American Benefits Council
P4P “Preparing for PPACA” Webinar

IRS Final Employer ‘Shared Responsibility’ (4980H) Regulations
Part III: Determination of ‘Full-Time Employee’

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Today’s Discussion

• Brief refresher:
  - What is “full-time” for purposes of 4980H?
  - What constitutes an “hour of service” for determining full-time status?
  - How are hours counted?

• Review of the two methods for determining 4980H compliance
  - “Look-back” measurement method
  - Monthly measurement method

• Rules on how to “slice and dice”

• Examples/questions
• What is “full-time” for purposes of 4980H?
  - 30 or more “hours of service” per week OR 130 “hours of service” per month
    • Note: This NOT the same definition of “full-time” that applies when determining whether an employer is an “applicable large employer” subject to 4980H in the first place. That definition uses 120 hours per month.
Hour of Service

- What is an “hour of service”?  
  - An hour of service includes:
    - **Hours Worked.** Each hour for which the employee is paid, or entitled to payment, “for the performance of duties”; **AND**
    - **Paid-Time Off.** Each hour for which the employee is paid, or entitled to payment “by the employer,” for the period of time due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty, or leave of absence
  
  - **Notes:**
    - Appears that all paid leave gets counted
    - Do **not** count hours if attributable to foreign-sourced income
    - What about employer-paid or employer-sponsored workers’ comp or STD/LTD?
Service Worked

• How to count hours of service?
  – An employer can use one of the following three methods:

  1. **Actual Hours** - Count actual hours of service worked “from records”, as well as other non-worked hours for which he or she is paid, or entitled to payment

  2. **Days-Worked Equivalency** – Credit 8 hours of service per day for each day for which the employee would be credited with at least one hour of service

  3. **Weeks-Worked Equivalency** – Credit 40 hours of service per week for each week for which the employee would be credited with at least one hour of service

• **Notes:**
  – Employers can use different methods for different classes of employees so long as reasonable and applied consistently; may change method annually

  – Includes anti-abuse rule
Compliance Methods

- Final regulations include two methods for determining an employer’s compliance with 4980H
  - “Look-back” measurement method
    - Largely the same as that set forth in proposed regulations
    - Permits an employer to test whether an employee reasonably expected to not work a full-time schedule (i.e., variable hour and part-time < 30 hrs). If the employee works on average a full-time schedule, then must be offered 4980H-compliant coverage for the duration of a corresponding “stability period”
  - NEW monthly measurement method
    - Effectively codifies the statutory requirements -- Subjects employer to potential liability for any month in which an employee works on average a full-time schedule for which a 4980H-compliant offer of coverage was not made
    - Less a planning tool than a means to determine potential 4980H liability
    - Likely of greatest utility for employers (i) who broadly make available 4980H-compliant coverage to ALL employees regardless of full-time status, or (ii) whose employees’ actual worked hours do not deviate from scheduled hours
**“Look-Back” Method**

<table>
<thead>
<tr>
<th>Measurement Period</th>
<th>Stability Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to 90-day administrative period to allow for open enrollment</td>
<td></td>
</tr>
</tbody>
</table>

- Allows an employer to “test” full-time status for variable hour, part-time and seasonal employees
  - Note: Generally, will need to apply this regime to comparable full-time employees upon change to part-time status, unless special rule applies

- During the measurement period, no 4980H liability **so long as** offer 4980H-compliant coverage as of the first day of the corresponding stability period to those employees who work a full-time schedule on average during the measurement period

- **Different rules apply for new versus ongoing employees**
“Look-Back” Method

• For **ongoing** employees:
  
  – May impose an “**ongoing** measurement period” of 3-12 months
  
  – May impose an “**ongoing** stability period” of 6-12 months so long as the stability period is at least as long as the initial measurement period
  
  – May impose an administrative period in the middle of no more than 90-days
  
  – **Special transition rule for 2015 compliance:** Employers may use a measurement period that is as little as 6 months long and still use a longer stability period in 2015 (up to 12 months), if:
    
    » Measurement period begins by no later than 7/1/14; **AND**
    
    » Measurement period ends no earlier than 90 days before start of 2015 plan year (i.e., 90 days before January 1, 2015 if not eligible for fiscal plan year relief)
For **ongoing** employees:

- Examples that work:
  - 3-month “ongoing measurement period” AND 6-month “ongoing stability period”
  - 6-month “ongoing measurement period” AND 6-month “ongoing stability period”
  - 12-month “ongoing measurement period” AND 12-month “ongoing stability period”
“Look-Back” Method

- For **ongoing** employees:
  - Examples that **DO NOT** work:
    - 3-month “ongoing measurement period” AND 3-month “ongoing stability period”
    - 12-month “ongoing measurement period” AND 6-month “ongoing stability period”
“Look-Back” Method

- For **NEW** employees:
  - May impose up to a 12-month “initial measurement period” so long as the individual, if he works a full-time schedule during such period, may enroll in coverage as of the first day of the fourteenth full calendar month after hire
    » Effectively, **cannot** utilize 12-month initial measurement period if seek to utilize 90 day administrative period
    » **MUST** be tied to employee’s hire date (or payroll period relating thereto); i.e., likely different beginning and end dates for employees hired on different dates
  - May impose an “initial stability period” of 6-12 months as is the case with respect to ongoing variable hour employees
    » **Remember:** The initial stability period, like all stability periods, must be the greater of 6 months or the length of the initial measurement period
    » **BUT,** **may need to cut the initial stability period short if employee tests as full-time employee across first “ongoing measurement period”**
  - **Note:** The 90-day administrative period maximum must take account of any period of time from the new employee’s date of hire until the first day of the his or her initial measurement period
“Look-Back” Method

- **For NEW employees:**
  - Examples that work:
    - 10-month initial measurement period (from hire date or first payroll period), 60-day administrative period, 10-month initial stability period
    - 12-month initial measurement period, 30-day administrative period, 12-month initial stability period

** Do not forget, however, that stability period must be cut short in some instances
“Look-Back” Method

- For **NEW** employees:
  - Example that **DOES NOT** work:
    » 12-month initial measurement period (from hire date or first payroll period), 90-day administrative period, 12-month initial stability period
“Look-Back” Method

- **Mechanics:**
  - Remember: You are CONSTANTLY testing employees
  - Example: *Ongoing* Employees
“Look-Back” Method

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“Look-Back” Method

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“Look-Back” Method

- **Mechanics:**
  - Remember: You are CONSTANTLY testing employees
  - Example: **Ongoing** Employees

![Diagram showing a timeline with multiple 12-Month Measurement Periods and 12-Month Stability Periods marked with annotations and arrows indicating the testing process.](image-url)
“Look-Back” Method

Mechanics:
- Remember: You are CONSTANTLY testing employees
- Example: Ongoing Employees
“Look-Back” Method

- **Mechanics:**
  - Remember: You are CONSTANTLY testing employees
  - Example: **NEW** Employees
“Look-Back” Method

- Mechanics:
  - Remember: You are CONSTANTLY testing employees
  - Example: **NEW** Employees

Test #1
“Look-Back” Method

- **Mechanics:**
  - Remember: You are CONSTANTLY testing employees
  - Example: **NEW** Employees
“Look-Back” Method

- **Mechanics:**
  - Remember: You are CONSTANTLY testing employees
  - Example: **NEW** Employees

Test #1

HIRE DATE (Apr. 1, 2015)

Mar. 31, 2016

May 1, 2016

Apr. 30, 2017

12-Month MEASUREMENT Period

12-Month MEASUREMENT Period

12-Month MEASUREMENT Period

12-Month MEASUREMENT Period

12-Month MEASUREMENT Period

12-Month STABILITY Period

Oct. 15, 2016
“Look-Back” Method

- **Mechanics:**
  - Remember: You are CONSTANTLY testing employees
  - Example: **NEW** Employees
“Look-Back” Method

- **Mechanics:**
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  - Example: **NEW** Employees
“Look-Back” Method

- **Mechanics:**
  - Remember: You are CONSTANTLY testing employees
  - Example: **NEW** Employees

Test #1: Hire Date (Apr. 1, 2016)

Test #2: Oct. 15, 2016

Must be treated as a FT employee as of the first day of the stability period, e.g., January 1, 2017
“Look-Back” Method

- Mechanics:
  - Remember: You are CONSTANTLY testing employees
  - Example: NEW Employees

Test #1

HIRE DATE (Apr. 1, 2015)

Mar. 31, 2016

May 1, 2016

May 30, 2017

Jan. 1, 2017

Test #2

Oct. 15, 2016

Must be treated as a FT employee as of the first day of the stability period, i.e., January 1, 2017
Monthly Measurement Method

- Effectively mirrors statutory language
- Allows employers to avoid use of measurement and stability period machinery
- Likely of most utility for employers who:
  - Offer 4980H-compliant coverage broadly to both “full-time” and “non-full-time” employees
  - Have workers with consistent and expected monthly hours of service
Monthly Measurement Method

• How does it work?

  - Employer is on the hook for a potential penalty for any month in which it fails to offer an employee 4980H-compliant coverage and the employee ends up working a full-time schedule

  • Potential strategy: Consider at least offering “A-Penalty” compliant coverage (which could be employee-pay-all minimum essential coverage) to broader class of employees to protect against A-Penalty liability
How does it work?

- Final regulations provide for a one-time (per employment term) non-assessment period of up to 3 months during which the employer is not subject to 4980H penalties.

- Therefore, no penalty for the first three full calendar months of initial eligibility so long as the employer makes an offer of qualifying coverage by the first day of the fourth full month following initial eligibility (e.g., by April 1\textsuperscript{st} if an employee for the first time works full-time in the preceding January and is otherwise eligible for coverage in January).
“Slice and Dice” Rules

- The final regulations restrict an employer’s ability to use different compliance methods (i.e., “look-back” or monthly measurement) for different employee populations:
  - Permitted categories:
    - Salaried employees versus hourly employees
    - Collectively bargained versus not collectively bargained
    - Employees covered by separate collective bargaining agreements
    - Employees in different states
  - REMEMBER: These categories do NOT distinguish between full-time employees and other (such as variable hour and part-time or seasonal)
    - Therefore, if an employer uses the “look-back” method for variable hour or part-time hourly employees, it generally will need to use the “look-back” method for those hourly workers it expects to work a full-time schedule
“Slice and Dice” Rules

- “Can I just use the ‘look-back’ method only for my variable hour or part-time employees?”

- “Can I just use the ‘look-back’ method for my seasonal employees?”

- “Do I need to track hours for my employees if I make qualifying coverage available to my employees who work more than 20 hours a week?”
“Slice and Dice” Rules

- Where an employer chooses to use the “look-back” method, it can ONLY use a different measurement/stability period based on the following:
  - Salaried employees versus hourly employees
  - Collectively bargained versus not collectively bargained
  - Employees covered by separate collective bargaining agreements
  - Employees in different states
“Slice and Dice” Rules

- “Can I use a 12-month measurement period for my salaried workers, but a different measurement period for my hourly workers?”

- “Can I use a 12-month measurement period for my variable hour workers, but a shorter measurement period for my seasonal workers?”

- “Can I use one measurement period for workers in the retail line of my business but a different measurement period for other employees?”
Example. Acme Corp. is an ALE (with no ALE members) and has these types of employees:

- Hourly employees:
  - Who work 30+ hrs/wk
  - Who work "variable" hours that may be above or below the 30-hour threshold for any given week
  - With fixed part-time hours of less than 30 hrs/wk
- Salaried employees - all 30+ hrs/wk

Acme Corp also has:

- Hourly collectively-bargained employees subject to bargained agreements (X), (Y) and (Z)
- Hourly and salaried employees whose primary place of employment is in NY, NJ and PA
“Slice and Dice” Rules

Regarding ACME Corp:

- Who must be measured?

- What are the categories that Acme Corp. could use for applying different methods? For example, could it use:
  
  - The look-back measurement method for hourly employees and the monthly measurement method for salaried employees?
  
  - The look-back measurement method for all employees in NY and the monthly measurement method for all employees in NJ?
  
  - A 6-month “look-back” measurement period for employees subject to CBA (X) and a 12-month “look-back” measurement period for CBA (Y)?
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Final Employer “Shared Responsibility” Regulations
Determination of “Full Time” Employee

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Overview

1. Change in Employment Status
2. Rehires and Breaks in Service
3. Short-Term and High Turnover Employees
Change in Employment Status – Ongoing Employees

Example: change from part time to full time or vice versa

- Change in status will be reflected in hours of service for measurement period ending after change.
- Stability period in which change occurs is unaffected.
  - Employee receiving coverage continues to receive coverage for remainder of stability period provided employee remains employed
  - Employee who was not offered coverage for stability period is not required to be offered coverage for remainder of stability period
Example 1: During 12-month measurement period ending October 14, 2016, A is determined to be full-time and is offered coverage for a 12-month stability period beginning January 1, 2017. A enrolls in coverage and changes to part-time status effective April 1, 2017. A’s coverage must continue through December 31, 2017 notwithstanding A’s change in status.

Example 2: During 12-month measurement period ending October 14, 2016, A is determined to not be full time and is not offered coverage for a 12-month stability period beginning January 1, 2017. A changes to full-time status effective April 1, 2017. A’s employer need not offer coverage for current stability period.
Change in Employment Status – New Employees

If a new variable hour, seasonal or part time employee experiences a change in status during the initial measurement period such that if the employee had begun employment in the new status, employee would be considered a non-seasonal, non-variable hour, full-time employee, coverage must be offered no later than earlier of:

1. first day of fourth full calendar month following change in status; or

2. first day of the first month following the initial measurement period, including any administrative period (if employee averages 30 or more hours of service per week during that period).
Example 1: Employer Z uses a 12-month initial measurement period for new seasonal, variable hour and part time employees and an administrative period from the end of the initial measurement period through the end of the first calendar month beginning after the initial measurement period. Z hires A as a variable hour employee on May 10, 2015. On September 15, 2015, Z promotes A to a position that can reasonably be expected to average 30 hours of service per week.

Z must offer A coverage no later than January 1, 2016.
Example 2: Same facts as Example 1 except that A is promoted on April 15, 2016.

If A had an average of 30 hours of service per week for the initial measurement period ending May 9, 2016, coverage must be offered no later than July 1, 2016; otherwise coverage must be offered by August 1, 2016.
Break in Service -- General Rule

- A rehired employee or an employee resuming service after leave of absence may be treated as a new employee only if employee did not have at least one hour of service for 13 consecutive weeks or, if less, a period of at least 4 consecutive weeks that exceeds the number of weeks that the employee’s period of employment proceeded the period in which no hours of service were credited.

- This rule applies solely for purposes of determining whether employee may be treated as new hire for purposes of offering coverage and does not determine whether employee actually has a termination of employment.
Break in Service -- Stability Period Impact

- An employee who is not treated as a new employee upon rehire retains the status employee had in any pending stability period.
- If employee was receiving coverage as full time employee during stability period and coverage ended due to termination of employment, employee must be offered coverage as soon as administratively practical following rehire.
  - Offering coverage no later than first day of calendar month following rehire is deemed to satisfy this requirement.
- Employer need not offer coverage if employee previously declined offer of coverage for stability period.
- If break in service does not result in actual termination of employment, coverage should continue during any pending stability period in which employee was enrolled before break in service.
Break in Service – Measurement Period Impact

- Except for certain special leaves discussed on next slide, the break in service for an employee treated as an ongoing employee upon resumption of service is counted as zero hours for purposes of the measurement period(s) covering the break period.
Break in Service -- Special Leaves

- If an employee goes on unpaid FMLA or USERRA leave and is not treated as a new employee upon resumption of service, then calculation of hours of service for measurement period covering the break period may not be adversely affected by such leave.
  - Must either exclude leave period from calculation of average HOS for measurement period or must credit HOS during leave period equal to average weekly rate of HOS employee was credited during measurement period while not on leave.
Break in Service

Example: A has been continuously employed by Z for three years and is currently receiving coverage during a 12-month stability period ending December 31, 2016. A terminates employment on April 1, 2016 and is rehired on May 20, 2016.

Because break in service is less than 13 consecutive weeks, Z is required offer A coverage for remainder of stability period as soon as administratively practicable following rehire, which will be deemed satisfied if coverage is offered no later than June 1, 2016. For A’s 12-month measurement period ending October 14, 2016, A’s break in service is counted as zero hours.
Break In Service

Example 2: Same facts in example 1, except A was on a protected unpaid USERRA leave and her employment did not terminate during the break period.

A’s coverage should not be terminated during the stability period and A’s average weekly hours of service for measurement period ending October 14, 2016 must be calculated by either disregarding USERRA leave period or crediting A with A’s average weekly hours of service for non-USERRA period of measurement period for number of weeks A was on USERRA.
Break in Service – Special Rules for Educational Organizations

- Break period must be at least 26 consecutive weeks to result in new employee status upon resumption of service.
- Measurement period relief rules for special leaves are expanded to include any break period of at least four consecutive weeks during which employee is not credited with hours of service (e.g., summer break).
International Transfers

- An employer can treat employee as terminating employment if employee transfers to position with substantially all non-US source income compensation that is expected to last for at least 12 months.

- If employee returns to US source income position before 12-months has expired, employee should be treated as continuing employee similar to rules for rehire before 13 consecutive week break.
Short-term and High Turnover Employees

- Treasury declined to provide specific relief in final regulations after requesting comments on how these employees should be treated.
- Following features of final regulations provide limited relief:
  - Do not have to offer coverage to new non-variable, non-seasonal employee until first day of fourth month following start date.
  - Can have initial measurement of up to 12 months for variable hour and seasonal employees.