AUGUST BENEFITS

HEALTH CARE REFORM

Employer Mandate: Measurement and Look-back Periods

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

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

"Variable Hour" and "Seasonal" Defined

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

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

1. The employee is replacing a full- or part-time employee
2. Employees in the same or similar positions are full- or part-time employees
3. The job was advertised or otherwise represented as requiring 30 hours or more per week

A "seasonal" employee is one whose customary annual employment does not exceed six months and whose work begins at approximately the same time each year. Examples of a seasonal employee may include a holiday seasonal retail store employee, a ski instructor or a golf course maintenance worker. In special circumstances, an employee may still be considered seasonal where the season extends beyond six months, such as when a ski instructor works seven or eight months due to an unusually long winter.

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

Measurement and Stability Periods Generally

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

Employers may use a different measurement period for employees in the same category, of which there are four: collectively bargained and non-collectively bargained employees, employees covered by different collective-bargaining agreements, salaried or hourly employees, and primary places of employment in different states.

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Details on the measurement periods vary for ongoing employees (standard periods) versus newly hired employees (initial periods). The differences between standard and initial periods are described in more detail below.

Ongoing Employees

General Parameters for Standard Periods (Ongoing Employees)	
Measurement Period	3-12 consecutive months
Stability Period	The longer of 6 months or the standard measurement period length
Administrative Period	Up to 90 days

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

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

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

In the above example, the employee averages 134.3 hours per month (sum of total six months' hours divided by six) during the six-month measurement period. Therefore, the employee is considered an FTE eligible for coverage in the plan during the subsequent six-month stability period (regardless of the number of hours the employee actually works during that stability period). Note that, the 6-month Standard Measurement Period repeats every 6-months. In this example, the next Standard Measurement Period would run from July-Dec (not shown). Only a partial-year snapshot of one Standard Measurement Period and one Standard Stability Period is shown in this illustration.

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

12-month Standard Measurement Period	Administrative Period (77 days)	12-month Standard Stability Period	
Oct. 15, 2013	**Oct. 15, 2014**	**2015**	**2016**

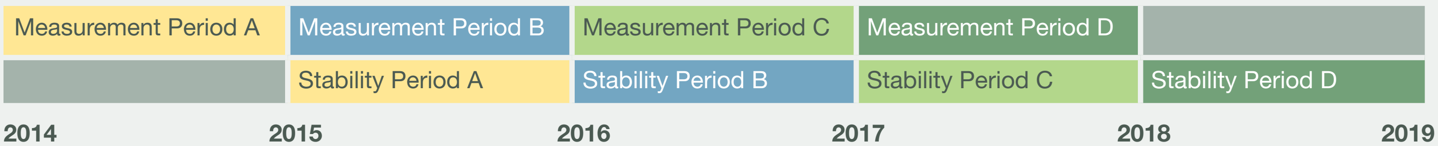
To coordinate a measurement period with an employer's calendar-year plan and allow time for an administrative period, the employer could implement a 12-month standard measurement period that ends within 90 days of the beginning of the calendar-year plan. The administrative period is the time during which the employer can determine which employees averaged 30 hours or more, offer them coverage and conduct an open enrollment period (which could coincide with the open enrollment period for its other, non-variable and non-seasonal employees). In the above example, the 12-month standard measurement period would run from Oct. 15, 2013, through Oct. 14, 2014, with the administrative period running Oct. 15, 2014, through Dec. 31, 2014. Any employees who average 30 hours or more during the standard measurement period would be offered coverage that begins on Jan. 1, 2015, and runs through 2015 (coinciding with the employer's calendar-year plan), and would remain covered through 2015 regardless of how many hours actually worked during 2015. Conversely, an employee that does not average 30 hours or more during the standard measurement period is not an FTE and therefore is not offered coverage during 2015 (and if the employer has 100+ FTEs, it is not liable for a penalty for these employees in 2015).

When do employers need to implement a standard measurement period for ongoing employees?
Employers will first need to implement measurement periods for ongoing variable hour or seasonal employees to determine which employees are FTEs in time for the Jan. 1, 2015, effective date of the employer mandate (although there may be a delayed effective date for employers with 50–99 FTEs and employers with non-calendar-year plans, if certain conditions are met). This means employers with 100+ FTEs will need to implement some sort of measurement period in 2014. While stability periods generally must match the measurement period length, there is a special rule for 2014 only. That rule allows 100+ FTE employers to use any consecutive six-month period in 2014 as its measurement period and use a 12-month calendar year in 2015 as its stability period.

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

Thus, for example, in the chart below, Measurement Period A determines eligibility for Stability Period A, Measurement Period B determines eligibility for Stability Period B, etc.

Overlap of Measurement and Stability Periods

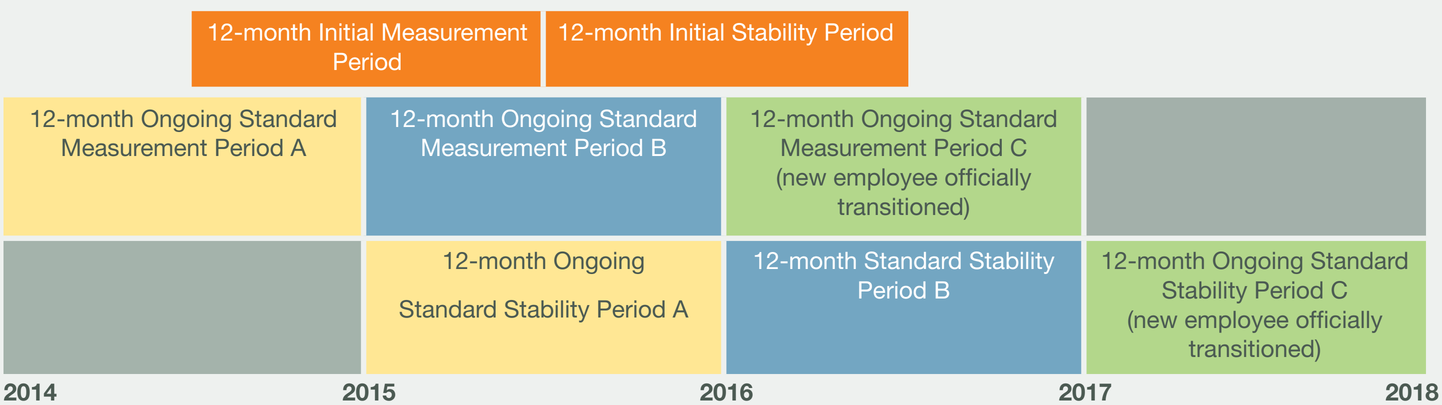


New Employees

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

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

Interplay Between Initial and Standard Periods



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

Change in Status and Rehires

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

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

There are two methods of determining when an employee returning to work following a period of absence (including a termination) will be considered a new employee. Under the first method, if rehired after at least 13 consecutive non-working weeks (approximately 3 1/2 months), the employee is considered a new employee. Under the second method (which applies for periods of absence less than 13 weeks), if the absence was at least four weeks and exceeds the number of weeks of employment immediately preceding the absence, the employee may be treated as a new employee. Special rules apply for educational organizations - see your advisor for additional details.

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

COBRA Obligations

For employees that experience a reduction in hours during a stability period, whether COBRA rights are triggered depends on whether the plan itself conditions eligibility on an employee working a certain number of hours. If so, and the reduction is such that the employee's hours drop below the threshold for eligibility, then the reduction will generally be an immediate COBRA qualifying event.

However, for purposes of the employer mandate, the FTE (and therefore penalty) status is locked in for the entire stability period, regardless of whether the employee is no longer eligible under the terms of the plan. Thus, to avoid liability under the employer mandate, the employer should treat a reduction in hours during a stability period as a COBRA qualifying event with a deferred loss of coverage that occurs at the end of the stability period. The employer may choose whether the COBRA maximum coverage period is measured from the date of the triggering event (i.e., reduction in hours) or from the date of the loss of coverage. This should be outlined in the employer's written plan document, discussed below.

For employees who are terminated from employment during a stability period, the termination constitutes an immediate COBRA qualifying event (termination plus a loss of coverage).

Finally, for fully insured plans, employers using measurement periods should work closely with insurers with respect to plan eligibility and COBRA obligations.

Plan Documents and Record Keeping

Plan documents and summary plan descriptions (SPDs) generally must include information on plan eligibility. Since measurement periods will determine plan eligibility for variable hour and seasonal employees, employers that choose to use measurement periods should describe the measurement and stability periods (e.g., length, application to new and ongoing employees, any administrative period, etc.) in the plan documents and SPDs, and may consider including the eligibility requirements as part of offer letters or enrollment information provided to employees when the expected number of work hours is unknown at the date of hire.

In addition, employers are responsible for reporting to the IRS on the employer mandate compliance. While a full discussion of the reporting requirements is beyond the scope of this paper, the employer's report will require them to identify which employees are FTEs and which were offered coverage. Since measurement periods would be used to determine variable hour and seasonal employees' FTE status and the related coverage offers, employers will need to keep detailed records to justify their reports. Thus, employers should diligently maintain records on the use of measurement periods.

Additional Resources

IRS Notice 2012-58
Employer Mandate Proposed Guidance
Final Regulations