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HEALTH CARE REFORM

## Eye on Washington

# DETERMINING FULL-TIME EMPLOYEES UNDER THE AFFORDABLE CARE ACT: IMPLICATIONS OF NOTICE 2012-58

Of the many substantive employer compliance provisions of the Affordable Care Act (ACA) that take effect in 2014, HR and Payroll departments may find that the most immediate impact will be in determining which employees qualify as “full-time employees” under the law.

This new calculation and recordkeeping requirement is part of a series of ACA measures collectively known as Employer Shared Responsibility Provisions, which will put into effect the basic premise that large employers will need to offer affordable health coverage that provides minimum value to full-time workers, or pay a new “Shared Responsibility” assessment to the IRS.

Only large employers (generally those with 50 or more full-time equivalent employees) are subject to the Shared Responsibility assessment and related provisions. See the Eye on Washington dated June 5, 2012 for a definition of “large employer” under the ACA.

### Full-time Employee Determination

Beginning in 2014, large employers must track each employee’s monthly status as full-time (defined under the ACA as an average of 30 hours per week, or at least 130 hours in a month) or part-time, report each employee’s full-time status to the IRS, and keep as part of their tax records the status of each employee. Hours of service include hours worked, and hours for which an employee is paid but does not work, such as vacation, holiday, illness or disability, jury duty, military duty, or leave of absence (up to a maximum of 160 hours for any continuous period). Special rules apply for certain situations.

Hours of service must be tracked on an actual hours-basis for hourly employees, but there are optional days-worked and weeks-worked rules designed to facilitate tracking for salaried employees.

### Alternate Measurement & Stability Period Approach

On August 31, IRS [Notice 2012-58](#) was issued to modify and expand on the safe harbor guidance previously provided in Notices 2011-36 and 2012-17; in particular concerning newly hired employees.

Under the guidance provided, employers may determine each employee’s full-time or part-time status each month; however, many expressed an interest in alternative methods to permit more certainty and improved administration of benefits eligibility, enrollments and possible Internal Revenue Service (IRS) Shared Responsibility Assessments. As a result, the IRS proposed an optional safe harbor alternative to help employers establish each employee’s full-time status for a future (“stability”) period, such as the next six or twelve months.

Under the proposed safe harbor method, employers choose and analyze a prior period (the “measurement period”) of three to twelve months to determine whether employees met the hours of service thresholds. For employees determined to be full-time, the stability period must be at least six months, and no shorter than the measurement period. For those determined not to be full-time employees, the stability period can be no longer than the measurement period. While measurement and stability periods for all existing (“ongoing”) employees can be scheduled at regular intervals, assessing newly hired employees may be more complex.

Generally, the revised rules permit measurement periods of between three and 12 months for employers to determine whether new “variable hour” employees are full time.



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Employees are variable hour employees when it cannot be determined at the time of hire whether a new employee is expected to work full-time or if an employee's full-time status is reasonably expected to be of limited duration (e.g., a retail employee hired to work full-time during the holiday season, but who is reasonably expected to work only part-time afterwards). (Employees who are expected to work full time at the time of hire qualify immediately as full-time, and should be offered health coverage with no more than a 90-day waiting period.)

The notice clarifies that initial measurement periods for new variable-hour employees can start on the employee's first day of work, or shortly thereafter (such as the start of the following week, month, or pay period).

Employers are also permitted to use "administrative periods" between measurement and stability periods to make determinations, offer coverage and administer enrollments. The rules are designed to prevent delays or lapses in coverage.

Employers may use both a measurement period of between three and 12 months and an administrative period of up to 90 days for new variable hour employees, but the measurement and the administrative periods combined may not extend beyond the last day of the first calendar month beginning on or after the one-year anniversary of the employee's start date (totaling, at most, 13 months and a fraction of a month).

New variable hour employees must also be tested after they have been employed for the first full standard measurement period for ongoing employees. Special rules and limitations may apply depending on whether the individual is full-time under either measurement period.

### Employers May Apply Different Measurement and Stability Periods

Employers may determine when measurement periods start and end, although this must be done on a uniform and consistent basis for all employees in the same category. Employers can apply different measurement and stability periods only to certain specified categories of employees, which are collectively bargained employees and non-collectively bargained employees; salaried and hourly employees; employees of different entities; and employees located in different states. As in the case of new variable hour employees, workers that transfer between these categories may be simultaneously subject to two sets of measurement and stability periods.

### Reporting and Recordkeeping

Even large employers that generally provide health coverage to all full-time employees will need to track and record hours of service under these rules in order to comply with reporting and payment obligations of the IRS Shared Responsibility assessment, which is based in part on the number of full-time employees, and whether any full-time employees receive subsidized health coverage through a Health Exchange. (See the Eye on Washington dated June 5, 2012 for more details.)

Notice 2012-58 provides that employers may rely on safe harbor methods described in the notice for compliance with § 4980H at least through the end of 2014.

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