VEHI FAQ

General Questions & Answers about the Affordable Care Act

Updated August, 2014

This VEHI FAQ has been updated to reflect recently released guidance on affordability provisions of the ACA. These updated provisions impact the point at which an employee may qualify for a subsidy on the exchange, but should not impact employer Safe Harbor provisions, unless further guidance is released. **Questions 19 and 24 have been revised to reflect the affordability updates. We also added a *heads up* prior to Question 14**.

Information in this Q&A was pulled from multiple sources, including the Internal Revenue Service's final regulations at http://www.gpo.gov/fdsys/pkg/FR-2014-02-12/pdf/2014-03082.pdf. The most recent regulation release, which includes the adjustments to the affordability thresholds, is available at http://www.irs.gov/pub/irs-drop/rp-14-37.pdf. Additionally, the IRS has also issued its own Q&A at http://www.irs.gov/uac/Newsroom/Questions-and-Answers-on-Employer-Shared-Responsibility-Provisions-Under-the-Affordable-Care-Act. Finally, VEHI has engaged Gallagher Benefits Services to assist us in providing ACA compliance information to Vermont Schools; its analysis is incorporated here.

For ease of reading, we have removed information relating to topics we have specifically addressed in other VEHI documents, including the VEHI FAQ addressing grandfathered status and the VEHI HRA and FSA FAQs found here:
http://www.vehi.org/media/doc/FAQ_Grandfathering_November__2013.pdf
http://www.vehi.org/media/doc/New_Rules_for_HRAs_under_ACA_FAQ_revised_June_2014.pdf
http://www.vehi.org/media/doc/FSA_FAQ_Jan_2014_FINAL.pdf

This Q&A is for general guidance purposes only—it is NOT legal advice. It will be revised when other relevant guidance is issued. If you have questions about the information in this document, please contact Laura Soares, Joseph Zimmerman and Mark Hage, your VEHI Trust Administrators: laura@vsbit.org, 223-5040 (ex. 208); joe@vsbit.org, 223-5040 (ex. 209) & mhage@vtnea.org, 223-6375 (ex. 2420).

Thank you.

Employer Obligations Regarding Health Insurance Benefits under the ACA

Question 1: Does the Affordable Care Act require employers to provide health care benefits to employees and their eligible dependents?

No. But the ACA does impose penalties on large employers if they do not offer health coverage that is affordable and that meets minimum actuarial values of at least 60% (most employer plans easily meet this minimum actuarial value) to their full-time employees (average of 30 or more hours per week) and dependents.

Question 2: How does the IRS define "dependents" under the ACA for purposes of offering coverage?

"Dependents" under the final rule include an employee's **children** who have not attained the age of 26. The definition of children under "Dependents" include natural or adopted children. The following are **excluded**:

- Spouses;
- Grandchildren;
- Qualifying relatives;
- Foster children; and
- Stepchildren.

Note: while the definition of 'dependent' for purposes of offering coverage under the employer shared responsibility mandate (ESRM) excludes foster children and stepchildren, other provisions of the ACA continue to require coverage of these categories of dependents (coverage up to age 26). Further guidance on this from the IRS would be welcome. Any further guidance will be communicated to VEHI members..

Question 3: Under the ACA, is it true that employers with <u>more than 200 full-time employees</u> that offer insurance coverage must <u>automatically enroll</u> new full-time employees in a health plan (as well as continue enrollment of current employees)?

Yes, but implementation is on hold pending further guidance. When it goes into effect, automatic enrollment programs must include adequate notifications and give employees the opportunity to opt out.

Health Plan Coverage under the ACA and Large Employer Status

Question 4: What is meant by "minimum essential coverage" and "minimum value"?

"Minimum essential coverage" is that which is obtained through an employer, a government program like Medicare and Medicaid, a retirement system, or from other sources. An employer plan that is compliant with the ACA is deemed to be minimum essential coverage.

Heads Up: VEHI plans are considered minimum essential coverage.

"Minimum value" refers to a level of coverage; it is satisfied when an insurance plan covers at least 60% of the total allowed costs of the benefits provided based on an actuarial calculation. All VEHI plans meet this threshold.

Question 5: Does the ACA mandate any penalties for small employers?

No. Small employers are those that have less than 50 full-time equivalent employees in the preceding calendar year.

Question 6: What is a "large" employer for purposes of calculating and assessing penalties against the employer?

"Large" is defined as having 50 or more "full-time equivalent" (FTE) employees. This status is determined based on employees' actual hours of service worked in the preceding calendar year (see Question 7).

Heads Up: There is transition relief for determining large employer status during 2014. See Q&A 5 of VEHI Transition Relief FAQ.

Question 7: For determining whether an employer will face a penalty, how will full-time equivalents and overall employer size be calculated?

The ACA states that an employer is "large" if it "employed an **average** of at least **50 full-time equivalent employees** on business days during the **preceding** calendar year. Each month's number of employees is calculated separately and then aggregated and averaged for the preceding calendar year.

In the hypothetical example in the table below, June, July, and August are assumed to have fewer full-time-equivalent (FTEs) employees because of the summer recess, and December has fewer due to the assumption that some education support professionals are not paid for days not worked during winter break.

Monthly Totals of Full-Time (FT) and Full-Time Equivalents (FTE) Employees

for Determining Large or Small Employer Status for a Hypothetical Vermont School

	Jan.	*Feb.*	*Mar.*	*April*	*May*	*June*	*July*	*Aug.*	*Sept.*	*Oct.*	*Nov.*	*Dec.*
FTEs	*13.50*	*13.50*	*13.50*	*13.50*	*13.50*	*6.25*	*5.69*	*13.87*	*13.50*	*13.50*	*13.50*	*10.32*
FTs	*47.00*	*47.00*	*47.00*	*47.00*	*47.00*	*47.00*	*47.00*	*47.00*	*47.00*	*47.00*	*47.00*	*47.00*
Total	*60.50*	*60.50*	*60.50*	*60.50*	*60.50*	*53.25*	*52.69*	*60.87*	*60.50*	*60.50*	*60.50*	*57.32*
Sum of Monthly Totals: 708.13												

The chart above can be broken down as follows:

Step One: Determine the number of FTEs (including seasonal workers). Full-time equivalents are calculated on a month-by-month basis during the preceding calendar year by adding the number of hours worked by employees who are **not** full time and then dividing by 120. So, 15 employees each worked

108 hours in January, and they count as 13.50 FTEs: (15 x 108) ÷ 120 = 13.50. (No more than 120 hours for any individual can count for this purpose; if they worked more than 120 hours, they'd be considered full-time.)

Step Two: Determine the number of full-time employees (those who worked at least 30 hours per week) and add that to the number of FTEs. There were 47 full-time employees in January, so the grand total for that month is the sum of 47 + 13.50, or 60.50 "full-time" employees. (At this stage of the calculation, fractional equivalents are permitted.)

Step Three: Aggregate each month total (FTs + FTEs), divide by 12. The final calculation for the hypothetical school represented in the table above results in an average of 59.01 "full-time" employees, including full-time equivalents, so the employer is considered **large**: 708.13 ÷ 12 = 59.01. If the average had turned out to be 49.99, the employer would be considered small, because the regulations call for discarding fractional amounts at the final stage of the calculation.

Determining Full-time Employee Status and Counting Hours

Question 8: How many hours per week does an employee have to work to meet the definition of "full-time" in respect to calculating penalties on employers?

"Full-time" employment for calculating penalties is defined as working an average of 30 or more hours a week in any given month. Employees who have variable hours may be considered full time if they meet an average of 30 hours per week during a specific measurement period as determined by the employer.

Question 9: How do school employees' summer, spring and winter recess periods affect the calculation of full-time status in the determination of an employer's size and penalty liability?

Any period during which an employee is paid (or entitled to payment) is counted, even if the employee is in a typical school recess period, provided the employee in question worked full-time during the active portions of the normal school year. This applies to employees who are determined to be full time as determined through a *look back* period.

Employees experiencing an employment break period (for example, summer breaks) of at least four consecutive weeks must be credited with their usual hours of service up to a maximum of 501 hours in a calendar year. Other unpaid leave or a termination of employment and rehire is covered at Q&A 12.

Question 10: How are hours of service credited during break periods?

When counting hours during a look back period, certain recess periods must be treated as time in which the individual is credited with hours of service. School organizations have two options to account for hours during recess periods of at least four consecutive weeks. Assuming a 12-month measurement period:

- Determine the average hours of service per week for the employee during the measurement period, excluding the employment break period (9 months), and use that average as the average for the entire break period;

- Credit the employee with the hours of service for the employment break period at a rate equal to the average weekly rate at which the employee was credited during the academic year. It is not necessary to credit any hours of service that exceed 501 hours.

Example: A school credits an employee with 38 hours of service from September 7, 2014, through May 23, 2015. The employee is on summer break until September 7, 2015. The school credits an employee with 38 hours of service for the 15 weeks between May 24, 2015, and September 5, 2015 (38 x 15 weeks = 570). However, the school is not required to credit more than 501 hours of service for an employment break period.

Question 11: What about paid leave hours (medical, family, maternity and paternity)?

An employee's hours on paid leave will count for purposes of an employer's applicable large employer status and penalty calculations.

Question 12: What about employees on unpaid leave under FMLA, unpaid leave subject to the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), or jury duty?

Certain unpaid hours must be taken into account, for example, unpaid FMLA. Generally, if employers use the look-back measurement method for counting hours to determine full-time status, they must determine the average hours of service per week for the employee during the measurement period – excluding the unpaid leave – and use that average as the average for the entire measurement period. Alternatively, you can choose to credit the employee with hours of service during the leave equal to the employee's average weekly rate during the weeks in the measurement period that were not unpaid leave.

Employer "Safe Harbors"

Question 13: What are employer penalty "safe harbors"?

"Safe harbors" are provisions of a law or regulation that provide protection from a penalty or liability if certain conditions are met. An employer who meets the safe harbor conditions won't face a penalty, even if the employer-sponsored coverage is unaffordable based on the employee's household income as affordability is defined in the ACA, and receives premium credits or cost-sharing reductions in the Exchange. In other words, if the conditions of a safe harbor are met, an employer's health coverage is essentially deemed "affordable." When determining cost of coverage for your employees, keep in mind that employers must offer affordable coverage or they will be subject to a potential penalty. Please review the following affordability safe harbors when determining employee contributions for coverage.

What follows are three scenarios in which no penalty would be assessable:

W-2 Safe Harbor: Using this method, the employer divides the employee annual contribution for employee-only coverage under the employer's lowest cost plan meeting minimum value requirements by the employee's W-2 wages listed in Box 1. If the result is no more than 9.5% the plan is considered affordable. Note: Box 1 is income that has been reduced by any pretax contributions to purchase benefits, so the earning reflected could be significantly lower than the employee's actual wage. Application of this safe harbor is <u>determined after the end of the calendar year</u>.

Rate-of-Pay Safe Harbor: an employer would (1) take the hourly rate of pay for each hourly employee who is eligible to participate in the health plan as of the beginning of the plan year, (2) multiply that rate by 130 hours per month, and (3) determine affordability based on the resulting monthly wage amount. Specifically, the employee's monthly contribution amount (for the self-only premium of the employer's lowest cost coverage that provides minimum value) is affordable if it is equal to or lower than 9.5 % of the computed monthly wages. For salaried employees, monthly salary would be used instead of hourly salary multiplied by 130. The calculation does not take into account any increases in wages received after the first day of the plan year.

The final rules allow an employer to apply the rate of pay safe harbor to an hourly employee even if the employee's rate of pay is reduced during the year. In this situation, the rate of pay is applied separately to each calendar month, rather than to the entire year and the employee's required contribution may be treated as affordable if it is affordable based on the lowest rate of pay for the calendar month multiplied by 130 hours.

Federal Poverty Line Safe Harbor: This safe harbor relies on the federal poverty level (FPL). Conditions for this safe harbor will be met if the employer offered employees (and their dependents) the opportunity to enroll in employer-sponsored coverage that provides minimum value for self-only coverage and if the employee's required contribution for the calendar year for the lowest-cost, **self-only** coverage that provides minimum value **does not exceed 9.5 percent of the FPL for a single individual**. The calculation must be done on a monthly basis using the annual FPL determination divided by 12. The FPL used would be the one relevant to the state in which the employee worked and the one based on most recent FPL determination as of the first day of the plan year.

For 2014, the FPL for an individual is the 48 contiguous states or the District of Columbia is $11,670. In Alaska it is $14,350; in Hawaii, $13,230.

The final rules allow employers to use the guidelines in effect six months prior to the beginning of the plan year, so as to provide employers with adequate time to establish premium amounts in advance of the plan's open enrollment.

Because this is such a low threshold, most employers will not find this to be a valuable safe harbor and are likely to rely on the W-2 or Rate-of-Pay options.

Premium Tax Credits, Cost-Sharing Subsidies & the ACA's Individual Mandate

Heads Up: On August 3, 2014, the IRS updated the definition of affordability for purposes of determining eligibility for an individual's ability to access a subsidy under the Exchange from 9.5% to 9.56%. The higher rate does not apply until the calendar beginning January 1, 2015. It's not clear whether the Employer Safe Harbor provisions will also be updated; therefore, employers should proceed under the assumption that the Safe Harbor rate remains at 9.5% until further guidance is released.

Question 14: If our employee qualifies for tax credits with respect to one of his/her dependent children, will the employer be liable for a penalty?

No. If self-only coverage is affordable, the employer will not be subject to penalty, even if family coverage is unaffordable. As long as the cost of self-only coverage is less than 9.5% of the employee's household income, the employer will not be subject to a penalty no matter how much coverage for dependents costs. In addition, those dependents offered coverage will be precluded from receiving any premium tax credit or subsidy for coverage on the state Exchange.

If one of your employee's dependents (such as a spouse) who is ineligible for coverage under your employer health plan obtains a premium tax credit or cost-sharing reduction, that will not result in any liability or penalty to you as an employer.

Question 15: Will states screen applicants to see if they eligible for Medicaid or another program?

States must "screen and enroll" all individuals who apply for premium credits. If eligible for such programs, they are to be enrolled and premium credits will not be an option. Additionally, an employer will not be subject to a penalty for individuals who are enrolled in Medicaid, even if the employer coverage was determined to be unaffordable.

School employees eligible for Medicaid will NOT be counted in the large-employer penalty assessment when the penalty is based on affordability or minimum value; they will be counted, however, if substantially all employees are not offered health coverage.

Remember, for 2015 only, the "30-free" rule for the $2,000 level penalty is increased to 80. See Q&A 8 of VEHI Transition Relief FAQ.

Question 16: Are employers ever required to pay a penalty for any part-time worker or full-time equivalent, even if that part-time/FTE employee receives a premium credit?

No. However, the employee must work less than an average of 30 hours per week.

Question 17: Will an individual be subject to penalty for a short gap in coverage?

No**.** Individuals who have a gap in coverage for less than a continuous three-month period will not incur a penalty. This exemption may only be used for one period without coverage in a year. There are specific actions an individual must take in order to assure they will not be penalized for this period.

Question 18: Who can receive premium tax credits and cost-sharing subsidies under the ACA and how do they work?

The ACA provides a federal premium tax credit (a premium "subsidy," in other words) for individuals and families:

(a) who are not otherwise eligible for minimum essential coverage (other than through an Exchange) for a given month, **OR**

(b) are eligible for minimum essential coverage that they elect not to take or disenroll from, and, in either case, is deemed "unaffordable," **AND**

(c) have household incomes between 100% - 400% of the federal poverty level (FPL) (However, most individuals with an FPL below 138% will be eligible for Medicaid in lieu of a receiving a premium tax credit).

The premium tax credit lowers the cost of premiums on the Exchange for workers who qualify for them.

The ACA also provides cost-sharing subsidies for those with household incomes up to 250% FPL. These subsidies will help lower-income workers and their families pay for out-of-pocket costs, like deductibles and co-insurance charges.

The definition of "household" includes all persons whom the taxpayer claims as a dependent on his/her income tax return. Modified Adjusted Gross Income (MAGI) will be used to determine eligibility for premium tax credits and cost-sharing subsidies starting in 2014.

Question 19: How are the portions of the premium paid by the government and the amount of tax credits an employee is eligible for on the Exchange calculated? [Revised]

The premium tax credit paid by the government for purchasing a product on the Exchange represents the difference between what employees must pay based on a percentage of their household income and the cost of the monthly premium of the second lowest-cost silver plan (a plan with an actuarial value of 70%). For the tax year beginning January 1, 2014, the ACA limits premium contributions by employees to between 2% and 9.5% of household income. For the tax year beginning January 1, 2015, the ACA limits premium contributions by employees to between 2.01% and 9.56% of household income.

The employee determined eligible for the premium tax credit will have the choice to apply some or all of the credit toward the cost of coverage on a monthly basis or wait until they file their income tax form and be reimbursed the credit to which they are entitled. If the employee elects to use the premium tax credit to apply to the premium, it is paid monthly directly to the insurer by the federal government. The FPL used to calculate the credit will be the one in effect on the first day of enrollment for the taxable year (usually the FPL for the year prior to the year in which the credit is awarded).

For example:

1. Take the income for an individual at 225% FPL: $2,095/month. For calendar years beginning January 1, 2015, on the Exchange, a person at this FPL will pay 8.05% of income toward premium contributions, or $168.65.

2. Let's say the monthly premium for the second lowest-cost silver plan is $500/month

3. The enrollee, then, pays $168.65 monthly premium and the federal government will pay a premium tax credit of $331.35/month directly to insurer ($500 minus $168.65 = $331.35).

An individual who chooses to enroll in a less expensive plan than the second lowest-cost silver plan will pay a lower premium and a person who chooses a more expensive plan on the Exchange will pay a higher premium.

If an employee is eligible for both the premium tax credit and the cost-sharing reduction, the employee must choose one of the silver-level plans to take advantage of the cost-sharing reduction.

Question 20: When do employees offered minimum essential coverage qualify for premium tax credits?

Employees in this scenario are eligible to receive premium tax credits if their employer's least expensive plan for single coverage is either:

(a) **unaffordable** (this means, after taking into account an employer's premium contributions, an employee's contributions for **SELF-ONLY** coverage exceed 9.5% (9.56% beginning January 1, 2015) of the employee's **household** income -note that penalties continue to be enforced at 9.5% until further notice),

or

(b) **fails to provide minimum value** (this means a plan's share of the total allowed costs of benefits is less than 60% of those costs—in other words, the plan's premiums pay for less than 60% of medical costs incurred).

The employer will not be penalized if family coverage is unaffordable as long as self-only coverage is affordable (less than 9.5% of MAGI).

Question 21: We pay 100% of the employee-only cost, but only pay 50% of the family cost. Is our plan considered "affordable"?

Yes. Your plan will be affordable because the determination of affordability is based on the employee's required contribution for self-only coverage. Because your employees pay less than 9.5% of their household income towards the cost of **employee-only** coverage, the plan is considered affordable. This is the case even if the employee contribution for family coverage exceeds 9.5% of the employee's household income.

Question 22: If an employee enrolls in employer-sponsored coverage that fails the affordability and/or minimum value requirements, can the employee obtain a premium tax credit or subsidy resulting in a penalty assessment against the employer?

No. The act of enrolling disqualifies the employee from receiving a premium tax credit or subsidy regardless of the adequacy of the employer's plan.

Question 23: Does the ACA require individuals to have health insurance?

Yes, in most cases. This was one of the key issues examined by the Supreme Court, and the court decided the individual mandate was constitutional. The ACA requires, starting in 2014, that individuals maintain "minimum essential coverage." That's coverage obtained through an employer, Medicare, Medicaid, the individual market, a health insurance exchange, a retirement system, or in other ways. Minimum essential coverage, again, generally doesn't describe the level of benefits, but primarily describes **the source**. Some people will NOT need to comply with this requirement, including those not in the country lawfully, people who are incarcerated, and people with qualifying religious and/or financial hardship exemptions.

Question 24: What will it cost workers who do not obtain health coverage beginning in 2014 and are subject to the individual mandate? [Revised]

The law creates a penalty for some people who don't have minimum essential coverage and are not eligible for an exemption from purchasing coverage.

Penalties will be the greater of a percentage of income or a flat dollar amount, but in no instance will they be higher than the national average premium for a bronze-level, Exchange-based plan for the applicable family size. The **percentage-based penalty** is based on an adjusted household annual income and will be 1 percent in 2014, 2 percent in 2015, and 2.5 percent in subsequent years. The **flat-dollar amount** will be assessed on the taxpayer and any dependents at the rate of $95 in 2014, $325 in 2015, and $695 in 2016 and subsequent years.

Individuals and their dependents won't face a penalty, even if they don't have coverage, if they have been determined to have suffered a hardship with respect to obtaining coverage, although we don't yet know how that determination will be made. Also, for calendar years beginning January 1, 2014, individuals (and their dependents) won't face a penalty if their income is low enough so that they are below the federal tax filing thresholds, or if the employee contribution requirement for self-only coverage is above 8 percent of household income (with the 8 percent adjusted to 8.05% for calendar years beginning January 1, 2015). In this case, self-only coverage refers to an employer-sponsored plan or the lowest-cost individual plan available on a health insurance exchange in the state in which the individual resides.

If a taxpayer fails to pay the penalty, the Internal Revenue Service can attempt to collect it by reducing the amount of any future tax refund. No other sanction, civil or criminal, is possible.

Question 25: How will employers be notified if an employee receives a premium tax credit, and when must they pay an assessed penalty?

The IRS will notify employers if an eligible employee has been granted a premium tax credit and, thus, triggered an employer penalty. The IRS may assess penalties on a monthly basis, and the monthly penalty will be 1/12th of the annual penalty. Employers are expected to be notified in 2014 if an eligible employee was granted a premium tax credit. However, when a school will actually become subject to penalty depends upon whether the school qualifies for transition relief. In most cases, a school with 50 to 99 employees will not be subject to penalty prior to July 1, 2016 (beginning of the 2016 plan year). In most cases, a school with 100 or more employees will not be subject to penalty prior to July 1, 2015 (beginning of the 2015 plan year).

Heads up: It is still unclear as to how long employers will have to pay a penalty after receiving notice, which is seminal to answering the question of how to factor these potential costs into school budgets. More guidance on this will be forthcoming.

Question 26: Will we be able to file an appeal if we disagree with the Exchange's determination that our employee qualifies for premium tax credits or cost-sharing reductions because our plan does not offer qualifying coverage?

Yes. HHS intends to make an appeal process available that will allow you to appeal a determination that your employee is eligible for premium tax credits or cost-sharing reductions in part because your plan is either unaffordable or the plan's share of the total allowed cost of benefits is less than 60%.

You will have 90 days from the date you are notified that one of your employees qualified for premium tax credits to file your appeal. You will be permitted to submit evidence to support your appeal, including information pertaining to whether coverage was offered to the employee, whether the employee had elected such coverage, the employee's portion of the lowest-cost, minimum-value plan you offer, and whether or not the employee is in fact employed by you.

Premium Cost-Sharing & Certain Employer Reporting Obligations

Question 27: Does the ACA indicate who has to pay for whatever increased benefit costs may result from health care reform?

No.

Question 28: Do employers have reporting obligations to employees regarding eligibility for and the services of the Exchange, premium tax credits and cost-sharing subsidies?

Under the ACA, schools must provide **each employee** a **written notice** concerning the Exchange. The initial notice should have been sent to all employees before October 2013. Each new employee must be provided this notice within 14 days of date of hire.

***Heads Up: Revised Notices are available at** <u>http://www.dol.gov/ebsa/pdf/FLSAwithplans.pdf</u> **and** <u>http://www.dol.gov/ebsa/pdf/FLSAwithoutplans.pdf</u>.*

Heads Up: There are additional reporting requirements under Code Sec. 6055 and 6056 that apply to all schools with at least 50 employees. The guidelines will be addressed in a separate VEHI document.

Question 29: Are we required to use the revised COBRA Model Notice?

As best practice, the revised Model COBRA Notice should be used. By providing the updated information, a former health plan participant becomes aware that coverage is available through the state Exchange as an alternative to purchasing employer coverage through COBRA.

The modified COBRA notification informs COBRA-eligible employees of their options on the Exchange [now called a "marketplace"]. The revised Notice also informs COBRA-eligible individuals of the elimination of pre-existing conditions.

Waiting Periods for Insurance Coverage

Question 30: We currently have a 180-day waiting period before coverage is effective. When will that have to be changed?

For plan years starting on or after January 1, 2014, your waiting period cannot be longer than 90 calendar days and must be effective as of the first day of your plan year beginning on or after January 1, 2014.

Question 31: Can we change our waiting period to three months instead of 90 days?

No. This is not permitted because three consecutive months in some cases may result in a waiting period that is more than 90 days. All calendar days are counted toward the 90-day limit beginning on the employee's start date, including weekends and holidays.

More ACA Mechanisms for Determining Who is a Full-Time Employee

This section is applicable to "large" school districts that employ variable-hour workers. The great majority of school employees are contracted for a set number of hours. However, there may be categories of employees— for example, bus drivers who regularly cover additional driving duties (field trips and sporting events) beyond their normal runs, and, perhaps, substitutes who are not on a long-term contract but work, on average, 30 hours per week covering multiple work situations for the <u>same employer</u>.

Question 32: The federal government gives employers the option of employing a "look-back" or "measurement" period to determine if and how much they may owe in penalties. How does this work?

In general, the IRS is planning to permit employers to "look back" over a period of **no less than three and no more than 12 months** to calculate whether, on average, an employee worked at least 30 hours a week. The hours worked during the look back period would be averaged over the whole period, **not** on a month-to-month basis. So, if an employee worked at least an average of 30 hours a week during the look back period, the employer would classify the employee as full time into the future for at least as long as the look back period. If the employee was deemed part time during the look back period, the employee would be considered part time moving forward until the next required measurement period. Many specific situations that we don't discuss here are also addressed in final regulations, including how to deal with employees who are newly hired and workers who are rehired after losing a job.

Keep in mind that this safe harbor would be **optional**. An employer could always just recognize that its employees were full time for purposes of the penalty. The IRS has also indicated that employers could apply alternative approaches to calculating employees' hours, including assuming that eight hours were worked in any day in which at least one hour was worked. Be cautioned, however, that if you fail to take into account a number of full time employees by not using the look back period, the employer may not be considered to be offering coverage to substantially all full-time employees and could then be subject to the penalty assessed by counting all full-time employees, even if many are offered health coverage.

Question 33: If employers use look-back/measurement periods, which hours must be counted when calculating the number of hours worked in the period?

For 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.

For non-hourly employees (for example: if a school bus driver is paid by route, or if a coach receives a stipend), you are permitted to calculate the number of hours of service using one of three methods. You may apply different methods for different classifications of non-hourly employees, so long as the classifications are reasonable and consistently applied. The three methods are:

1. Counting actual hours of service (as in the case of hourly employees) 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; or

2. Using a days-worked equivalency method whereby the employee is credited with eight hours of service for each day; or

3. Using a weeks-worked equivalency of 40 hours of service per week.

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 (i.e., employees working three 10-hour days).

Question 34: Do we have to make the look-back/measurement period the same for all employees?

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

1. Each group of collectively bargained employees covered by a separate collective bargaining agreement;

2. Collectively bargained and non-collectively bargained employees;

3. Salaried employees and hourly employees;

4. Employees whose primary places of employment are in different states.

Question 35: At what point would an employer have to stop using the initial look-back/measurement periods and transition employees to ongoing status?

Once a new employee, who has been employed for an initial measurement period, has been employed for 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 first test a new variable hour employee whose start date is February 12 for full-time status 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.

Question 36: We intend to adopt a 12-month measurement period and a 12-month stability period but are facing time constraints in getting our systems set up to be ready to enroll full-time employees on January 1, 2015. Are there any other options?

Yes. Solely for purposes of stability periods beginning in 2015, you may adopt a transition measurement period that is shorter than 12 months but that is no less than 6 months long and that begins no later than July 1, 2014 and ends no earlier than 90 days before the first day of the plan year beginning on or after January 1, 2015 (90 days being the maximum permissible administrative period). For example, you could use a measurement period from April 15, 2014 through October 14, 2014 (six months), followed by an administrative period ending on December 31, 2014 with a 12-month stability period starting on January 1, 2015.

In 2016, a transition measurement period may not be used. Therefore, if a 12-month measurement period is used, a 12-month stability period must also be used.

Question 37: 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.

Question 38: If one of our new variable hour employees is promoted to a permanent full-time position during their initial measurement period, how should his/her eligibility for coverage be treated?

For a new variable hour or seasonal employee who changed employment status to full-time during their initial measurement period, you should treat her as a full-time employee as of the first day of the fourth month following the change in employment status.

Question 39: We 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 26 consecutive weeks, 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 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.

Question 40: We occasionally hire temporary employees on a full-time, 40-hour schedule. How should we classify them in order to determine if we should be offering them coverage?

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 at the start date, the period of employment at more than 30 hours per week is reasonably expected to be of limited duration and 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. However, you must assume that a temporary employee will work for the entire duration of the initial measurement period, so you will not be able to automatically classify them as variable-hour employees because of their limited duration.

Question 41: What happens if the change in employment status occurs during a stability period?

An ongoing employee's change in employment status during the stability period would not affect his or her status as a full-time employee or non-full-time employee for the remainder of that stability period.

New Rules on Determining Employee Status under the Final Regulations

Question 42: Has the IRS provided any additional guidance on how to determine whether an employee is variable?

Yes. The IRS cautions that no single factor is determinative. However, it has provided the following considerations for employers to utilize in making their determinations regarding whether an employee is variable:

- Is the employee replacing a full-time employee?
- Have hours of service fluctuated during recent measurement periods?
- Was the job advertised as full-time or averaging 30 or more hours per week?

Question 43: Is there an exception for student workers?

Yes. However, the exception is limited in scope. Under the exception, an employer is not required to count the hours of a student who is part of federal work study program or substantially similar state program.

Heads Up: There is no general exception for student employees or student externs/interns.

Question 44: Is there an exception for volunteers?

Yes. An employer is not required to count the hours of a bona fide volunteer. In order to qualify, the volunteer:

1. Must be an employee of a section 501(c) organization; and
2. Cannot receive compensation that exceeds reasonable expenses.

Nominal fees customarily paid by similar entities are acceptable.