement Method for all newly-hired employees who are "reasonably expected" to work full-time. This applies even if the new employee is in a category of employees for whom the Look-Back Measurement Method would apply. (Of course, there is an exception to this exception. See below for the exception for Seasonal Employees.)

For example, even if an employer elects to apply the Look Back Measurement Method to hourly employees, the employer must apply the Monthly Measurement Method to a newly-hired hourly employee who is reasonably expected to work full time. If a newly-hired hourly employee is NOT reasonably expected to work full time, the Look Back Method would apply.

The Monthly Measurement Method must be used until the newly-hired full-time employee becomes an "ongoing employee" (as defined in 54.4980H-1(a)(31)of the final regulations). This could take almost two years, depending on when the employee is hired. This is because a new hire does not become an on-going employee until after he or she has completed one Standard Measurement Period. (See Diagram A and more detailed explanation below.)

Reasonably Expected to Work Full-Time

To determine whether a newly hired employee is "reasonably expected" to be full-time, the final regulations allow an employer to consider various factors such as (but not limited to) the following:

- Is the new employee replacing a full-time or part-time employee?

- Do employees in comparable positions work full-time or variable hours?
- Was the position advertised as a full-time or variable hour position?
- What do provisions say in the job description or employment contract?

The regulations specifically state that when making the determination of whether a newly hired employee is reasonably expected to work full time, an employer **cannot** consider the likelihood that an employee will terminate employment before the end of the initial measurement period. For example, an employee who is hired to work full time for just six months (in a non-seasonal position) should be considered full-time upon hire. This means the employee's hours would initially be measured using the Monthly Measurement Method, and the employee would be offered coverage no later than the first day of the fourth month, or earlier if the applicable waiting period is less than that. (See the last section of this article entitled "Waiting Periods" for an explanation of the two different waiting period rules.)

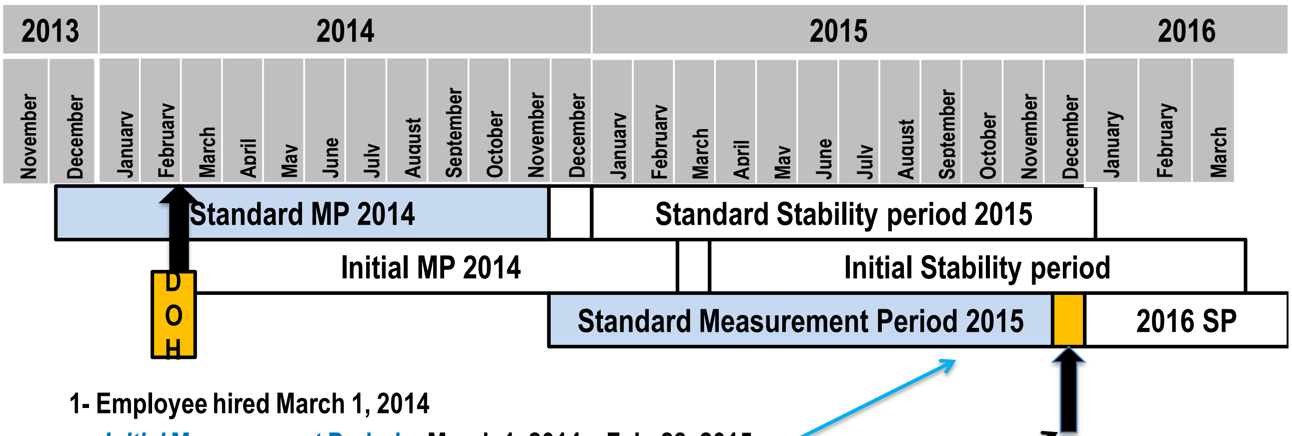
Transition from <u>Newly Hired</u> Full-Time Employee to <u>Ongoing</u> Employee

Once a newly-hired full time employee becomes an "ongoing" employee, the exception under Rule #2 above no longer applies and the appropriate Measurement Method as selected by the employer may be applied. For example, as noted above, even if an employer elects to apply the Look Back Measurement Method to hourly employees, the employer must apply the Monthly Measurement Method to a newly-hired hourly employee who is reasonably expected to work full time. This applies until the newly hired full-time employee becomes an "ongoing" employee. A newly hired employee does not become an ongoing employee until the end of the first Standard Measurement Period.

During the first Standard Measurement Period, an employer may have to track an employee's hours under both the Monthly Measurement Method and the Look-Back Measurement Method. This will occur if the new employee is in a category for which the Look-Back Method generally will apply. This is because under the Look-Back Measurement Method, an employee's hours are tracked during the Standard <u>Measurement</u> Period to determine whether or not the employee must be offered coverage during the associated Standard <u>Stability</u> Period. Under the Monthly Measurement Method, an employee's hours during each calendar month determine the employee's current eligibility. For an employee who is in transition from new-hire to ongoing, the employer must determine the employee's eligibility each month until the <u>end</u> of the Standard Measurement Period, and also must use the hours worked <u>during</u> that Standard Measurement Period to determine if the employee will be eligible for coverage during the associated <u>Stability</u> Period.

If, however, the new employee is in a category for which the Monthly Measurement Method will apply, then nothing changes once the employee becomes an ongoing employee. The employer would continue to apply the Monthly Measurement Method.

DIAGRAM A



1- Employee hired March 1, 2014

--*Initial* Measurement Period = March 1, 2014 – Feb. 28, 2015

--Initial Stability Period = April 1, 2015- March 31, 2016

--1st *Standard* MP = Dec. 1, 2014 – Nov. 30, 2015

2- Employee becomes an ONGOING Employee as of Dec. 1, 2015

3- As of Dec. 1, 2015, apply the Measurement METHOD for EEs in that category

4- From March 1, 2014-Nov 30, 2015, apply Monthly Measurement Method

5- But <u>also</u> track hours during the Standard Measurement Period (Dec 1, 2014-Nov 30, 2015) to determine if employee will be eligible for benefits as of Dec 1, 2015

Seasonal Employees: The Exception to the Exception

As noted above in Rule #2, seasonal employees are the exception to the exception. The final regulations added a definition of a "seasonal employee." (section 54.4980H-1(a)(38)) Employers can use the Look-Back Measurement Method to track the hours of employees who meet this definition, even if the seasonal employees are reasonably expected to work full-time. Specifically, what this means is:

- If an employer elects to use the Look-back Method for hourly employees, and
- The employer hires a seasonal employee who is paid hourly and is reasonably expected to work full-time during the period of seasonal employment,
- The employer can track the full-time seasonal employee's hours using the Look-back Measurement Method, rather than the Monthly Measurement Method.

The result is that the employer will **not** have to offer coverage by the first day of the fourth calendar month to the newly-hired full-time seasonal employee. If the employer has a Look-Back Measurement Period of six or 12 months, this probably means that the employer will not have to offer coverage to seasonal workers. This is in contrast to the result if the employer hires a <u>non-</u>

seasonal worker who is reasonably expected to work full-time. (For additional information on how the Measurement Methods apply to new-hires, see our article entitled "Understanding When to Offer Coverage to NEW HIRES under the Employer Shared Responsibility Provisions" – June 9, 2014 at https://news.leavitt.com/health-care-reform/employers-might-need-offer-new-hires-coverage-sooner-think/)

The key factor in this analysis, however, is that the employee must meet the final regulations' definition of "seasonal employee"—which is an employee in a position for which the customary annual employment is six months or less. If an employer labels an employee as a "seasonal" employee but considers the season to be eight months, the employee is not a seasonal employee as defined in the regulations.

Note that the *proposed* regulations included a definition of seasonal *worker* for purposes of determining employer size, and not for purposes of determining whether a particular employee was a seasonal or non-seasonal employee. The final regulations include the definition of seasonal worker and also add a definition of seasonal *employee.* This new definition is included for purposes of identifying specific employees as seasonal or not, because employers can apply the Measurement Method to their seasonal employees in the same manner as to their variable hour employees.

Possible Strategies When Deciding which Measurement Method to Use

An employer's strategy in deciding which Measurement Method to apply to which categories of employees will be influenced by what the employer's workforce situation is. Below are some possible strategies:

Possible Strategy	**Workforce Situation**
Use only the Monthly Measurement Method	All employees consistently work full-time and/or consistently work part time
Use only the Look Back Measurement Method	Both hourly employees and salaried employees work a mixture of full-time, part time and/or variable hours.
Use the Look-back Measurement Method for hourly employees and the Monthly Measurement Method for salaried employees	Most variable hour and seasonal employees are hourly, and most employees with consistent hours are salaried

Waiting Periods

As noted previously, there are two different waiting period rules. Once an employee is eligible for coverage, an employer must offer coverage within the appropriate waiting period time in order to avoid penalties. There are two separate sections of the ACA that address waiting period limits, and different penalties apply under each:

- Waiting Period must be "reasonable" - 90 day limit on waiting period, plus an employer can have a 1-month orientation period before the waiting period begins
- Employer Shared Responsibility - large employer must offer coverage by first day of fourth calendar month

Under the final rule on Waiting Period limits and orientation periods, waiting periods that are based on elapsed time can be no longer than 90 calendar days. However, an employer can apply a bona-fide orientation period of up to one month, before the 90-day waiting period begins. This generally means that coverage must be offered to an eligible employee by the first of the month following three months. In lieu of elapsed-time waiting periods, an employer can base eligibility on substantive requirements such as being in an eligible job classification or completing job-related licensing requirements. The waiting period rule applies to employers of any size and to any eligible employee whether full time or not. The penalty (under IRC section 4980D) for noncompliance is $100/day per affected employee for as long as the violation continues, but not if the failure is corrected within 30 days of discovery.

Under the Employer Shared Responsibility provisions, an employer must offer coverage to an eligible full time employee by the first of the month following three months. This rule only applies to large employers as defined under this provision (i.e., 100 or more full-time employees or full-time equivalents in 2015, and 50 or more in 2016 and thereafter). The potential penalties (under IRC section 4980H) are (a) $2,000/year times the number of full-time employees, minus the first 30 (minus 80 for 2015), if at least one full-time employee receives a subsidy to buy health insurance in an exchange, or (b) $3,000/year times the number of full-time employees who are not offered affordable coverage that provides minimum value and who receive a subsidy to buy health insurance in an exchange.

To avoid penalties associated with both waiting periods, a large employer would need to comply with the shorter or stricter waiting period. This will vary depending on when in the month an employee is hired. See our June 27, 2014 article "Final Regulations Allow One-Month Orientation Period before 90-Day Waiting Period."

