

DEALING WITH CHANGES TO AN EMPLOYEE'S MEASUREMENT PERIOD

Sep 30, 2014

Recently the IRS issued Notice 2014-49, offering guidance for situations in which the measurement period or method applicable to an employee changes.

Background

Under the Affordable Care Act, as amended ("ACA") an applicable large employer risks the imposition of a penalty tax under Code section 4980H in connection with a failure to offer full-time employees (and their dependents) minimum essential coverage under an eligible employer-sponsored plan that is both affordable and provides minimum value. This is sometimes called the "play or pay" penalty.

There are two methods an employer may use to identify full-time employees for purposes of Code section 4980H – the monthly method and the look-back method. Under the look-back method, employers average an employee's hours of service during a predetermined period (i.e., the measurement period) to determine whether to treat the employee as a full-time employee for the period that follows (i.e., the stability period). Employers have the flexibility to set their own measurement and stability periods, subject to certain prescribed parameters. Each employer within a control group may use different measurement methods or may establish measurement periods that differ in duration or that start on different dates. Employers may also establish different periods for specified categories of employees (e.g., collectively and non-collectively bargained employees, employees covered by different collective bargaining agreements, salaried and hourly employees and employees with primary places of employment in different states).

In the Notice the IRS offers guidance on administering the applicable measurement method in the following situations:

- Employee who transfers to a position to which a different measurement period applies
- Employer changes the measurement method (look-back to monthly or vice versa) applicable to a category of employees, or changes the start or duration of the measurement period

Transfer to Position with a Different Measurement Period

In situations in which an employee transfer to another position for which the employer uses a different measurement period (i.e., duration of measurement period and/or different start dates), the look-back method would be applied as follows:

- **Transfer Occurs While Employee is In a Stability or Administrative Period** (or as of the date of transfer the employee has been assigned a status for the stability period). Employee's status as a full-time or non-full-time employee remains in effect until the end of the stability period applicable to the employee's initial position. At the end of the stability period during which the transfer occurred (or, if the employee was in an administrative period, the end of the immediately following stability period), the employee assumes the full-time or non-full-time status that would have applied to the employee under the look-back methodology relating to the employee's new position. If the employee's full-time employee status in his or her new position cannot be determined (e.g., the employee is a variable hour employee who has not yet been employee for a full initial measurement period for the new position) then the rule governing employees who are not in a stability period (as described below) would apply to the employee with respect to his or her new position.
- **Employee Not In a Stability or Administrative Period.** Determine the employee's status as a full-time or non-full-time employee solely under the look-back measurement method applicable to his or her new position as of the date of the transfer, including all hours of service in the employee's first position.

Example: For Position 1, the employer uses 12-month standard measurement and stability periods beginning January 1 and a 12-month initial measurement period beginning on each employee's start date. For Position 2, the employer uses 6-month standard measurement and stability periods (beginning January 1 and July 1) and a 6-month initial measurement period beginning on an employee's start date. Employee B is hired to fill Position 1 as a new variable-hour employee on January 1, 2015. Employee B averages 30 or more hours of service per week during the period from January 1 through June 30, 2015. On October 1, 2015, at which time Employee B is in the initial measurement period for Position 1, Employee B transfers from Position 1 to Position 2. Position 2 is a variable-hour position as well. At the date of the transfer, Employee B is not in a stability period for Position 1 because Employee B has not been employed for a full initial measurement period or a full standard measurement period. Accordingly, Employee B's status is determined under the measurement method applicable to Position 2 as of the date of transfer, taking into account Employee B's hours of service in Position 1. Employee B is a full-time employee from the date of transfer (October 1, 2015) through the end of the applicable stability period for Position 2 (December 31, 2015) because Employee B averaged 30 or more hours of service per week during the applicable measurement period for Position 2 ending June 30, 2015 (for Employee B, the initial measurement period and standard measurement period ran simultaneously from January 1, 2015

through June 30, 2015). After December 31, 2015, Employee B's status continues to be determined using the applicable measurement period for Position 2.

Note, however, that all the same rules generally applicable to the look-back measurement method will continue to apply, including the change in employment status rules that affect new employees. Therefore, a new variable hour, part-time or seasonal employee who transfers to a position where he or she is reasonably expect to average at least 30 hours of service per week will no longer be subject to an initial measurement period. Rather, the full-time status of such an employee will be determined on the basis of hours of service in each month, until that employee has been employed for a full standard measurement period applicable to the second position. If the employee has been employed for a full standard measurement period applicable to the new position but not the first position as of the transfer date, the employee's full-time status will continue to be determined on the basis of the employee's average hours of service during the standard measurement period for the new position.

Employer Change to Measurement Method

For purposes of applying this rule, a change in the measurement method includes a change from the look-back measurement method to the monthly measurement method (or vice versa) as well as a change in the duration or start date of any applicable measurement period under the look-back measurement method.

The Notice provides that an employer who changes from the look-back to the monthly method or vice versa should apply the same transition rules contained in the final regulations that govern when an employee transfers from a position that uses the look-back method (or the monthly method) to a position that uses the other method. Those rules are contained in [Treas. Reg. § 54.4980\(H\)-3\(f\)](#).^[1]

Upon a change in the measurement period applicable to a category of employees, each employee's full-time or non-full-time status for a transition period following the effective date of the change is determined as if the employee had transferred from a position to which the original measurement method applies to a position to which the revised measurement method applies.

Example: Starting January 1, 2015, the full-time employee status of employees covered by a particular collective bargaining agreement ("CBA") is determined using 6-month measurement and stability periods (each starting April 1 and October 1). In contrast, the employer utilizes 12-month measurement and stability periods (each starting January 1) for employees who are not covered by the CBA. On April 1, 2017, the employer changes the look-back measurement method for employees not covered by the CBA to be the same as that used for employees covered by the CBA. For a transition period following the date of such change, each employee who is subject to the measurement method applicable to employees not covered by the CBA is treated as if on April 1, 2017, that employee had transferred from a position subject to the original measurement method to

a position subject to the revised measurement method. Consequently each employee subject to the measurement method applicable to employees not covered by the CBA who is in a stability period as of April 1, 2017 retains his or her status as a full-time employee or non-full-time employee, as determined under the original measurement method for the remainder of the 12-month stability period applicable to that employee. Each such employee who is not in a stability period as of April 1, 2017 has his or her status determined as of April 1, 2017 in accordance with the 6-month measurement method.

Effective Date

Although the IRS is inviting comments to the proposed approaches, the Notice can be relied upon until further guidance is issued and at least through December 31, 2016.

[1] The IRS has informally confirmed that the reference in the Notice to Treas. Reg. § 54.4980H-3(f) (2), which contains a special rule for certain employees who have been continuously offered coverage, should actually refer to Treas. Reg. § 54.4980(H)-3(f)(1), which contains the generally applicable rules regarding changes in employment status from a position to which the look-back method applies to a position to which the monthly method applies, or vice versa. It is anticipated that this citation will be corrected when published in the Internal Revenue Bulletin next week.

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be "Attorney Advertising" under the ethics and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP's principal office and Kathrine Dixon (kathrine.dixon@bclplaw.com) as the responsible attorney.