

Affordable Care Act's Shared Responsibility Definitions

EDITOR'S NOTE: On March 20, 2013, WorldatWork hosted the first webinar of a three-part town-hall series event aimed to educate benefits practitioners on key elements of the Patient Protection and Affordable Care Act of 2010. Following are the questions asked and submitted during the first town hall, "Large or Small: How is your company defined under the Affordable Care Act?"

Background:

In January 2013, the Department of Treasury and Internal Revenue Service (IRS) issued comprehensive guidance in the form of a Proposed Rulemaking (NPRM), followed by a Question & Answers (Q&A) document, regarding the employer shared responsibility provisions under the Affordable Care Act. While this guidance was issued in the form of an NPRM, it specifically states that for compliance, employers can rely on this NPRM until final rules are issued. It also said that outstanding issues will be addressed in future regulations. In other words, consider this NPRM final until further guidance is issued. All of the answers to the questions below can be attributed to these two documents.

- NPRM "Shared Responsibility for Employers Regarding Health Coverage" (PDF)
- IRS Q & A's on Employer Shared Responsibility Provisions Under the Affordable Care Act (WEBSITE)

Counting Employees

Q Who is considered a full-time employee?

A full-time employee is any employee that works on average 30 hours of service/week or 130 hours of service/calendar month.

According to the IRS, only work in the United States should be taken into account when looking at hours that contribute to a worker's full-time status.

Q What is considered offering coverage to "reasonably all" of your employees?

"Reasonably all" is defined by offering health-care coverage to at least 95% of all full-time employees and their dependents.

Q If a company has more than 50 full-time employees then you really don't have to worry about the full-time employee calculation, correct?

Correct. If you already have over 50 full-time employees, you are deemed a large employer for purposes of the employer mandate. However, if you don't offer health insurance to your employees, then you will have to use the full-time employee calculation to determine your potential tax penalties.

Q Our U.S. operations has <10 employees, however our corporate operations are in Canada, where we have >1800 employees. Are we still considered a small employer?

Yes. According to the IRS, only work in the United States should be taken into account when looking at hours that contribute to a worker's full-time status.

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Counting Employees (CONTINUED)

Q How are hours counted for different types of employees?

Hourly employees: Calculate actual hours from records of hours worked and all types of paid time off.

Non-hourly employees: Calculate the number of hours of service under any of the following three methods:

- (1) Actual hours of service,
- (2) Days worked — count eight hours of service for each day the employee would be required to be credited with at least one hour, or
- (3) Weeks worked — count 40 hours/week for each week the employee would be required to be credited with at least one hour.

New employees: If reasonably expected to work a full-time schedule, count as a full-time employee. If a variable hour employee is not reasonably expected to work a full-time schedule, use the initial measurement period (three to 12 months) to determine status going forward through the stability period.

Seasonal employees: Until this category is further defined, employers “may apply a reasonable good faith interpretation” for 2014. This category is not limited to agricultural and retail workers. Employers are not required to make available coverage to seasonal employees even if they work a full-time schedule.

Q Would unpaid FMLA time be excluded in the hours-of-service calculation?

Yes. It is each hour for which an employee is paid, so paid leave is counted. So, if a person is on FMLA and concurrently using paid leave, that would count, but any unpaid FMLA would not count.

Q How should “rehires” be treated?

If the break in service is at least 26 consecutive calendar weeks for which the employee is not credited with any hours of service, then the employer can treat the employee as a new employee upon rehire.

For periods of less than 26 weeks, the employer may apply the “rule of parity” and treat the employee as having had a termination of employment and who is being rehired as a new employee if:

- (1) The period with no credited service is at least four weeks long, and

- (2) The period with no credited service is longer than the employee’s immediately preceding period of employment.

If the period is less than 26 weeks and the rule of parity does not apply, then the measurement and stability period that applied at the time of the employee’s termination continues to apply upon rehire. Further guidelines in the Notice of Proposed Rulemaking (NPRM) cover certain types of special unpaid leave.

Q For a company with multiple subsidiaries, where each subsidiary has its own employer federal ID, is the whole company the employer or is it each subsidiary with a federal ID that will be judged to be the employer for deciding the size of the company?

The whole company is considered the employer. You will have to add the full-time employees of all subsidiaries and the parent company to see if you are considered a “large employer” and therefore responsible for the employer shared mandate.

Q How does the employer mandate work with companies with common ownership? Are all entities counted separately or combined?

Consistent with longstanding standards that apply for other tax and employee benefits purposes, these types of companies combine their number of full-time employees. Common-law employment principles apply when determining the employment relationship. Below are some examples are, but they do not cover all circumstances:

- Parent-subsidiary group: An entity has an 80% or more controlling interest in another entity.
 - Example:
 - P owns 100% of S-1 and S-2.
 - For all of 2013, P has 10 full-time employees, S-1 has 40 full-time employees and S-2 has 60 full-time employees.
 - P, S-1 and S-2, collectively, are an applicable large employer, and each one is an applicable large employer member for 2014.
- Brother-sister group: The same five or fewer people (or trusts/estates) together own at least 80% of each entity and, taking into account the ownership interest of each owner only to the extent identical with respect to each entity, the owners hold more than 50% of each entity.

Affordable Care Act's Shared Responsibility Definitions

Temporary Workers or Independent Contractors

Q Are independent contractors (ICs) calculated into full-time employees?

No, ICs are not considered employees of the employer who hires them, but make sure they are really independent contractors.

Q Are contractors and temps who are payrolled through a temp agency counted as our “employees”?

Independent contractors are not counted as employees, but temporary employees are a bit more complicated. Due to concern over how temporary employees are used and how their hours are counted, the agencies have requested input and intend to develop a safe

harbor/“anti-abuse rules” in the near future. Expect the IRS to discourage employers from taking advantage of any regulatory loopholes.

Q Is there guidance regarding treatment of per diem employees (fluctuating schedule) or do we use the guidelines outlined regarding counting hours worked, W-2 wages, etc.?

Per diem employees, as a category, are not specifically mentioned by name in the guidance, but if they are on a fluctuating schedule, one would assume that they should be treated as variable hour employees when calculating and measuring hours worked.

Seasonal Employees

Q When was guidance offered on the definition of seasonal employees and not having to include them?

Guidance regarding seasonal employees was covered in both the most recent NPRM and Q&As issued by Treasury and the IRS. The guidance specifically addresses that the Department is reserving that definition for future guidance.

Q We are a large employer with 400 full-time staff (not counting any full-time equivalents) that employs about 600 seasonal staff during the year. If I understand this correctly, we do not need to provide health coverage to these seasonal staff members, and if they go into the state exchange, we would not be penalized. Is that accurate?

Yes. According to current guidance and until further guidance regarding this issue is provided, employers “may apply a reasonable good faith interpretation” for 2014. For now seasonal employees are not limited to agricultural and retail workers, and employers are not required to make available coverage to seasonal employees even if they work a full-time schedule.

Dependent Coverage

Q What is considered a dependent?

A dependent is considered a son, daughter, stepson, stepdaughter, adopted child, child placed for adoption and foster child up to the age of 26.

Q Are children of domestic partners included in the definition?

The guidance does not specifically address this issue.

Q What if a parent keeps a child on their health-care plan through college then child graduates and gets a job and drops parent’s plan in lieu of their own. Child is then laid off at age 24. Can they easily return to parent’s plan until age 26?

The ease of returning to the plan has not been addressed specifically, but to meet the requirements of the mandate, the child must be allowed to return to the parent’s plan up to the age of 26.

Dependent Coverage (CONTINUED)

Q Can dependents with disabilities be covered beyond age 26 under the new plan?

The NPRM only requires that at a minimum, to meet the shared mandate requirements, eligible large employers must offer coverage to all full-time employees and their dependents. The NPRM defines dependents as children up to age 26. This is the minimum requirement. Employers can design plans that are more generous than the minimum requirements. However employers will have to consider the excise tax down the road when it kicks in 2018. This tax will penalize employers that offer high-cost plans.

Q Does a dependent have to be living with or be claimed as a dependent to be eligible?

No. Special rules on dependents:

- Don't have to be living with a parent
- Don't have to be a dependents on their parents' tax return
- Don't have to be full-time students
- May be married (but plan doesn't have to cover the dependent's spouse or children)
- Eligible foster child:
 - defined as an individual who is placed with the subscriber by an authorized placement agency or by judgment, decree or other court order qualifies as a dependent under the ACA

Measurement and Stability Periods

Q I thought [the measurement period] could be a minimum of 90 days? But the stability period was a minimum of six months? How do they work together?

Any measurement period can be from three to 12 months, but the following stability period can be a minimum of six months. There are special transition rules for 2014 only.

Q On an ongoing basis, can you have a three-month measurement period with a 12-month stability period?

For those people who you determine are NOT full-time in that three-month measurement period, will you have to review them again every three months to see if they are full time? And would that re-evaluation apply to the full-time people as well?

You cannot have a three-month measurement period with a 12-month stability period. Only in 2014 can you have a 12-month stability period with a shorter measurement period (six months). The length of the standard stability period for an employee determined to work full time during the standard measurement period must be the greater of six consecutive calendar months or the length of the standard measurement period. The standard stability period must begin immediately after the standard measurement period and any applicable administrative period. If an employee is determined not to have worked full time during the standard measurement period, the maximum length of the standard stability period during which the employee may be treated as

part time may not exceed the length of the standard measurement period.

Q Can you change measurement and stability periods yearly?

Yes, employers can change lengths of measurement and stability periods, but not with respect to an employee whose measurement period has already begun. Additionally, if you change the measurement period, remember the stability period must be greater than six months or the length of the standard measurement period if longer (unless you meet the special transition rules for 2014).

Q Are there special rules for ongoing employees? If they change their status from non-full time to full time when do companies need to allow these employees the opportunity to enroll in their health insurance plans?

It depends on your measurement period, but always keep in mind that the 90-day wait/administrative period is the maximum allowed following any measurement period. When using the safe harbor look-back method, if the employee is determined to be non-full time during the standard measurement period, the employee can be treated as non-full time for the maximum length of the stability period, as long as it does not exceed the length of the measurement period.

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Health Insurance Exchanges

Q Are there any updates on the timing of the exchange notices?

Under a provision of the Affordable Care Act, businesses need to provide to each employee a written notice informing employees about the existence of exchanges and the employer's cost-sharing plans.

The original deadline for providing the notice was March 1, 2013. However, the Labor Department delayed the deadline, saying it was "committed to a smooth implementation process including providing employers with sufficient time to comply."

"The Department of Labor expects that the timing for distribution of notices will be the late summer or fall of 2013, which will coordinate with the open enrollment period for Exchanges," the Centers for Medicare and Medicaid Services said [in an implementation question-and-answer page](#).

Q When do exchanges open up for large employers?

Beginning in 2017 states may allow large group issuers of health insurance (employers with more than 100 employees) to purchase health insurance through the exchanges. This will have to be monitored as the exchanges get up and running.

Q Can individuals go to the exchange beginning Oct. 1 if their employer doesn't offer the minimum required coverage?

Individuals who lack access to affordable, minimum value coverage can sign up through the open enrollment for the exchanges, which are scheduled to begin October 2013, although coverage will not be effective until Jan. 1, 2014.

Minimum Essential Coverage and Affordability Requirements

Q What is the definition of minimum essential coverage?

At this time, the IRS has stated that future regulations are expected to provide further guidance on the definition of minimum essential coverage and eligible employer-sponsored plans. It is currently under the agency's discretion to designate a particular plan as providing minimum essential coverage. Until further guidance is issued on the matter, employers who wish to be sure that their plans meet minimum essential coverage should make sure that they meet the affordability and minimum value requirements.

Q In calculating valuation, is there guidance to address out-of-pocket expenses?

Yes, there are specific rules on how to address out-of-pocket expenses as well as many others. Previously, the guidance recommended using an actuarial value calculator/test to confirm a plan would meet the required bronze-level minimum (60% of the cost of benefits), but very recently the Department of Health and Human Services released a "[Minimum Value Calculator](#)" (SPREADSHEET) to assist in valuation.

Q Do the current rules prohibit employers from charging different premium contributions depending on the hours the employee works? So, for instance, can an employer charge a 30-hour employee a different premium contribution than a 40-hour-per-week employee?

They regulations do not specifically prohibit this so long as the premiums meet the limits for affordability and minimum value requirements.

Employer-sponsored coverage is deemed affordable if the employee's share of the premium for self-only (individual) coverage does not exceed 9.5% of the employee's household income. Employers may rely on the employee's W-2 statements to calculate affordability in lieu of household income, which few employers know. Future regulations will specify what is necessary as far as dependent coverage.

A plan meets the minimum value requirement if it is at the required bronze-level minimum (60% of the cost of benefits), but very recently the Department of Health and Human Services released a "[Minimum Value Calculator](#)" (SPREADSHEET) to assist in valuation.

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Minimum Essential Coverage and Affordability Requirements (CONTINUED)

Q How are we to determine household income for employees?

You don't need to determine household income for now. Since affordability is based on the premium share for *self-only* coverage, the law allows you, for purposes of this determination, to use employee only W-2 wages.

Q If an employee is part-time, and an employer offers affordable coverage but the employee chooses to purchase coverage through the exchange because it is more affordable, does the employer get penalized?

No. Remember, the mandate says that eligible large employers must provide coverage to all full-time employees, not part-time employees. An employer will only get hit with a penalty if a *full-time* employee receives a premium tax credit to purchase coverage through the exchanges. Additionally, if an eligible large employer meets all the requirements (e.g., minimum value, affordability, etc.) and a full-time employee elects to go into the exchange and get coverage because it is cheaper, there should be no employer penalty.

Midyear Plans

Q What is the impact of the ACA on midyear plans — are changes for compliance required as of Jan. 1, 2014, if the plan year does not change until July 1, 2014?

There are special guidelines concerning midyear plans. First, for any employees who are eligible as of Dec. 27, 2012 (whether or not they take the coverage), the employer will not be subject to a potential payment until the first day of the fiscal plan year starting in 2014. Second, if (a) the fiscal-year plan was offered to at least one-third of the employer's employees at the most recent open season or (b) the fiscal-year plan covered at least one quarter of the employer's employees, then the employer also will not be subject to the Employer Shared Responsibility payment until the first day of the fiscal plan year starting in 2014, provided that those

full-time employees are offered coverage no later than that first day.

For example, if during the most recent open season preceding December 27, 2012, an employer offered coverage under a fiscal year plan with a plan year starting on July 1, 2013, to at least one-third of its employees (meeting the threshold for the additional relief), the employer could avoid liability for a payment if, by July 1, 2014, it expanded the plan to offer coverage satisfying the employer shared responsibility provisions to the full-time employees who had not been offered coverage. For purposes of determining whether the plan covers at least one-quarter of the employer's employees, an employer may look at any day between Oct. 31, 2012, and Dec. 27, 2012.



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