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Documenting Method for Identifying Full-time Employees

Beginning in 2015, the Affordable Care Act (ACA) imposes a penalty on applicable large employers (ALEs) that do not offer health insurance coverage to substantially all full-time employees and dependents. An ALE may also be subject to a penalty if it offers health insurance coverage to full-time employees and dependents, but the coverage is unaffordable or does not provide minimum value. An ALE is only liable for a penalty if one or more of its full-time employees receives a health insurance subsidy for coverage under an Exchange.

The ACA's employer penalty rules are often referred to as "employer shared responsibility" or "pay or play" rules. The pay or play rules will take effect for many ALEs on **Jan. 1, 2015**.

This Legislative Brief includes a brief overview of the two methods for identifying full-time employees, and it provides guidelines for documenting the method an employer decides to use. It also includes sample language for describing the look-back measurement method. This sample language, which requires customization, could be incorporated into an employer policy, health plan document or summary plan description (SPD).

METHODS FOR IDENTIFYING FULL-TIME EMPLOYEES

On Feb. 12, 2014, the Internal Revenue Service (IRS) published final regulations on the employer shared responsibility rules. The final regulations provide two methods for identifying full-time employees for purposes of offering health plan coverage and avoiding a pay or play penalty—the **monthly measurement method** and the **look-back measurement method**.

A full-time employee is an employee who was employed, on average, at least **30 hours of service per week.** The final regulations treat **130 hours of service in a calendar month** as the monthly equivalent of 30 hours per service per week.

Monthly Measurement Method

The monthly measurement method involves a month-to-month analysis where full-time employees are identified based on their hours of service for each calendar month. This method is not based on averaging hours of service over a prior measurement period. Month-to-month measuring may cause practical difficulties for employers, particularly if there are employees with varying hours or employment schedules, and it could result in employees moving in and out of health plan coverage on a monthly basis.

Look-back Measurement Method

To give employers flexible and workable options and greater predictability for determining full-time employee status, the IRS developed an optional look-back measurement method as an alternative to the monthly measurement method.

Under the look-back measurement method, an employer counts an employee's hours of service during one period (called a measurement period) to determine his or her full-time status for a future period (called the stability period). The details of this method are complex, and vary based on whether the employees are ongoing or new and whether new employees are expected to work full time or are variable, seasonal or part-time employees.

Selecting a Measurement Method

In general, an employer must use the same measurement method for all employees. Thus, an employer generally cannot use the monthly measurement method for employees with predictable hours of service and the look-back measurement method for employees whose hours of service vary.

However, an employer may apply either the monthly measurement method or the look-back measurement method to the following groups of employees:

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

DOCUMENTING MEASUREMENT METHODS

Pay or Play Penalty Disputes

The final regulations from the IRS do not require ALEs to document the measurement method they use for identifying full-time employee status and determining when employees are eligible for coverage. Also, the Internal Revenue Code (Code) Section 6056 reporting requirement for ALEs does not require employers to report on the method used for determining full-time employee status.

Key point

Although the IRS does not require employers to document their measurement method, maintaining a description of the selected measurement method and a record of the method's outcomes for individual employees may help an ALE **demonstrate its compliance** with the shared responsibility rules and avoid a pay or play penalty.

For instance, if the IRS notifies an ALE of its potential liability for a penalty because an employee received a health insurance subsidy, the employer will want to have documentation showing that either the employee was offered health coverage that meets the ACA's standards, or the ALE was not required to offer coverage because the employee did not have full-time status.

ERISA Compliance

Most employer-sponsored health plans are subject to ERISA, a broad federal law that sets minimum standards for employee benefit plans. Among other requirements, ERISA requires health plans to:

- Be "established and maintained pursuant to a written instrument" that enables employees to determine their rights and obligations under the plan. In other words, ERISA requires health plans to have a **plan document**. For insured health plans, the plan document typically consists of the insurance policy or contract that describes the plan's benefits and a "wrap" document that includes other ERISA-required information, such as the plan's eligibility rules.
- Provide participants with a **summary plan description (SPD)** that describes important plan information, including the plan's eligibility rules. The SPD must be written in a manner calculated to be understood by the average plan participant.

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Also, a summary of material modifications (SMM) is required any time there is a material change in the terms of the plan or any change in the information that is required to be included in the SPD.

Key point

To comply with ERISA, the health plan's plan document and SPD must describe the plan's eligibility requirements. This description should include the measurement method the employer uses to determine employees' full-time status. The SPD's description of the measurement method should explain how an individual can determine if he or she is eligible under the plan in a way that is understandable to the average participant and not overly complex.

Also, if a plan changes its eligibility rules (for example, by adopting the look-back measurement method), the plan sponsor should distribute either an SMM or an updated SPD to explain the revised rules to participants.

The summary of benefits and coverage (SBC) is not required to include health plan eligibility information. Thus, the SBC does not need to include information about the plan's measurement method for determining full-time employee status.

ACTION STEPS

Once an ALE decides which measurement method it will use for determining employees' full-time status, it should consider taking the following steps:

- ☑ **Document the selected method and how it will be implemented**. For example, if an employer selects the look-back measurement method, employers should document the length of the measurement, stability and administrative periods for groups of employees. This documentation could be included in a separate policy.
- ☑ **Establish a method for keeping records on outcomes for individual employees** (that is, whether an employee qualifies as a full-time employee who is eligible for coverage under the selected measurement method). For employers that use the look-back measurement method, this may be part of an employee tracking tool used by the employer.
- ☑ **Update the plan document and SPD** to include information about the measurement method. A plan sponsor should either distribute an SMM or an updated SPD to explain the revised eligibility rules to participants.

Documenting Method for Identifying Full-time Employees

SAMPLE LANGUAGE FOR POLICY OR PLAN DOCUMENT

The following sample language can be used as a starting point for documenting the look-back measurement method in a policy and in the plan document. It requires customization and cannot be used "as is." This is a sample only.

EMPLOYEE ELIGIBILITY—LOOK-BACK MEASUREMENT METHOD

The Company offers coverage under its health plan (Plan) to full-time employees. A full-time employee is an employee who is employed, on average, for at least **30 hours of service per week** or **130 hours of service in a calendar month**. Full-time employees may also elect coverage for their dependent children up to age 26 {and *include information on other individuals eligible for coverage, such as spouses}*.

Effective *{insert date}*, the Company will use a look-back measurement method to determine whether an employee is a full-time employee for purposes of Plan coverage. The look-back measurement method is based on Internal Revenue Service (IRS) final regulations under the Affordable Care Act (ACA). Its purpose is to provide greater predictability for Plan coverage determinations.

The look-back measurement method applies to all Company employees. *{If the look-back measurement method will only apply to certain groups of employees, describe which groups it will apply to, and note that other groups of employees will be subject to monthly measurement}.*

The look-back measurement method involves three different periods:

- A **measurement period** for counting an employee's hours of service (also called a standard measurement period or an initial measurement period);
- A **stability period** when the employee is either treated as full-time or non-full-time for Plan eligibility purposes; and
- An **administrative period** that allows time for Plan enrollment and disenrollment.

The Company establishes how long these periods will last, subject to specified IRS parameters.

The rules for the look-back measurement method are complex. They vary depending on whether an employee is an ongoing employee or a new employee, and whether a new employee is expected to work full time or is a variable, seasonal or part-time employee. The Company intends to follow the IRS final regulations (including any subsequent guidance issued by the IRS on the look-back measurement method) when administering the look-back measurement method.

Ongoing Employees

For ongoing employees, the Company determines full-time status by looking at a **standard measurement period (SMP)** lasting *{insert length of SMP, which must be between three to 12 consecutive months}*. The SMP starts on *{insert date}* and ends on *{insert date}*. *{Drafting Note: If your SMP is shorter than 12 months, include all the SMP start and end dates during the year.}* An employee's hours of service during the SMP will determine his or her Plan eligibility for the stability period that follows the SMP.

An ongoing employee is one who has been employed by the Company for at least one complete SMP.

If an ongoing employee was employed, on average, for at least 30 hours of service per week (or 130 hours per month) during the SMP, the employee is treated as a full-time employee for a set period into the future, known as the **stability period**. This means that, as a general rule, the employee is eligible for Plan coverage during the stability period, regardless of the employee's number of hours of service during the stability period, as long as he or she remains an employee.

The final IRS regulations include an exception for certain employees who have been continuously offered Plan coverage and who transfer to part-time positions during the stability period. If certain conditions are met, Plan eligibility for these transferred employees may end during a stability period. The Company intends to follow applicable IRS guidance, including the rules for changes in employment status, when administering the look-back measurement method.

If an ongoing employee was not employed, on average, for at least 30 hours of service per week (or 130 hours per month) during the SMP, the employee is not treated as a full-time employee during the stability period, regardless of the employee's number of hours of service during the stability period.

The stability period *{insert description of when the stability period begins and ends, based on the following rules –If an employer determines that an employee worked full time during the SMP, the stability period must be at least six calendar months and must be at least as long as the SMP. If an employer determines that an employee did not work full time during the SMP, the stability period cannot be longer than the SMP.}*

The Company also uses an **administrative period** between the SMP and the stability period. The administrative period lasts *{insert length of administrative period, which can be up to 90 days}*. The administrative period overlaps with the prior stability period to prevent any gaps in coverage for employees enrolled in coverage because of their full-time status during a prior measurement period.

New Employees Expected to Work Full Time

For a new employee who is not a seasonal employee and who the Company reasonably expects at his or her start date to be a full-time employee, the Company will determine the employee's status as a full-time employee based on the employee's hours of service for each calendar month.

If the employee's hours of service for the calendar month equal or exceed an average of 30 hours of service per week (or 130 hours per month), the employee is a full-time employee for that calendar month. Once the new employee becomes an ongoing employee (that is, he or she is employed for at least one complete SMP), the measurement rules for ongoing employees will apply.

New Variable Hour, Seasonal or Part-time Employees

Under the look-back measurement method, the Company determines whether new variable hour employees, new seasonal employees and new part-time employees are full-time employees by measuring their hours of service during an **initial measurement period (or IMP)**.

- An employee is a **variable hour employee** if, at the employee's start date, the Company cannot determine whether the employee is reasonably expected to be employed, on average, at least 30 hours per week because the employee's hours are variable or otherwise uncertain.
- A **seasonal employee** is generally an employee who is hired into a position for which the customary annual employment is six months or less. Also, the period of employment for a seasonal employee should begin each calendar year in approximately the same part of the year, such as summer or winter.
- A **part-time employee** is a new employee who the Company reasonably expects to be employed, on average, less than 30 hours per week during the IMP,

Similar to the method for ongoing employees, the look-back measurement method for new variable hour, seasonal and part-time employees utilizes a stability period for when coverage may need to be provided, depending on the employee's hours of service during the IMP. An administrative period is also used to make eligibility determinations and notify and enroll employees.

The IMP lasts *{insert length of IMP, which must be between three to 12 consecutive months}*. It begins on *{insert description of when IMP begins, which can be on the employee's start date or on any date up to and including the* *first day of the first calendar month following the employee's start date (or on the first day of the first payroll period starting on or after the employee's start date, if later)}*.

If a new variable hour, seasonal or part-time employee was employed, on average, at least 30 hours of service per week (or 130 hours per month) during the IMP, the employee is treated as a full-time employee for a set period into the future, known as the **stability period**. This means that the employee is eligible for Plan coverage during the stability period, regardless of the employee's number of hours of service during the stability period, as long as he or she remains an employee.

If a new variable hour, seasonal or part-time employee was not employed, on average, at least 30 hours of service per week (or 130 hours per month) during the IMP, the employee is not treated as a full-time employee during the stability period, regardless of the employee's number of hours of service during the stability period.

The final IRS regulations contain special rules for a new variable hour, seasonal or part-time employee who, before the end of the IMP, changes employment to a position or status where if the employee had started employment in the new position or status, he or she would have reasonably been expected to be employed full time as a non-seasonal employee. The Company intends to follow applicable IRS guidance, including the special rules for changes in employment status, when administering the look-back measurement method.

The stability period *{insert description of how long the stability period lasts, based on the following rules—This stability period must be the same length as the stability period for ongoing employees. If an employer determines that an employee worked full time during the IMP, the stability period must be at least six calendar months and must be at least as long as the IMP. If an employer determines that an employee did not work full time during the IMP, the stability period cannot be more than one month longer than the IMP and cannot exceed the remainder of the first entire standard measurement period (plus any associated administrative period) for which the variable hour, seasonal or part-time employee has been employed.}*

The Company also uses an **administrative period** between the IMP and the stability period. The administrative period lasts *{insert length of administrative period, which can be up to 90 days. Also, keep in mind that the IMP and the administrative period combined cannot 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}*.

Once a new variable hour, seasonal or part-time employee has been employed for an entire standard measurement period, the employee will be tested for full-time status, beginning with that standard measurement period, at the same time and under the same conditions as other ongoing employees.

Rehired Employees and Employees Returning from Unpaid Leave

The following rules apply to rehired employees and employees returning from unpaid leave:

- If an employee goes at least 13 consecutive weeks without an hour of service and then earns an hour of service, he or she is treated as a new employee for purposes of determining the employee's full-time status under the look-back measurement method. The Company will apply a rule of parity for periods of less than 13 weeks. Under the rule of parity, an employee is treated as a new employee if the period with no credited hours of service is at least four weeks long and is longer than the employee's period of employment immediately before the period with no credited hours of service.

- For an employee who is treated as a continuing employee, the measurement and stability periods that would have applied to the employee had he or she not experienced the break in service will continue to apply upon the employee's resumption of service.

In addition, a special averaging method applies when measurement periods include special unpaid leave (that is, leave under the Family and Medical Leave Act (FMLA) or the Uniformed Services Employment and Reemployment Rights Act (USERRA) or jury duty leave). This method only applies to an employee who is treated as a continuing employee upon resuming services for the employer, and not to an employee who is treated as terminated and rehired. Under the averaging method, the Company will either:

- Determine the average hours of service per week for the employee during the measurement period, excluding the special unpaid leave period, and use that average as the average for the entire measurement period; or
- Treat employees as credited with hours of service for special unpaid leave at a rate equal to the average weekly rate at which the employee was credited with hours of service during the weeks in the measurement period that are not special unpaid leave.

{Optional} ***Transition Rule for 2015***

For purposes of the stability period beginning in 2015, the Company uses a transition standard measurement period that lasts *{insert length of transition measurement period, which must be shorter than 12 months, but not less than six months long}* and begins on *{insert date transition measurement period begins. It must begin no later than July 1, 2014 and end no earlier than 90 days before the first day of the first plan year beginning on or after Jan. 1, 2015}*.

This transition relief applies to the stability period beginning in 2015. It applies to individuals who are employees as of the first day of the transition standard measurement period. For employees hired during or after the transition standard measurement period, the general rules for new employees under the look-back measurement method apply.

SAMPLE LANGUAGE FOR SPD

The following sample language can be used as a starting point for documenting the look-back measurement method in an SPD. The SPD should include a section that describes the health plan's rules for eligibility and enrollment. The look-back measurement method description should be added to that section. It requires customization and cannot be used "as is." This is a sample only.

To be eligible to participate in the health plan (Plan), you must be a full-time employee. In general, you are a full-time employee if you are employed, on average, at least **30 hours of service per week (or 130 hours of service in a calendar month)**. Full-time employees may also elect coverage for their dependent children up to age 26 *{and include information on other individuals eligible for coverage, such as spouses}.*

Effective *{insert date}*, the Company uses a look-back measurement method to determine who is a full-time employee for purposes of Plan coverage. The look-back measurement method is based on Internal Revenue Service (IRS) final regulations under the Affordable Care Act (ACA). Its purpose is to provide greater predictability for Plan coverage determinations.

The look-back measurement method applies to all Company employees. *{If the look-back measurement method will only apply to certain groups of employees, describe which groups it will apply to, and note that other groups of employees will be subject to monthly measurement}.*

The look-back measurement method involves three different periods:

- A **measurement period** for counting your hours of service.
  - If you are an ongoing employee, this measurement period (which is also called the "standard measurement period") runs from *{insert dates}* and will determine your Plan eligibility for the stability period that follows the measurement period.

{Optional} For purposes of determining your eligibility for coverage for the stability period beginning in 2015, the Company uses a shorter measurement period that runs from *{insert dates}*.

- If you are a new employee who is variable hour, seasonal or part-time, the measurement period will begin on *{insert description of when initial measurement begins}* and will last for *{insert length of initial measurement period}*.
- If you are a new non-seasonal employee who is expected to work full time, the Company will determine your status as a full-time employee who is eligible for Plan coverage based on your hours of service for each calendar month. Once you have been employed for a certain length of time, the measurement rules for ongoing employees will apply to you.

- A **stability period** is a period that follows a measurement period. Your hours of service during the measurement period will determine whether you are a full-time employee who is eligible for coverage during the stability period. As a general rule, your status as a full-time employee or a non-full-time employee is "locked in" for the stability period, regardless of how many hours you work during the stability period, as long as you remain an employee of the Company. There are exceptions to this general rule for employees who experience certain changes in employment status. The stability period *{insert description of how long the stability period lasts}.*
- An **administrative period** is a short period between the measurement period and the stability period when the Company performs administrative tasks, such as determining eligibility for coverage and facilitating Plan enrollment. The administrative period lasts *{insert length of administrative period}.*

Special rules apply when employees are rehired by the Company or return from an unpaid leave.

The rules for the look-back measurement method are very complex. Keep in mind that this is just a general overview of how the rules work. More complex rules may apply to your situation. The Company intends to follow the IRS final regulations (including any future guidance issued by the IRS) when administering the look-back measurement method. If you have any questions about this measurement method and how it applies to you, please contact *{insert contact information}*.