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## Determining Full-Time Employee Status for Purposes of the Employer Shared Responsibility Provisions under the ACA

It is important for employers to know which employees are considered to be a full-time employee for two reasons. First, the number of full-time employees impacts whether the employer can be penalized for a failure to offer affordable coverage with minimum value, a determination which is based on the employer's size. Additionally, determining the number of full-time employees assists with identifying the employees who could trigger a penalty for an employer under the Patient Protection and Affordable Care Act (ACA). The focus of this article is on determining employee status for purposes of the Employer Mandate penalty calculations, not on determining employee status for purposes of determining employer size.<sup>1</sup>

### Calculating Hours of Service

Under the ACA, an employer identifies its full-time employees based on each employee's hours of service. Generally, "hours of service" include any hour for which an employee is paid or entitled to payment when duties are not performed, such as vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty, or leave of absence. For purposes of the 4980H penalties (i.e., the \$2,000 penalty for failure to offer coverage and the \$3,000 penalty for failure to offer coverage that provides minimum value and is affordable<sup>2</sup>), an employee is a full-time employee for a calendar month if he or she averages at least 30 hours of service per week or 130 hours of service for that month.

Based on the final regulations, employers may determine the hours of service for hourly and non-hourly employees (e.g., salaried employees, per diem employees, etc.) using either the monthly measurement method or the look-back method. An employer may use the monthly measurement method and the look-back method for different categories of employees, but only the four categories of employees specified in the regulations may be used: (1) collectively bargained employees and non-collectively bargained employees; (2) each group of collectively bargained employees covered by a separate collective bargaining agreement; (3) salaried employees and hourly employees; and (4) employees whose primary places of employment are in different states. This means that an employer could use the monthly measurement method for salaried employees and the look-back method for hourly employees, but an employer

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<sup>1</sup> For information on determining an employer's status as an applicable large employer, see our article "Final Regulations on How to Calculate Applicable Large Employer Status" click [here](#) for a copy.

<sup>2</sup> The \$2,000 and \$3,000 penalties are indexed annually.



cannot use the monthly measurement method for some hourly employees and the look-back method for other hourly employees.

Each of these methods is discussed in more detail below, but first, please review the general rules for which hours to count applicable to both methods.

### ***Hourly Employees***

For hourly employees, employers must generally calculate hours of service based upon actual hours worked and hours for which payment is due even if duties are not performed (i.e., paid time off for vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military leave, or other leave of absence). For more information about when employees must be credited with hours of service, please see our article, “What Counts as an Hour of Service” available [here](#).

**Fast Fact:** The final regulations introduced another method to determine hours of service for employers not using the “look-back measurement method.” This method is called the “monthly measurement method.”

### ***Non-Hourly Employees***

For non-hourly employees, one of three methods may be used:

- (1) actual hours worked and hours for which payment is due even if duties are not performed (i.e., paid time off for vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military leave, or other leave of absence) (for more information when employees must be credited with hours of service, please see our article, “What Counts as an Hour of Service” available [here](#));
- (2) days-worked equivalency - employees are credited with eight hours of service for any day during which the employee would be due one hour of service for an actual hour worked or for which payment is due (e.g., if the employee worked for one hour on Monday, the employee would be credited with eight hours of service for Monday); or
- (3) weeks-worked equivalency - employees are credited with forty hours of service for each week in which the employee would be due one hour of service for an actual hour worked or for which payment is due (e.g., if the employee worked for one hour on Monday, the employee would be credited with forty hours of service for that week).

The days-worked and weeks-worked equivalency methods are intended to be the same as the equivalency rule approach for crediting hours of service under an employee pension benefit plan. Employers may be familiar with those rules.

Note that an employer may not use the days-worked equivalency or weeks-worked equivalency method if doing so would result in a substantial understatement of an employee's hours causing the employee not to be considered full-time or understate the service hours of a substantial number of employees. For example, assume an employee actually worked 80 hours during one week and 60 hours during the following week, but no additional hours for the month. In this example, using the weeks-worked equivalency method would result in crediting the employee with only 80 hours of service, but the employee actually worked 140 hours of service and would otherwise be considered as a full-time employee for the month.

An employer must use one of the three methods above for non-hourly employees, but the employer is not required to use the same method for all non-hourly employees so long as the categories used are reasonable and consistently applied. For example, an employer may use one method for non-hourly-paid cashiers and another method for non-hourly-paid stockers. Also, individual members of a controlled group are not required to use the same method as other members of the same controlled group. Thus, one wholly owned subsidiary may use actual hours worked to track hours for non-hourly employees, and another wholly owned subsidiary in the same controlled group could use the days-worked equivalency method to calculate hours of service for its non-hourly employees. Further, an employer may change its method of calculating hours for non-hourly employees (or even a sub-group of non-hourly employees) each calendar year.

## **Monthly Measurement Method**

If an employer does not use the look-back measurement method to calculate employees' hours of service, the employer must use the monthly measurement method. Using this method, an applicable large employer will determine each employee's status by counting that employee's hours for each calendar month.

### ***Initial Employment***

Under the monthly measurement method, an employer will not be liable for either a Section 4980H(a) or Section 4980H(b) penalty for the first three months an employee is employed if the employee meets the eligibility requirement for the plan, but is not covered because the employee is in a waiting period, so long as the employee is

offered coverage no later than the first day of the first month following that three-month period. (To avoid a 4980H(b) penalty, the coverage offered must also provide minimum value.) For example, if an employer uses the monthly measurement method and hires a new employee on March 1 and that employee averages 130 hours per month in March, April, and May, the employer will not be subject to any penalty for that employee during the months of March, April, and May so long as the employee is offered coverage as of June 1 of that same year. As a practical matter, due to the limitation on waiting periods to 90 days under the ACA, the employee would most likely be offered coverage no later than the first day of May (this employee must be offered coverage by May 29 under the ACA limitation on waiting period lengths to 90 days).

### ***Using Weekly Periods***

To provide flexibility and to reduce administrative burden on employers, the final regulations permit employers to use successive one-week periods to determine an employee's status for a calendar month. This method is referred to as the "weekly rule." Under the weekly rule, full-time status is based on hours of service over four-week periods for certain months and five-week periods for other months. For calendar months calculated using a four-week period, an employee with at least 120 hours of service will be considered as full-time for that month. For calendar months with five-week periods, an employee with at least 150 hours of service will be considered to be a full-time employee for that month. The period measured for each month must include either the week that includes the first day of the month, or the week that includes the last day of the month, but not both. The final regulations include the following example.

**Example:** (i) **Facts.** Employer Y uses the monthly measurement method in combination with the weekly rule for purposes of determining whether an employee is a full-time employee for a particular calendar month. For purposes of applying the weekly rule, Employer Y uses the period of Sunday through Saturday as a week and includes the week that includes the first day of a calendar month and excludes the week that includes the last day of a calendar month (except in any case in which the last day of the calendar month occurs on a Saturday). Employer Y measures hours of service for the five weeks from Sunday, December 27, 2020, through Saturday, January 30, 2021, to determine an employee's full-time employee status for January 2021, for the four weeks from Sunday, January 31, 2021, through Saturday, February 27, 2021, to determine an employee's status for February 2021, and the four weeks from Sunday, February 28, 2021, through Saturday, March 26, 2021, to determine an employee's status for March 2021. For January 2021, Employer Y treats an employee as a full-time employee if the employee has at least 150 hours of service (30 hours per week x 5 weeks). For February 2021 and March 2021, Employer Y treats an employee as a full-time employee if the employee has at least 120 hours of service (30 hours per week x 4 weeks).

(ii) **Conclusion.** Employer Y has correctly applied the weekly rule as part of the monthly measurement method for determining each employee's status as a full-time employee for the months January, February, and March 2021.

### ***Rehired Employees***

Under the final regulations, if an employee has a period of at least 13 weeks (26 weeks for an employee of an academic institution) during which no hours of service were credited for that employee, then that employee may be treated as an employee whose employment was terminated and who is a rehired employee – rather than a continuing employee – upon resuming services for the employer.

**Example:** Employer A hires an employee on February 1, 2019 and that employee works as a full-time employee from February 1, 2019 through December 31, 2019, during which time, the employee has coverage through Employer A that has minimum value. The employee works for Employer B from January 1, 2020 through December 31, 2020, but returns to Employer A as of January 1, 2021. The employee may be treated as a new employee by Employer A and be subject to any applicable waiting period prior to gaining coverage under Employer A's plan (that has minimum value). Employer A will not be penalized for the months the employee is without coverage during that employee's new waiting period so long as Employer A offers coverage with minimum value as of the first day of the fourth month following the employee's date of rehire.

### ***Continuing Employees***

If a rehired employee has a period of less than 13 weeks (26 weeks for an employee of an academic institution) without credit for an hour of service, the employee will be treated as a continuing employee under the monthly measurement method. In this case, the employer must offer coverage as of the first day that the rehired employee is credited with an hour of service, or if later, as soon as administratively practicable. The regulators have stated that providing coverage on the first day of the calendar month following the day the employee first received credit for an hour of service would satisfy this rule.

### ***Rule of Parity***

Under a "rule of parity," an employer may treat a shorter-term employee as a new hire if the employee's break in service is at least four weeks (but less than 13 weeks or 26 weeks for an employee of an academic institution) and is as long as the employee's preceding period of employment. For example, suppose an employee works for six weeks, then is furloughed for eight weeks, and then returns to work. Because the period the employee was not working was at least four weeks long and was longer than his period of employment, he is considered to have had a break in service and may be treated as a new employee.

**Example:** If an employee works for Employer C for two weeks, terminates employment, but rejoins Employer C after six weeks, that employee may be treated as terminated and rehired as a new employee under the monthly measurement method.

### ***Special Unpaid Leave and Employment Breaks***

The averaging method for special unpaid leave and employment break rules (for academic institutions) does not apply under the monthly measurement method, even if the employer is an academic institution. The reason for this rule is that the monthly measurement period does not average hours of service over a particular period of time, but instead determines hours of service for a particular month. See below for more information on special unpaid leave and employment break rules when using the look-back method.

### ***Employees Transferred to International Positions***

Employers using the monthly measurement method may treat employees as having terminated employment when transferred to certain international positions so long as certain conditions are met. Those conditions are as follows:

1. The international position must be with the same applicable large employer (or a member of the same controlled group);
2. The international position must be either anticipated to continue indefinitely or last at least 12 months;
3. Substantially all of the compensation must constitute income from sources outside of the United States; and
4. The rules related to rehired employees are followed (i.e., if the employee has an international position meeting the conditions above for at least 13 weeks, the employee may be treated as a new employee upon rehire).

Our article [“Special Issues for Certain Workers under the ACA”](#) also discusses transfers between domestic and foreign employers within the same controlled group.

### ***Changes in Employment Status***



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Employers using the monthly measurement method may have employees who move from part-time to full-time positions. The final regulations provide that if such an employer provides coverage no later than the first day of the first full calendar month following the period of three full calendar months after the change in position, it will not be subject to an Employer Mandate penalty for the months the employee was considered to be part-time or the first three months the employee was a full-time employee, but the employer could be penalized for the first three calendar months following the change to full-time if the coverage does not provide minimum value. Furthermore, after the three-month period following the change in status, if the coverage is either not affordable or does not provide minimum value, the employer could be subject to penalties under the Employer Mandate.



**Example: (i) Facts. Employer Z uses the monthly measurement method.**

Employer Z hires Employee A on January 1, 2020. For each calendar month in 2020, Employee A averages 20 hours of service per week and is not eligible (or otherwise eligible) for an offer of coverage under the group health plan of Employer Z. Effective January 1, 2021, Employee A is promoted to a position that is eligible for an offer of coverage under a group health plan of Employer Z, following completion of a 90-day waiting period. For January 2021 through March 2021, Employee A meets all of the conditions for eligibility under the group health plan, other than completion of the waiting period. The coverage that would have been offered to Employee A under the terms of the plan, but for the waiting period, during those three months would have provided minimum value. Effective April 1, 2021, Employer Z offers Employee A coverage that provides minimum value. Employee A averages 40 hours of service per week for each calendar month in 2020.

**(ii) Conclusion.** Because Employer Z offers minimum value coverage to Employee A no later than the first day following the period of three full calendar months beginning with the first full calendar month in which Employee A is otherwise eligible for an offer of coverage under a group health plan of Employer Z, Employer Z is not subject to an assessable payment for January 2021 through March 2021 under Section 4980H by reason of its failure to offer coverage to Employee A during those months. For calendar months after March 2021, an offer of minimum value coverage may result in an assessable payment under Section 4980H(b) with respect to Employee A for any month for which the offer is not affordable and for which Employer Z has received a notice that the employee is eligible for premium assistance. Employer Z is not subject to an assessable payment under Section 4980H by reason of its failure to offer coverage to Employee A during each month of 2020 because for each month of 2020, Employee A was not a full-time employee.

See Gallagher Article, [“Handling Changes in Employment Status When First Position is Subject to the Monthly Measurement Method.”](#)

## Look-Back Measurement Method

Under the look-back measurement method, an employer may determine the status of an employee as a full-time employee during a future period (referred to as a stability period), based upon the hours of service of the employee in a prior period (referred to as a measurement period). The look-back measurement method uses the measurement, administrative, and stability period safe harbors. Note: the look-back measurement method for identifying full-time employees is available only for purposes of determining and computing liability for an Employer Mandate penalty, and not for purposes of determining if the employer is an applicable large employer. See our article [“Final Regulations on How to Calculate Applicable Large Employer Status”](#) for more information on determining when an employer is an applicable large employer.

**Fast Fact:** For purposes of Section 4980H, a seasonal employee is defined by the final regulations as “an employee in a position for which the customary annual employment is six months or less.”

When using this method, employers must categorize employees as either full-time (i.e., non-part-time, non-variable hour, non-seasonal), part-time, variable hour, or seasonal employees. Full-time employees are those who are hired into positions that will require the employee to work an average of 30 or more hours per week (or 130 hours per month). A part-time employee is someone who is hired into a position that will clearly average fewer than 30 hours per week. A variable hour employee is someone whose hours at the date of hire cannot be determined to average 30 or more hours per week or be less than 30.

For purposes of Section 4980H only, a seasonal employee is defined as “an employee in a position for which the customary annual employment is six months or less.” “Customary” means that the nature of the position typically lasts for six months or less and that the period of employment begins at approximately the same time each year. Examples of seasonal employees under this definition would include retail employees hired for holiday or back-to-school shopping seasons, summer camp counselors, and summer lawn crews. The final regulations permit exceptions for unusual extensions. For example, if a ski instructor at a resort normally has an annual employment period of six months, but due to an unusually long snow season, that instructor’s annual employment lasts seven months, she may still be considered to be a “seasonal employee.”

The final regulations clarify that the determination as to whether an employee is a full-time employee is based upon facts and circumstances such as 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) as requiring hours of service that would average 30 or more (or less) hours per week.

### ***Measurement Period Adjustments to Accommodate Payroll Periods***

Employers may adjust measurement periods to accommodate for payroll periods by treating as a measurement period a period that ends on the last day of the payroll period preceding the payroll period that includes the date that would otherwise be the last day of the measurement period, so long as the measurement period begins on the first day of the payroll period that includes the date that would otherwise be the first day of the measurement period. For example, an employer using the calendar year as its twelve-month measurement period could exclude the entire payroll period that includes January 1 (of the current year) if it includes the entire payroll period that includes December 31 (of the prior year).

### ***Different Periods may be used for Different Categories of Employees***

The determination of full-time (or non-full-time) status must be made on a uniform and consistent basis for all employees within the same category of employees. Thus, employers may use different measurement, administrative, and stability periods for different categories of employees, but only as long as those categories fall within one of the following:

- (A) Collectively bargained employees and non-collectively bargained employees,
- (B) Each group of collectively bargained employees covered by a separate collective bargaining agreement,
- (C) Salaried employees and hourly employees, and
- (D) Employees whose primary places of employment are in different states.

The final regulations do not permit employers to develop their own customized categories.

### ***Treatment of New Variable Hour, Seasonal, and Part-Time Employees under the Look-Back Method***

For new variable hour, seasonal, and part-time employees, employers may determine whether the new employee is a full-time employee using an initial measurement period of no less than three consecutive months and no more than 12 consecutive months that begins 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).

The stability period must begin immediately after any initial administrative period. The administrative period can be no longer than 90 days, but the combined length of the initial measurement period (which must not exceed 12 months) and the initial administrative period (which cannot exceed 90 days) can be no longer than 13 and a fraction of a month. The combined initial measurement period and initial administrative period (totaling no more than 13 and a fraction of a month) cannot extend beyond the last day of the first calendar month beginning on or after the first anniversary of the employee's start date. The final regulations clarify that any period of time between the employee's start date and the beginning of the initial measurement period is also counted toward the 90-day limit on the initial administrative period.

The initial administrative period, if any, is followed by the initial stability period. If the new variable hour, seasonal, or part-time employee works on average at least 30 hours per week during the initial measurement period, the employee will be considered to be a full-time employee for the following initial stability period. If the new variable hour, seasonal, or part-time employee works on average less than 30 hours per week during an initial measurement period, the employee will be considered non-full-time for the following initial stability period unless a change in employment status occurs (e.g. moving from a variable hour to a non-variable hour, full-time position). To determine whether a new non-seasonal employee is a full-time employee, the final regulations indicate that factors such as the following should be considered:

- (A) Whether the employee is replacing an employee who was (or was not) a full-time employee;
- (B) The extent to which hours of service of ongoing employees in the same or comparable positions have varied above and below an average of 30 hours per week; and
- (C) Whether the position was advertised or otherwise communicated as requiring hours of service of an average of at least 30 hours per week.

The length of an applicable initial stability period depends upon whether an employee is determined to be non-full-time or full-time during an initial stability period. For employees determined to be full-time during an initial measurement period, the initial stability period must be the same length as the stability period for ongoing employees. The initial stability period must also be at least six consecutive calendar months and cannot be shorter than the initial measurement period. Thus, if an employer applies a

three-month initial measurement period, an employee determined to be full-time must be provided with a six-month initial stability period.

If an employee is determined not to be full-time during the initial measurement period (i.e., working less than an average of 30 hours per week), the initial stability period duration may not be more than one month longer than the initial measurement period. Additionally, the duration of the initial stability period cannot exceed the duration of the first full standard stability period, plus any associated administrative period. Thus, for example, if an employer uses a three-month initial measurement period, and an employee is determined not to be full-time during that initial measurement period, the employer may only use a four-month initial stability period during which the employee will be considered non-full-time.

The table below illustrates the duration of each period of the look-back method for new variable hour, seasonal, and part-time employees.

	Duration	Comments
<b>Initial Measurement Period</b>	3 -12 months from any date between the employee's start date or the first of the month following the date of hire.	
<b>Initial Administrative Period</b>	90 days or less.	<p>Any period of time between the employee's start date and the beginning of the initial measurement period is also counted toward the 90-day limit on the initial administrative period.</p> <p>Combined length of the initial measurement period and the administrative period cannot exceed 13 months plus a fraction of a month for newly hired employees.</p>

	Duration	Comments
<b>Initial Stability Period</b>		
<ul style="list-style-type: none"> <li><b>Employee is full-time during initial measurement period</b></li> </ul>	At least 6 months, but not shorter than the initial measurement period.	Duration must be the same length as the standard stability period for ongoing employees.
<ul style="list-style-type: none"> <li><b>Employee is not full-time during initial measurement period</b></li> </ul>	Not more than 1 month longer than the initial measurement period.	Duration cannot exceed the duration of the first full standard stability period, plus any associated administrative period.

### ***Transitioning from a New Employee to an Ongoing Employee***

If a new non-variable hour, non-seasonal employee within a category of employees (e.g., hourly employees) for whom the employer has decided to use the look-back method is reasonably expected at the start of his or her employment to be a full-time employee, the employee's status is determined based upon the hours of service for each calendar month. Once a new employee becomes an ongoing employee, the rules for determining status as an ongoing employee apply. In other words, if an employer hires an employee who is reasonably expected to work 40 hours per week, then the employer will classify that employee as a full-time employee and offer coverage under the regular eligibility rules for new employees (e.g., impose a 30-day waiting period before coverage begins).

After the individual has been employed long enough to transition to an ongoing employee (i.e., is employed on the first day of a standard measurement period), then the standard measurement and stability rules for ongoing employees apply. If the employee qualifies as full-time during the initial measurement period, the employee must be treated as full-time during the initial stability period following his initial measurement period. This is true even if the employee is not determined to be full-time during the standard measurement period, in which case the employee would be treated as full-time for the period during which the initial stability period overlaps the first standard stability period occurring during the employee's employment. If the employee was not full-time during the initial measurement period, but works sufficient hours to qualify as full-time during his first standard measurement period, he must be treated as full-time for the entire standard stability period following the standard measurement period.

### ***Treatment of Ongoing Variable Hour Employees***

Ongoing variable hour employees are those employees who have been employed for at least one standard measurement period. The standard measurement period may be a period from three to twelve months long. If an employer chooses a twelve-month standard measurement period, the employer may use the calendar year, a non-calendar year plan year, or a different twelve-month period that ends prior to the start of the employer's annual enrollment period. If a variable hour employee is determined to have averaged at least 30 hours per week during a standard measurement period, then that employee is a full-time employee during the standard stability period for purposes of medical coverage so long as he or she remains employed, regardless of the number of hours worked. Coverage must begin as of the first day of the new stability period, which must begin immediately following any administrative period, in order to avoid Employer Mandate penalties. The administrative period must immediately follow the standard measurement period and can be no longer than 90 days. In addition, the administrative period cannot lengthen either the measurement period or the stability period. The standard administrative period will overlap with the prior standard stability period so that during any applicable administrative period for ongoing employees following a standard measurement period, ongoing employees who are eligible for coverage based upon their status as a full-time employee during a prior measurement period will continue to be offered coverage.

If a variable hour employee is determined not to average at least 30 hours per week during a standard measurement period, the employer may treat the employee as not a full-time employee for the following standard stability period.

Specific rules impact the length of the standard stability period, depending upon whether an individual is determined to be full-time or non-full-time during the standard measurement period. If an employee is determined to be full-time during a standard measurement period, the standard stability period must be the greater of six consecutive calendar months or the length of the standard measurement period. So, if an employer has a nine-month standard measurement period, it must have a nine-month (or greater) standard stability period for employees determined to be full-time during a standard measurement period. For employees determined not to be full-time during a standard measurement period, the stability period cannot be longer than the measurement period. This means, for example, that an employer with a three-month standard measurement period cannot impose a stability period of greater than three months for employees determined **not** to be full-time during that standard measurement period. However, if an employer has a twelve-month standard measurement period, the employer may impose a twelve-month stability period both upon an employee who is





determined not to be full-time during that period and upon an employee who is determined to be full-time.

The table below illustrates the duration of each period of the look-back method for ongoing variable hour employees.

	Duration	Comments
<b>Standard Measurement Period</b>	3 -12 months.	Employer determines the measurement period start and end date.
<b>Standard Administrative Period</b>	90 days or less.	To prevent any potential gaps in coverage for ongoing full-time employees, the administrative period should overlap with the prior stability period.
<b>Standard Stability Period</b>		
<ul style="list-style-type: none"> <li><b>Employee is full-time during standard measurement period</b></li> </ul>	Greater of 6 months or the duration of the standard measurement period.	
<ul style="list-style-type: none"> <li><b>Employee is not full-time during standard measurement period</b></li> </ul>	Cannot be longer than the measurement period.	

### ***Transition from New Variable Hour, Seasonal, or Part-Time Employee to Ongoing Employee***

Once a variable hour, seasonal, or part-time employee has been employed for a full standard measurement period, those employees become “ongoing employees,” and the employer must use the same rules for those employees as other ongoing employees. This means that there is likely to be some overlap between an individual’s initial measurement period and that individual’s first standard measurement period.





If an employee qualifies as a full-time employee during the initial measurement period, then the employee will be considered to be a full-time employee during the initial stability period, so long as the employee remains employed with the employer. If an employee does not qualify as a full-time employee during an initial measurement period, but qualifies as a full-time employee during her first standard measurement period, the employee would be treated as a full-time employee during the standard stability period, but not the initial stability period (even if there would be some overlap in months). If an employee is determined to be a full-time employee during an initial measurement period and thus a full-time employee during the corresponding initial stability period, but then the employee is determined not to be a full-time employee during an overlapping standard measurement period, the employer may not treat the employee as a non-full-time employee until the end of the initial stability period. Likewise, if an employee is determined not to be a full-time employee during an initial measurement period, but is determined to be a full-time employee during an overlapping or immediately following standard stability period, the employee must be treated as a full-time employee during the entire stability period that corresponds with the overlapping or immediately subsequent standard stability period (even if that standard stability period begins before the end of the stability period associated with the initial measurement period).

**Fast Fact:** Once a part-time employee becomes an “ongoing employee,” the employer must apply the measurement, administrative period, and stability rules for that employee, too.

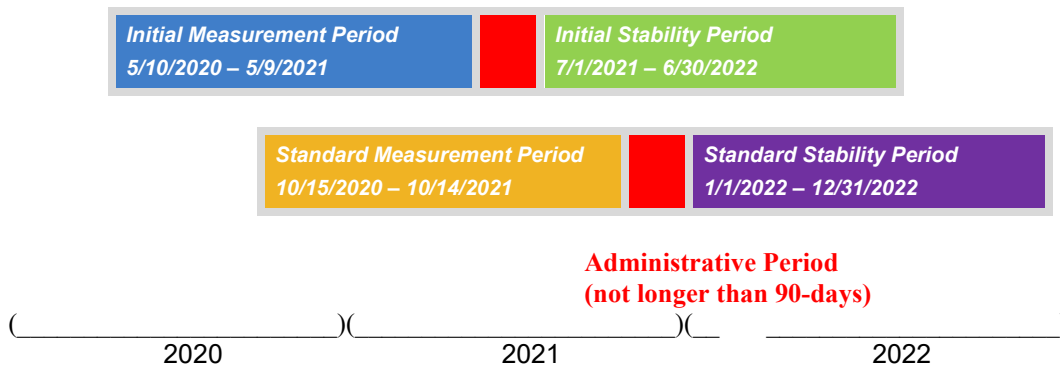
**Example:** (i) Facts. Employer Z hires Employee A on May 10, 2020. Employee A's initial measurement period runs from May 10, 2020, through May 9, 2021. Employee A has an average of 30 hours of service per week during this initial measurement period. Employer Z offers coverage that provides minimum value to Employee A for a stability period that runs from July 1, 2021, through June 30, 2022.

Employer Z has a standard measurement period from October 15, 2020, through October 14, 2021 (Employer Z's first standard measurement period that begins after Employee A's start date). During that time, Employee A has an average of 28 hours of service per week during that period. Employer Z continues to offer coverage to Employee A through June 30, 2022 (the end of Employee A's initial stability period), but does not offer coverage to Employee A for the period of July 1, 2022, through December 31, 2022 (the remainder of the stability period related to Employee A's first standard measurement period).

(ii) Conclusion. Employer Z is not subject to any payment under section 4980H for any calendar month during 2021 with respect to Employee A. Please see illustration below.

**Illustration:**

**1 + Month Administrative Period  
(5/10/21 – 6/30/21)**



Employee A is only covered during period marked as the Initial Stability Period (green box) because the employee did not qualify as a full-time employee during the standard measurement period (marked in the orange box).

***Rehired Employees***

Under the final regulations, if an employee has a period of at least 13 weeks (26 weeks for an employee of an academic institution) during which no hours of service were credited for that employee, then that employee may be treated as a rehired employee rather than a continuing employee upon resuming services for the employer. This means that the employer may begin a new initial measurement period for a new variable hour or seasonal employee. Shorter periods without credit for any hours of service are considered to be “breaks in employment.” Employees who do not qualify as rehired employees under these guidelines will be considered to be continuing employees.

In guidance contained in [Notice 2015-87](#), the IRS noted that the special 26-week rule for academic institutions may also apply in situations where a staffing agency provides employees to the academic institution. Our article [“IRS Provides Guidance on Hours of Service”](#) describes this additional guidance.

### ***Special Rule for Employees on Leave***

An employer that is not an academic institution must determine an employee's average hours of service for a measurement period either by computing the average after excluding any special unpaid leave (defined as unpaid leave for FMLA, USERRA, or jury duty) during that measurement period and by using that average as the average for the entire measurement period, or by treating the employee as credited with hours of service for any periods of special unpaid leave during that measurement 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 a period of special unpaid leave.

An employer that is an academic institution must determine an employee's average hours of service for a measurement period either by computing the average after excluding any special unpaid leave (defined as unpaid leave for FMLA, USERRA, or jury duty) and a break in employment due to a closure of the institution such as a summer break during that measurement period and by using that average as the average for the entire measurement period, or by treating the employee as credited with hours of service for any periods of special unpaid leave during that measurement 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 a period of special unpaid leave. However, the academic institution employer is not required to exclude (or credit) more than 501 hours of service for employment breaks. The 501-hour cap does not apply to special unpaid leave.

### ***Continuing Employees***

Under the look-back method, employees who are treated as continuing employees (and not rehired employees) will retain the status held during an applicable stability period prior to the break in service immediately preceding their return to work. This means that they must be offered coverage upon resumption of services for the employer. "Upon resumption of services" means that the employer must offer coverage as of the first day that the employee is credited with an hour of service or, if later, as soon as administratively practicable. Regulations have stated that the first of the month following the date the employer is credited with an hour of service would satisfy the administratively practicable requirement. If an employee returns during a stability period for which the employee previously declined coverage, the employer will not be required to make a new offer of coverage, but will be considered to have offered coverage for the remainder of the applicable stability period.



## ***Rule of Parity***

Employers may also apply a rule of parity when determining if an employee is a rehired or continuing employee. Under a “rule of parity,” an employer may treat a shorter-term employee as a new hire if the employee’s break in service is at least four weeks (but less than 13 or 26 weeks for an employee of an academic institution) and is as long as the employee’s preceding period of employment..

**Example:** If an employee works for Employer C for two weeks, and terminates employment, but rejoins Employer C after six weeks, that employee may be treated as terminated and rehired as a new employee under the look-back measurement method.

## ***Employees Transferred to International Positions***

Employers may treat employees as having terminated employment when transferred to certain international positions so long as certain conditions are met. Those conditions are as follows:

1. The international position must be with the same applicable large employer (or a member of the same controlled group);
2. The international position must be either anticipated to continue indefinitely or last at least 12 months;
3. Substantially all of the compensation must constitute income from sources outside of the United States; and
4. The rules related to rehired employees are followed (i.e., if the employee has an international position meeting the conditions above for at least 13 weeks, the employee may be treated as a new employee upon rehire).

Our article [“Special Issues for Certain Workers under the ACA”](#) also discusses transfers between domestic and foreign employers within the same controlled group.

## ***Changes in Employment Status***

If an employee begins employment as a seasonal or variable hour employee and has a change in position during her initial measurement period that, if the employee had originally been hired in that position, would have made her a full-time employee (i.e., one that works on average 30 or more hours per week), the employer would not be subject to an Employer Mandate penalty until the first day of the fourth calendar month following the change in employment status if the employer provides coverage at the end of that period, or if earlier, on the first day of the first month following the initial measurement period (if the employee was determined to be a full-time employee based upon the initial measurement period).

However, if an ongoing employee has a change in status during a stability period, that change will not impact his or her classification as a full-time or non-full-time employee during the remainder of the stability period. Instead, that change in status will impact the hours during the current standard measurement period. According to the final regulations, this means that if an employee has an increase in hours (but not a change to a position that would otherwise make the employee eligible for coverage), the employee maintains the status earned during the prior measurement period. Likewise, if an employee experiences a decrease in hours, the decrease does not impact the employee's status for the current stability period.

See Gallagher Articles, "[Handling Changes in Employment Status When First Position is Subject to the Look-Back Method](#)" and "[Handling Changes in Employment Status When First Position is Subject to the Monthly Measurement Method.](#)"

### On-Call Hours

One difficult area in calculating hours of services is handling "on-call" hours. Under Department of Labor standards, an employee who is required to remain on his or her employer's premises or so close thereto that he or she cannot use the time effectively for his or her own purposes is working while on-call. Questions arise under Section 4980H as to whether on-call hours must be counted as hours of service. The final regulations do not provide specific guidance on this issue, but until further guidance is issued, employers of employees who have on-call hours are required to use a reasonable method for crediting hours of service that is consistent with Section 4980H. The final regulations indicate it is not reasonable for an employer to fail to credit an employee with an hour of service for any on-call hour for which payment is made or due by the employer, for which the employee is required to remain on-call on the employer's 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.

This means employers with on-call employees must carefully consider the nature of the on-call requirements for those employees. Hospitals with employees who are required to be on-call on premises, apartment complex managers who have site managers or maintenance workers who must be available on premises by pager, or even resident assistants or counselors who must remain on-call during weekend or night duty at university dormitories are some types of employees that are likely to fall within the requirement to track hours of service for on-call time.

Employees for whom the Monthly Measurement Method or the Look-Back Method may be difficult to administer

The IRS continues to consider additional rules for the determination of hours of service for certain categories of employees whose hours of service are particularly challenging to identify or track or for whom the general rules for determining hours of service may present special difficulties (including adjunct faculty, commissioned salespeople, and airline employees) and certain categories of work hours associated with some positions of employment, including layover hours (for example for airline employees) and on-call hours. Thus, until further guidance is issued, employers are required to use a reasonable method of crediting hours of service for such categories of employees that is consistent with Section 4980H. The preamble to the final regulations includes examples of methods of crediting hours of service that are considered reasonable and others that are considered not reasonable.

Please see our article "[Special Issues for Certain Workers under the ACA](#)" for more information on methods of crediting hours of service for special classes of employees.

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*The intent of this analysis is to provide general information regarding the provisions of current federal laws and regulation. It does not necessarily fully address all your organization's specific issues. It should not be construed as, nor is it intended to provide, legal advice. Your organization's general counsel or an attorney who specializes in this practice area should address questions regarding specific issues.*