Counting Hours

Frequently Asked Questions

Disclaimer

We share this information with our clients and friends for general informational purposes only. It does not necessarily address all of your specific issues. It should not be construed as, nor is it intended to provide, legal advice. Questions regarding specific issues and application of these rules to your plans should be addressed by your legal counsel.

Compliance Consulting
Benefits & Human Resources Consulting

Gallagher

Insurance | Risk Management | Consulting

Gallagher

Insurance | Risk Management | Consulting

Contents

Gallagher

Insurance | Risk Management | Consulting

1. **We have more than 50 full-time employees, so we are subject to the Employer Mandate penalties. How do we know which of our employees is considered "full-time" requiring us to pay a penalty if they qualify for premium tax credits in the Marketplace ?**

For purposes of the Employer Mandate penalties, the guidance permits you to use one of two methods to determine if an employee is a full time employee. The first is a "look-back measurement" method where you may use a standard measurement/stability period for ongoing variable hour employees, while using a different initial measurement/stability period for new variable hour and seasonal employees. The second method is the "monthly" method where full-time employee status is determined on a month-to-month basis.

2. **If we use the look-back method, how long can the measurement and stability periods be?**

For ongoing employees, the standard measurement period must be at least 3 but not more than 12 consecutive months. The stability period for employees that are determined to be full-time must be the greater of six consecutive calendar months or the length of the standard measurement period. If an employee did not work full time, the stability period cannot be longer than the standard measurement period.

3. **What method can we use to determine the number of hours worked for non-hourly employees?**

For non-hourly employees, you are permitted to calculate the number of hours of service using one of three methods. You may apply different methods for different classes of non-hourly employees, so long as the classes are reasonable and consistently applied. The three methods are:

- Counting actual hours of service and hours for which payment is made or due for vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence (see Question #4 below); or
- Using a days-worked equivalency method whereby the employee is credited with eight hours of service for each day, the employee is credited with at least one hour of service (including hours of service for which no services were performed); or
- Using a weeks-worked equivalency of 40 hours of service per week for each week, the employee is credited with at least one hour of service (including hours of service for which no services were performed).

However, you cannot use the days-worked or weeks-worked equivalency method if the result would be to substantially understate an employee's hours of service (e.g., employees working three 10-hour days).

4. Which hours do we have to count when calculating the number of hours worked by our employees (hourly and non-hourly)?

For hourly and non-hourly employees, you must calculate actual hours of service and hours for which payment is made or due for vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence.

However special rules apply to disability and workers compensation. An hour of service includes periods during which an individual retains status as an employee (i.e., has not been terminated) and is receiving short or long-term disability payments unless the payments are made from an arrangement to which the employer did not contribute directly or indirectly. For this purpose, an arrangement under which an employee pays the full cost of the coverage with after-tax dollars would not be contributed to by the employer. However, if the employer pays any part of the cost for the arrangement, or if the employee pays any part of the cost with pre-tax dollars, then the employer is considered to contribute and hours of service must be included. Where an employer provides salary continuation or disability benefits as a payroll practice, the disability benefit would be employer-provided, and the employer must count hours of service for the time associated with the salary continuation or receipt of disability benefits.

An hour of service does not include: (1) an hour for which an employee is compensated or entitled to compensation (directly or indirectly) for a period during which no duties are performed if payment is made or due under a plan maintained to comply with workers' compensation, unemployment compensation, or state disability insurance laws (California, Hawaii, New Jersey, New York, Rhode Island, and Puerto Rico), or (2) where payment is limited to reimbursing an employee for medical or medically related expenses incurred by the employee. The workers' compensation exception may be important for many employers.

See our article "IRS Provides Additional Guidance on Hours of Service" for more detailed information (click here for a copy.)

5. We have full-time employees that work outside the U.S., do their hours have to be counted when determining if they are full-time employees?

No. Hours worked outside the U.S. for which no U.S.-sourced compensation is due do not have to be counted.

6. Do we have to use the same method of counting hours for all of our non-hourly employees?

No. You are not required to use the same method of calculating a non-hourly employee's hours of service for all non-hourly employees and may apply different methods of calculating a non-hourly employee's hours of service for different categories of non-hourly employees, provided that the categories are reasonable and consistently applied.

You may also change the method of calculating a non-hourly employee's hours of service for one or more categories of non-hourly employees for each calendar year.

7. Is there a formula we can use to determine whether a variable hour employee worked 30 or more hours per week during the measurement period?

Employees would be deemed to be full-time employees if they work on average at least 130 hours per month. For example, using a 12-month measurement period you would count up the number of hours worked in those 12 months and divide by 12. If the hours worked per month averages 130 or more, that employee would be a full-time employee for the ensuing stability period.

8. For our school district plan, can we use a 12-month measurement period by counting only the hours of service that were worked during the school year (and no hours for the summer break)?

No. For employees of educational institutions, a 12-month measurement period is permitted but a special rule applies that says for employment break periods (e.g., summer break) of four or more consecutive weeks, you must either:

- Determine the average hours of service per week for the employee during the measurement period excluding the employment break period and use that average as the average for the entire measurement period; or

- Credit the employee with hours of service for the employment break period 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 part of an employment break period (but no more than 501 hours of service are required to be credited).

Also, you cannot treat your employees who work during the active portions of the academic year as seasonal employees.

9. We generally do not track the full hours of service of our adjunct faculty, but instead compensate them on the basis of credit hours taught. How should we count hours of service for our adjunct faculty?

You must use a reasonable method for crediting hours of service that is consistent with the purposes of the Employer Mandate. For example, a method of crediting hours would be reasonable if it took into account all of your adjunct professor's hours of service including classroom or other instruction time and other hours that are necessary to perform the employee's duties, such as class preparation time, faculty meetings, or office hours.

Until further guidance is issued, one method that is reasonable for this purpose would credit an adjunct faculty member of an institution of higher education with (a) 2.25 hours of service (representing a combination of teaching or classroom time and time performing related tasks such as class preparation and grading of examinations or papers) per week for each hour of teaching or classroom time and, separately, (b) 1 hour of service per week for each additional hour outside of the classroom the faculty member spends performing duties he or she is required to perform (such as required office hours or required attendance at faculty meetings).

For example, assume an adjunct professor teaches a course load of twelve credit hours and is required to hold office hours for 2 hours per week and attend a one- hour faculty meeting each week. Under the method above, the university would credit the adjunct professor with 27 hours of service per week (12 x 2.25) for teaching time, an additional 2 hours per week for the office hours, and 1 hour for the faculty meeting. This would result in a total credit of 30 hours of service per week, and the adjunct would be a full-time employee for purposes of PPACA.

10. As an educational organization, we frequently employ students. Do their hours have to be counted?

It will depend on the situation. The hours of students in positions subsidized through the federal work study program or a substantially similar program of a State or political subdivision do not have to be counted. However, all hours of service for which a student employee is paid or entitled to payment in a capacity other than through the federal work study program (or a State or local government's equivalent) are required to be counted as hours of service.

11. Do we have to count the hours of our unpaid interns?

No. Services performed by an intern do not count as hours of service to the extent that the intern does not receive, and is not entitled to, payment in connection with those hours.

However, hours of service for which interns receive (or are entitled to receive) compensation are counted and are subject to the general rules, including the option to use the look-back measurement or monthly measurement method for determining full-time employee status.

12. Our city has a volunteer fire department and other volunteer positions where the volunteers are nominally paid for their expenses or may receive cash awards. Do we have to count their hours?

No. Hours of service do not include hours worked as a "bona fide volunteer." Bona fide volunteers include any volunteer (including a volunteer firefighter) who is an employee of a government entity or an organization described in section 501(c) that is exempt from taxation under section 501(a) whose only compensation from that entity or organization is in the form of (i) reimbursement for (or reasonable allowance for) reasonable expenses incurred in the performance of services by volunteers, or (ii) reasonable benefits (including length of service awards), and nominal fees, customarily paid by similar entities in connection with the performance of services by volunteers.

13. Do our members of a religious order have to be treated as full-time employees of their orders?

There are no special rules for members of a religious order, but until further guidance is issued, you do not have to count as an hour of service any work performed by an individual who is subject to a vow of poverty as a member of that order when the work is in the performance of tasks usually required (and to the extent usually required) of an active member of the order.

14. Do we have to count hours that an employee is on-call when determining if they are full-time employees?

It will depend on the situation. Generally, you will be required to use one of the reasonable methods for crediting hours of service for any on-call hour for which payment is made or due, for which the employee is required to remain on-call on your premises, or for which the employee's activities while remaining on-call are subject to substantial restrictions that prevent the employee from using the time effectively for the employee's own purposes.

15. If an employee takes an unpaid FMLA leave or goes on unpaid military leave during his or her measurement period, how do we account for that time upon the return to work?

For periods of special unpaid leave, including under FMLA, USERRA or on account of jury duty, you must 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. Alternatively, you can choose to credit employees with hours of service during the leave at a rate equal to the employee's average weekly rate during the weeks in the measurement period that were not special unpaid leave.

The rule for special unpaid leave does not apply if you are using the monthly method to determine full-time employee status.

16. How are new employees classified?

New hires are generally classified based on the employee's hours worked, or, the amount of hours the employee is reasonably expected to work as of the date of hire.

- **New employee reasonably expected to work full-time (i.e., 30 or more hours per week)** - If you reasonably expect an employee to work full-time when you hire that employee, and coverage is offered to the employee before the end of the employee's initial 90 days of employment, you will not be subject to the Employer Mandate payment for that employee, if the coverage is affordable and meets the minimum required value.
- **New employee reasonably expected to work part-time (i.e., less than 30 hours per week)**- If you reasonably expect an employee to work part-time and the employee's number of hours do not vary, you will not be subject to the Employer Mandate penalty for that employee if you don't offer the employee coverage.
- **New variable hour and seasonal employees** – If based on the facts and circumstances at the date the employee begins working (the start date), you cannot determine that the employee is reasonably expected to work on average at least 30 hours per week, then that employee is a variable hour employee. A "seasonal employee" is defined for purposes of the Employer Mandate penalty as an employee who is hired into a position for which the "customary" annual employment is six months or less. Customary means that by the nature of the position an employee typically works for a period of six months or less, and that period should begin each calendar year in approximately the same part of the year, such as summer or winter.

Factors to consider in determining if a new hire is or is not a full-time employee include as of the start date include, but are not limited to, whether the employee is replacing an employee who was or was not a full-time employee, the extent to which employees in the same or comparable positions are or are not full-time employees, and whether the job was advertised, or otherwise communicated to the new hire or otherwise documented (for example, through a contract or job description), as requiring hours of service that would average 30 (or more) hours of service per week or less than 30 hours of service per week.

17. If we use the look-back measurement method for new variable hour, part-time, or seasonal employees, how long can the initial measurement and stability periods be?

Once hired, you have the option to determine whether a new variable hour, part- time, or seasonal employee is a full-time employee using an "initial measurement period" of between three and 12 months (as selected by you). You would measure the hours of service completed by the new employee during the initial measurement period to determine whether the employee worked an average of 30 hours per week or more during this period. If the employee did work at least 30 hours per week during the measurement period, then the employee would be treated as a full-time employee during a subsequent "stability period," regardless of the employee's number of hours of service during the stability period, so long as he or she remains an employee. The stability period must be a period that is the same length as the stability period for ongoing employees, must be for at least six consecutive calendar months, and cannot be shorter than the initial measurement period. If the employee did not work on average at least 30 hours per week during the measurement period, you would not have to treat the employee as a full-time employee during the stability period that followed the measurement period. That stability period could not be more than one month longer than the initial measurement period and must not exceed the remainder of the first entire standard measurement period (plus any associated administrative period) for which a variable hour employee, seasonal employee, or part-time employee has been employed.

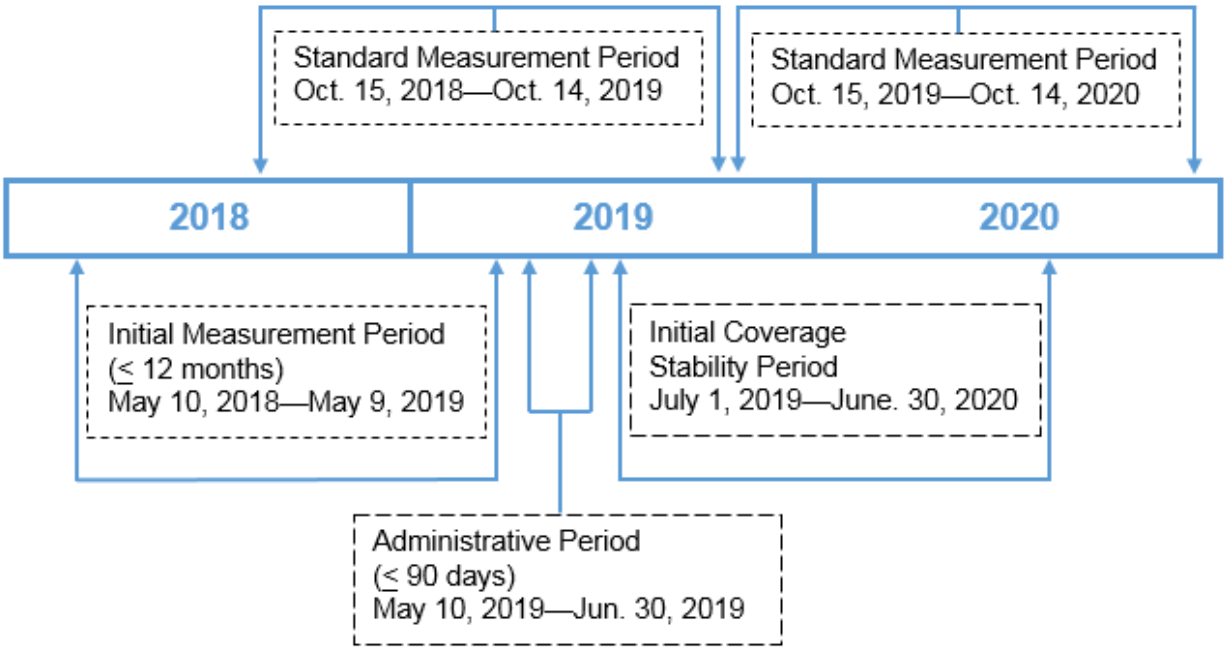
Example

Facts: For new variable hour employees under a calendar year plan, you use a 12-month initial measurement period that begins on the start date and apply an administrative period from the end of the initial measurement period through the end of the first calendar month beginning on or after the end of the initial measurement period.

Situation: Dianna is hired on May 10, 2018. Dianna's initial measurement period runs from May 10, 2018, through May 9, 2019. Dianna works an average of 30 hours per week during this initial measurement period. You offer affordable coverage to Dianna for a stability period that runs from July 1, 2019 through June 30, 2020.

Conclusion: Dianna worked an average of 30 hours per week during her initial measurement period and you had: (1) an initial measurement period that does not exceed 12 months; (2) an administrative period totaling not more than 90 days; and (3) a combined initial measurement period and administrative period that does not last beyond the final day of the first calendar month beginning on or after the one- year anniversary of Dianna's start date. Accordingly, from Dianna's start date through June 30, 2020, you are not subject to an Employer Mandate penalty with respect to Dianna because you complied with the standards for the initial measurement period and

stability periods for a new variable hour employee. However, you must test Dianna again based on the period from October 15, 2018 through October 14, 2019 (your first standard measurement period that begins after Dianna's start date) to see if she qualifies to continue coverage beyond the initial stability period.



18. Do we have to make the measurement period and stability period the same for all employees?

No. You may use measurement periods and stability periods that differ either in length or in their starting and ending dates for the following categories of employees:

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

No other categories may be used.

19. So, if an employee meets the 30 hours per week requirement during the measurement period, do we need to enroll them the day after the measurement period ends?

For ongoing employees, you can build in an "administrative period" after the measurement period ends and before the associated stability period begins. This administrative period: (1) can't reduce or lengthen the measurement period or the stability period; (2) can't be longer than 90 days; and (3) must overlap with the prior stability period; so that, during the administrative period, you continue to offer coverage to ongoing employees until the new stability period begins.

For new variable or seasonal employees, you can build in an administrative period before the start of the stability period. This administrative period must not exceed 90 days in total. For this purpose, the administrative period is counted from the date of hire to the date the employee is first offered coverage under your group health plan, other than the initial measurement period. Thus, for example, if you begin the initial measurement period on the first day of the first month following the employee's start date, the period between the employee's start date and the first day of the next month must be taken into account in applying the 90-day limit on the administrative period. Similarly, if there is a period between the end of the initial measurement period and the date the employee is first offered coverage under your plan, that period must be taken into account in applying the 90-day limit on the administrative period.

In addition, you are limited in how long the initial measurement period and the administrative period combined can be for a new variable or seasonal employee. Specifically, your initial measurement period and administrative period together cannot extend beyond the last day of the first calendar month beginning on or after the first anniversary of the employee's start date. For example, if you use a 12- month initial measurement period for a new variable hour employee, and begin that initial measurement period on the first day of the first calendar month following the employee's start date, then the administrative period before coverage starts cannot be longer than one month, assuming, of course, the employee met the full-time hours requirement during the initial measurement period.

20. At what point would we stop using the initial measurement/stability period and transition an employee to ongoing status?

Once a new employee, who has been employed for both an initial measurement period and an entire standard measurement period, the employee must 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.

Example: If you have a calendar year standard measurement period that also uses a one-year initial measurement period beginning on the employee's start date, you would

test a new variable hour employee whose start date is February 12 for full-time status first based on the initial measurement period (February 12 through February 11 of the following year) and again based on the calendar year standard measurement period (if the employee continues in employment for that entire standard measurement period) beginning on January 1 of the year after the start date.

If you determine the employee is a full-time employee during the initial measurement period or standard measurement period, then he or she must be treated as a full-time employee for the entire associated stability period. This is the case even if the employee is determined to be a full-time employee during the initial measurement period but determined not to be a full-time employee during the overlapping or immediately following standard measurement period. In that case, you may treat the employee as a part-time employee only after the end of the stability period associated with the initial measurement period. Thereafter, the employee's full-time status would be determined in the same manner as that of other ongoing employees.

In contrast, if you determine the employee is not a full-time employee during the initial measurement period, but **is** determined to be a full-time employee during the overlapping or immediately following standard measurement period, you must treat the employee as a full-time employee for the entire stability period that corresponds to that standard measurement period (even if that stability period begins before the end of the stability period associated with the initial measurement period). Thereafter, the employee's full-time status would be determined in the same manner as that of other ongoing employees.

21. How does standard measurement and stability periods apply to ongoing employees?

For ongoing employees with variable hours, you have the option to determine each ongoing employee's full-time status by looking back at a standard measurement period between 3 and 12 consecutive calendar months (as chosen by you). You can choose the months in which the standard measurement period starts and ends, provided that you are uniform and consistent in applying it for all employees in the same category. (See below in this section for permissible categories.) For example, if you chose a standard measurement period of 12 months, it could be the calendar year, a non-calendar plan year, or a different 12-month period, such as one that ends shortly before the start of the plan's annual open enrollment season. If you determine that an employee averaged at least 30 hours per week during the standard measurement period, then you must treat the employee as a full-time employee during a subsequent "stability period", regardless of the employee's number of hours of service during the stability period, so long as he or she remains an employee. The stability period would have to be at least six consecutive calendar months and no shorter than the standard measurement period. If you determine that the employee did not work full-time during the standard measurement period, you would not have to treat the employee as a full-

time employee during the stability period that follows and you would not incur an Employer Mandate penalty.

Example

Facts: You choose a 12-month stability period that begins January 1 and a 12-month standard measurement period that begins October 15. Consistent with the terms of your group health plan, only an ongoing employee who works full-time (an average of at least 30 hours per week) during the standard measurement period is offered coverage during the stability period associated with that measurement period. You also choose to use an administrative period between the end of the standard measurement period (October 14) and the beginning of the stability period (January 1) to determine which employees worked full-time during the measurement period, notify them of their eligibility and of the coverage available under the plan for the calendar year beginning on January 1, answer questions and collect materials from employees, and enroll those employees who elect coverage in the plan. Previously-determined full-time employees already enrolled in coverage continue to be offered coverage through the administrative period until January 1.

Situation: Phil and Cara have been employees for several years, continuously from their start date. Phil worked full-time during the standard measurement period that begins October 15 of Year 1 and ends October 14 of Year 2 and for all prior standard measurement periods. Cara also worked full-time for all prior standard measurement periods, but is not a full-time employee during the standard measurement period that begins October 15 of Year 1 and ends October 14 of Year 2.

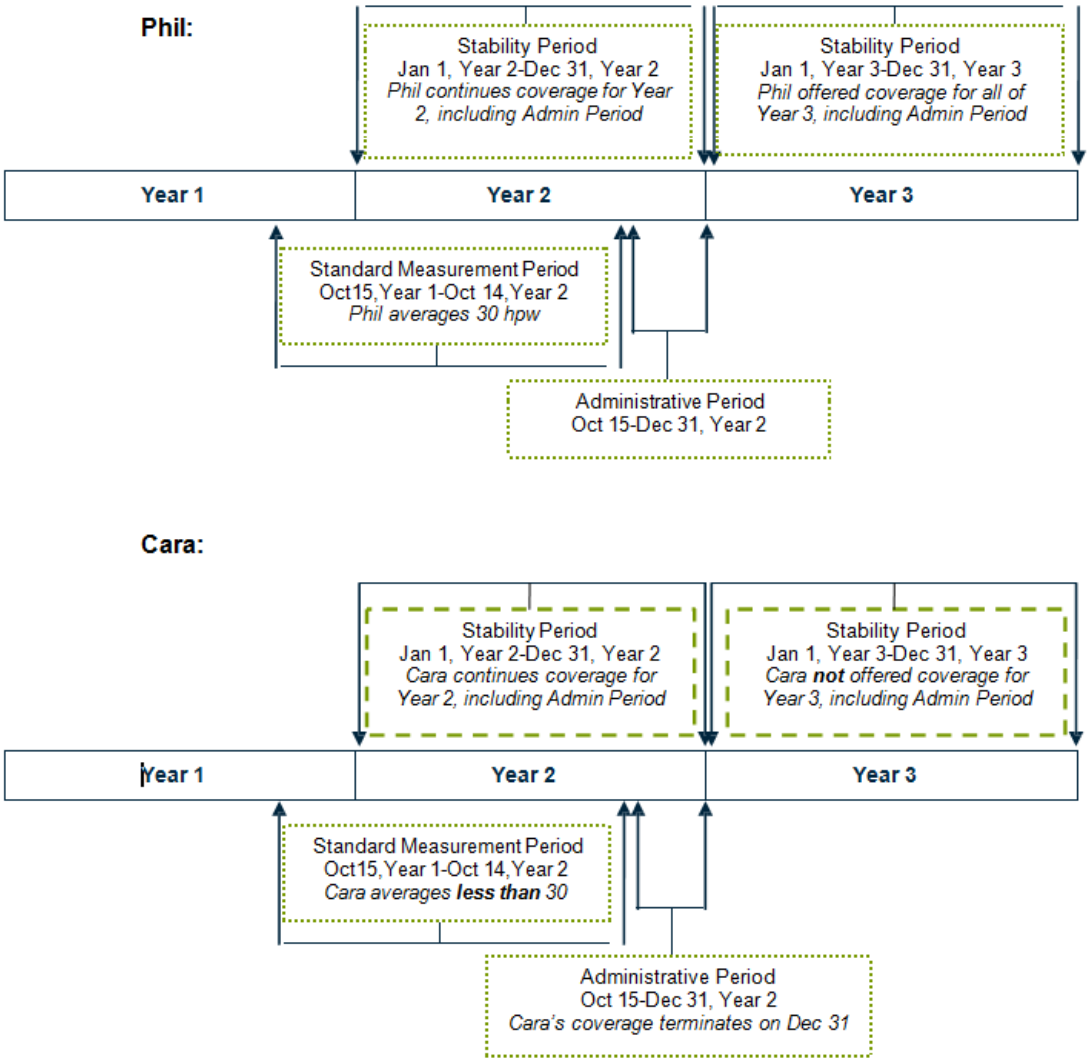
Conclusions: Because Phil was employed for the entire standard measurement period that begins October 15 of Year 1 and ends October 14 of Year 2, he is an ongoing employee with respect to the stability period running from January 1 through December 31 of Year 3. Because Phil worked full-time during that standard measurement period, he must be offered coverage for the entire Year 3 stability period (including the administrative period from October 15 through December 31 of Year 3). Because Phil worked full-time during the prior standard measurement period, he would have been offered coverage for the entire Year 2 stability period, and if enrolled would continue such coverage during the administrative period from October 15 through December 31 of Year 2.

Because Cara was employed for the entire standard measurement period that begins October 15 of Year 1 and ends October 14 of Year 2, Cara is also an ongoing employee with respect to the stability period in Year 3. Because Cara did not work full-time during this standard measurement period, she is not required to be offered coverage for the stability period in Year 3 (including the administrative period from October 15 through December 31 of Year 3). However, because Cara worked full-time during the prior standard measurement period, she would be offered coverage through the end of the Year 2 stability period, and if enrolled would continue such coverage during the

administrative period from October 15 through December 31 of Year 2.

In this example, you would comply with the standards because your measurement and stability periods are no longer than 12 months; the stability period for ongoing employees who work full-time during the standard measurement period is not shorter than the standard measurement period; the stability period for ongoing employees who do not work full-time during the standard measurement period is not longer than the standard measurement period; and the administrative period is not longer than 90 days.

See illustration below.



22. Can we change the timing or duration of our standard measurement and stability periods?

You may change your standard measurement period and stability period for subsequent years, but you may not change them once the standard measurement period has begun.

23. If one of our new variable hour, part-time, or seasonal employees is promoted to a permanent full-time position during her initial measurement period, how should her eligibility for coverage be treated?

For a new variable hour, part-time, or seasonal employee who changed employment status to full-time during her initial measurement period, you should treat her as a full-time employee on the earlier of:

- The first day of the fourth month following the change in employment status; or
- If the employee averages 30 or more hours of service per week during the initial measurement period, the first day of the initial stability period that would have applied had the employee not had a change in employment status.

24. What happens if the change in employment status occurs during a stability period?

An ongoing employee's increase or decrease in hours without a change in employment status during his or her stability period would not affect the employee's status as a full-time employee or non-full-time employee for the remainder of that stability period. However, a change in employment status may result in a change in status as full-time or non-full-time for the remainder of the stability period if certain conditions are met. For more information, please see our article "Handling Changes in Employment Status When First Position is Subject to the Look-Back Method" available here.

25. What happens if an employee fails to make a timely contribution (e.g., tipped employees, reduced work schedules, and leaves of absence) during the stability period?

If your employee's payment is late, you must provide the employee with a 30-day grace period in order to make the payment. If your employee does not make the payment within the grace period, you are not required to provide coverage for the period for which the premium is not timely paid and may terminate coverage. In addition, you are treated as having offered that employee coverage for the remainder of the coverage period (typically the remainder of the plan year) and cannot be penalized for terminating coverage if the premium is not paid. Similarly, if the employee makes a partial payment

that is “not significantly less” than the total amount due (the lesser of 10% of what is due or $50), you must either accept the deficient payment as payment in full or notify the employee in writing of the underpayment and give the employee a reasonable amount of time to pay the remaining balance.

26. We frequently have variable hour employees whose contracts are terminated and then they are rehired at a later date. Can we treat them as new employees and start the measurement period over again for purposes of determining if they are a full-time employee?

It will depend on the length of the non-employment period. If the period of non-employment is at least 13 weeks (26 weeks for employees of an educational organization), you may treat the rehired employee as a new employee.

You can also use the “rule of parity” that says an employee may be treated as a new employee if the period of non-employment of less than 13 weeks (for an employee of an educational organization employer, a period that is shorter than 26 weeks) is at least four weeks long and is longer than the employee’s period of employment immediately preceding the period of non-employment. For example, if an employee works six weeks, terminates employment, and is rehired ten weeks later, that rehired employee is treated as a new employee because the ten-week period of non-employment is longer than the immediately preceding six-week period of employment.

27. What happens if the break in service is less than 13 weeks (26 weeks for an educational organization) and the “rule of parity” does not apply?

For an employee who is treated as a continuing employee (as opposed to an employee who is treated as terminated and rehired), the measurement and stability period that would have applied to the employee had the employee not experienced the period of non-employment would continue to apply upon the employee’s resumption of service. For example, if the continuing employee returns during a stability period in which the employee is treated as a full-time employee, then the employee is treated as a full-time employee upon return and through the end of that stability period and must be offered coverage again as of the first day that employee is credited with an hour of service, or, if later, as soon as administratively practicable. For this purpose, offering coverage by no later than the first day of the calendar month following resumption of services is deemed to be as soon as administratively practicable.

28. If we transfer an employee out of the U.S., is that considered a termination of employment?

You may treat an employee as having terminated employment if the employee transfers to a position outside the U.S. if the position is anticipated to continue indefinitely or for at least 12 months and if substantially all of the employee’s compensation will constitute

income from sources outside the United States.

29. What if we bring an employee into the U.S. from one of our foreign locations?

You may treat an employee transferring to the U.S. from a position outside the U.S. (with compensation from sources outside the U.S.) as a new hire. However, if the employee previously had hours of service at your U.S. location, then the rules related to rehired employees would apply (i.e., breaks in service of more or less than 13 weeks).

30. When we have large projects to complete, we occasionally hire temporary employees who may be hired to work a 40-hour per week schedule when initially employed, but may not work at least 30 hours per week thereafter. How should we classify them in order to determine if we should be offering them coverage?

Employees that are hired for a limited duration (whose employment is not tied to a particular season of the year) can be treated as variable hour employees subject to your measurement/stability period analysis. This means that you may not be required to classify the employee as full-time unless the employee worked 30 hour or more per week for at least three months. A new employee who is expected to be employed initially at least 30 hours per week can be classified as a variable hour employee if, based on the facts and circumstances, it cannot be determined that the employee is reasonably expected to be employed on average at least 30 hours per week over your entire initial measurement period.

For an employee hired for less than three months, you will not have to offer coverage regardless of the number of hours he/she works per week because the obligation to offer coverage does not begin until the first day of the fourth month following the date of hire. However, you must assume that a temporary employee will work for the entire duration of the initial measurement period.

For example, say you hire an employee to fill in for employees who are absent and to provide additional staffing at peak times. You expect that this employee will average 30 hours of service per week or more for the first few months of employment, while assigned to a specific project, but you also reasonably expect that the assignments will be of unpredictable duration, that there will be periods of unpredictable duration between assignments, that the hours per week required by subsequent assignments will vary, and that the employee will not necessarily be available for all assignments.

Therefore, if you cannot determine whether this employee is reasonably expected to average at least 30 hours of service per week for the initial measurement period, you may treat this employee as a variable hour employee during the initial measurement period.

31. We occasionally use employees from a PEO or other staffing firm. Are we required to offer them coverage if the PEO or staffing firm is already offering them coverage?

No, if certain conditions are met. If the PEO or staffing firm offers coverage to your employee that is performing services for you as your common-law employee, the PEO or staffing firm's offer is treated as an offer of coverage made by you if the fee you pay to the PEO or staffing firm for an employee enrolled in the staffing firm's plan is higher than the fee you would pay to the staffing firm for the same employee if the employee did not enroll in the staffing firm's plan.

32. As a home care agency, we do not generally direct and control our workers. Do we have to count them as full-time employees for either determining if we are a large employer or for offering coverage?

Each case will have to be evaluated to determine whether you or the service recipient is the common law employer of the provider. If the service recipient has the right to direct and control the home care provider as to how they perform the services, including the ability to choose the home care provider, select the services to be performed, and set the hours of the home care provider, these facts would indicate that the service recipient may be the employer under the common law standard rather than your agency. In that case, you would not be subject to penalties with respect to that particular provider.

33. We are an agricultural operation that frequently employs workers with H-2A and H-2B visas. Are these workers counted as employees for purposes of the Employer Mandate?

Yes. There are no special rules for H-2A or H-2B workers though in many cases they can be classified as seasonal employees and thus would be subject to your measurement method.

34. If we elect not to use the look-back measurement method to determine our employee's status, is there any other method we can use?

There is another method that is referred to as the "monthly method." Under the monthly method, the determination of the employee's status is based on hours of service in each month and is not based on averaging over a prior period. However, IRS representatives have informally indicated that this method was intended to be used simply as a method used at the end of the year to determine whether penalties would apply for any months of the year.

Gallagher

Insurance | Risk Management | Consulting

35. As a member employer of a controlled group, do we have to use the same method for determining our employee's status as the other employer members of the controlled group?

No. You may use different measurement methods (the look-back measurement method or the monthly measurement method) and/or different starting and ending dates and lengths of measurement and stability periods.