

## Further Guidance on Determining Full-Time Employees for Purposes of Employer Shared Responsibility Payments under the Affordable Care Act

Last week, the Department of the Treasury issued [Notice 2012-58](#), which provides further guidance on methods employers are permitted (but not required) to use in determining which employees must be treated as full-time employees for purposes of calculating any assessable payment under the employer shared responsibility provisions in section 4980H of the Internal Revenue Code. These provisions generally apply to employers with at least 50 full-time employees (“applicable large employers”).

Building on proposals set forth in earlier guidance, the details of which were described in a previous Ropes & Gray [Alert](#), Notice 2012-58 provides a framework to determine whether variable hour and seasonal employees are treated as full-time employees for purposes of the employer shared responsibility provisions of the Affordable Care Act. The Notice reflects comments received in response to the safe harbor method previously proposed by giving employers the option to use a look-back measurement period of up to 12 months to determine whether new and ongoing variable hour employees and seasonal employees are full-time employees. The guidance also provides for the optional use of certain periods intended to enable employers to administer the determinations made, explains how employees can transition from the determination method used for new employees to that used for ongoing employees, and provides useful examples of how these expanded methods can be applied.

Simultaneously with the issuance of Notice 2012-58, the Department of the Treasury issued [Notice 2012-59](#) and the Departments of Labor and Health and Human Services issued substantially identical administrative guidance related to section 2708 of the Public Health Service Act, which limits to 90 days the waiting period that may be imposed by a group health plan.

While the rules may appear complicated, they offer employers a common sense approach to determining whether a variable hour or seasonal employee should be treated as a full-time employee. In addition, the two Notices, read together, show how an employer can design its group health plan to take advantage of the safe harbor approach to determining the full-time status of newly hired employees detailed under Notice 2012-58 with the 90-day maximum waiting period rules set forth in Notice 2012-59. In an effort to eliminate further uncertainty and enable employers to begin planning for 2014, the guidance permits employers to rely on Notices 2012-58 and 2012-59 at least through the end of 2014.

### Determining Full-Time Status

In general, the framework set forth in Notice 2012-58 builds off the safe harbor method first proposed in Notice 2011-36, under which an applicable large employer may use a measurement period of up to 12 months to determine whether an employee will be treated as full-time for each month during a corresponding stability period.

The Notice introduces terms and concepts that will become familiar to employers establishing methods for determining full-time employee status. These include:

- **Variable Hour Employee.** A new employee is a variable hour employee if, based on the facts and circumstances at the date the employee begins providing services to the employer, it cannot be determined that the employee is reasonably expected to work on average at least 30 hours per week.

- **Seasonal Employee.** The Affordable Care Act does not define “seasonal employee” for purposes of determining when someone is a full-time employee. Notice 2012-58 states that through at least 2014, employers are permitted to use a reasonable, good faith interpretation of the term “seasonal employee” for this purpose.
- **Ongoing Employee.** An ongoing employee is an individual who has been employed by the employer for at least one complete standard measurement period.
- **Standard Measurement Period.** A standard measurement period is a time period of not less than three but not more than 12 consecutive calendar months, as chosen by an applicable large employer for determining the full-time status of an ongoing employee.
- **Initial Measurement Period.** The initial measurement period is a time period of not less than three but not more than 12 consecutive calendar months, as chosen by an applicable large employer for determining the full-time status of a new variable hour or seasonal employee.
- **Stability Period.** For ongoing employees, a stability period is a period of at least six consecutive calendar months that is no shorter in duration than the standard measurement period and that begins after the standard measurement period and any applicable administrative period. The stability period for new employees must be the same length as the stability period for ongoing employees (i.e., a period of at least six consecutive calendar months that is no shorter in duration than the initial measurement period) and begins after the initial measurement period and any associated administrative period.
- **Administrative Period.** An administrative period is a period of not longer than 90 days following the end of an initial or standard measurement period and ending before the associated stability period, during which an employer can complete standard duties associated with group health plan administration, such as making eligibility determinations and notifying and enrolling eligible employees. For new employees, the permissible 90-day period between the initial measurement period and the initial stability period is reduced by the number of days between the date of hire and the first day of the initial measurement period.
- **Permissible Employee Categories.** Permissible employee categories are those categories of employees for which employers may use measurement periods and stability periods that differ either in length or in their starting and ending dates. The categories are (1) collectively bargained employees and non-collectively bargained employees, (2) salaried and hourly employees, (3) employees of different entities, and (4) employees located in different states.

## Ongoing Employees

Under the safe harbor method, employers can have a standard measurement period with a different start and duration for each permissible employee category, so long as the determination is made on a uniform and consistent basis for all employees in the same category. If an employee averages at least 30 hours per week (or 130 hours per month) during the applicable standard measurement period, then the employer must treat the employee as a full-time employee during the subsequent stability period, regardless of the employee’s number of hours worked during the stability period. If the employer determines that the employee did not average 30 hours per week during the standard measurement period, the employer can treat that employee as

not a full-time employee during the stability period that follows, but is not longer than, the standard measurement period.

In Notice 2012-58, the IRS has established a permissible administrative period of up to 90 days. This period neither reduces nor lengthens the standard measurement period or the stability period, but overlaps with the prior stability period to ensure continued coverage for ongoing employees who are eligible for coverage based on a determination of full-time status during a prior standard measurement period.

## **New Employees**

The Notice modifies the prior proposal set forth in Technical Release 2012-1 by lengthening the maximum permissible initial measurement period for newly hired variable hour and seasonal employees from six to 12 months. If a newly hired employee is determined to be a full-time employee, he or she must be treated as a full-time employee for each month in a stability period that is the same length as the stability period for ongoing employees. If an employer is permitted to treat the employee as not a full-time employee during the stability period, the duration of the stability period cannot exceed the duration of the initial measurement period by more than one month and it must not exceed the remainder of the standard measurement period (plus any associated administrative period) in which the initial measurement period ends. The Notice also provides guidance on how to transition from the new employee rules to the ongoing employee rules.

For a new employee who is reasonably expected at his or her start date to work full-time, the Notice makes clear that no penalty under section 4980H will be assessed with respect to the first three calendar months of employment, so long as coverage is offered at or before the conclusion of those three months.

Application of these rules is best explained by the many examples provided throughout the Notice.

## **90 Day Maximum Waiting Period**

Section 2708 of the Public Health Service Act, as incorporated into the Code and ERISA, prohibits any group health plan from imposing a waiting period longer than 90 days. A waiting period is the period of time that must pass before coverage for an employee or dependent who has otherwise met the plan's substantive eligibility conditions (such as being in an eligible job classification or achieving job-related licensure requirements specified in the plan's terms) can become effective.

Notice 2012-59 provides temporary guidance on what the Departments of the Treasury, Labor and Health and Human Services will consider to be compliance with section 2708, at least through the end of 2014. Under this guidance, eligibility conditions that are based solely on the lapse of a time period are permissible for no more than 90 days; other conditions for eligibility are generally permissible, so long as they are not designed to avoid having to comply with the 90-day waiting period limitation. The waiting period limitation will be considered satisfied if the employee can elect coverage that begins within a permissible 90-day period, even if the employee takes additional time to elect coverage.

In providing guidance on the application of the 90-day waiting period limitation to employees who work less predictable schedules, Notice 2012-59 builds on the safe harbor method set forth in Notice 2012-58 for newly hired variable hour and seasonal employees. Under the Notice, if a group health plan conditions eligibility on an employee regularly working a specified number of hours per period (or working full time), and it cannot be determined that a newly hired employee is reasonably expected to regularly work that number of hours per period (or work full time), the plan may take a reasonable period of time to determine

whether the employee meets the plan's eligibility condition. The reasonable period may include a measurement period that is consistent with the time frame permitted for these determinations under section 4980H (i.e., no more than 12 months), whether or not the employer is an applicable large employer subject to section 4980H. For employees who satisfy the hours of service or full-time status requirement, coverage must be made effective no later than 13 months from the employee's start date (plus if the employee's start date is not the first day of a calendar month, the time remaining until the first day of the next calendar month).

## More to Come

Notice 2012-58 indicates that upcoming proposed regulations under section 4980H will reflect the proposals and issues described in the Notice and certain other issues on which comments are specifically requested. Given the short comment deadline of September 30, 2012, employers might expect to see proposed regulations prior to the end of this year.

For further information about the Notices, please contact your usual Ropes & Gray advisor or a member of the Employee Benefits practice group. For information on federal health care reform generally, please visit our [Health Reform Resource Center](#).