


## What You Have to Measure, Track and Record Under ACA

4 key terms and how they work to determine the status of a new, variable-hour employee

BY ROBERT S. SHEEN



**A**n Applicable Large Employer (ALE) must report to the IRS in monthly snapshots for the calendar year: 1) Those “full-time” employees (at least 30 hours of service per week), and 2) Whether they were offered healthcare coverage. But, what about those employees who are hired into positions with varying hours? That is where it gets tricky.

The IRS issued final regulations for what is called the “Look-Back Measurement Method” as a means to determine whether such “variable-hour” employees are full time. The term “variable hour” applies to employees for whom an ALE “cannot reasonably determine as to whether he/she is reasonably expected to be employed on average at least 30 hours of service per week during the initial measurement period because the employee’s hours of service are variable or otherwise uncertain.” This determination must be based on “the facts and circumstances at the employee’s start date.”

Factors to consider include:

- Whether the employee is replacing a full-time (FT) employee
- Comparison in actual hours to employees in comparable positions during recent measurement periods
- Whether the job was advertised, communicated or documented as requiring an average of more (or less) than 30 hours per week

These factors apply to the extent that the employer has no reason to anticipate that the facts and circumstances related to this employee will be different.

For new, variable-hour employees who, by definition, have uncertain hours, the IRS provides the “Look-Back Measurement Method” to determine the FT status of such employees during a future period (referred to as the stability period, or SP), based upon hours in a prior period (referred to as the measurement period, or MP).

In other words, the method looks back on past hours to determine FT status for the future. This methodology does vary depending on whether the variable hour employee is an “ongoing” employee (an employee who has been employed at least one standard MP) or a “new” hire (an employee who is still in his or her initial MP).

The measurement and tracking of this method cannot be easily performed by hand and will likely require the use of software algorithms. To give a general understanding of the method, the paragraphs below describe the key terms (MP, SP, AP and WP) and how they interplay with respect to the eventual determination of FT status of a new, variable-hour employee.

**L** An MP is selected by the employer. This is a period of at least three, but no more than 12, consecutive months.

During this period for which a variable-hour employee’s hours are measured in order to determine whether he or she is FT. The months need not be in the same calendar year and can either be full calendar months (June 1 to June 30) or a period that begins on any date following the first day of the calendar month and ends on the immediately preceding date in the immediately following calendar month (March 15 to April 14). An employer will set a “standard” MP that applies to all “ongoing” employees in the company.

An “initial” MP is the first MP for a new variable hour employee. The initial

MP must begin on (a) the employee’s start date or (b) the later of, (i) any date up to and including the first day of the first calendar month following the employee’s start date or (ii) on the first day of the first payroll period starting on or after employee’s start date.

For example, if an employee’s start date is April 2, an initial MP must begin on either April 2, or the later date of May 1 or the first day of the first payroll period after April 2. The latter allows the employer to consolidate groups of initial MPs, so that, at most, the employer has 12 different initial MPs, instead of potentially 365 different initial MPs.

Once the employee has completed an entire standard MP, the employer must determine whether that employee has FT status, beginning with that standard MP, at the same time and under same conditions as ongoing employees.

**2** The stability period, or SP, is a period selected by the ALE that immediately follows a standard MP or an initial MP (and, if elected, the AP associated with the standard MP or initial MP)

In contrast to MPs, the SP must be in calendar months. It is the start of the SP whereby the variable hour FT employee must be offered healthcare coverage to avoid the Employer Shared Responsibility penalties under Section 4980H of ACA.

The rules for SPs differ depending on whether a new variable hour employee is determined to be FT or not during the initial MP. If the employee is determined to be FT during the initial MP, the SP must be at least six consecutive calendar months that is no shorter than the initial MP. Moreover, the SP must be the same length as stated above for ongoing employees.

If the employee is determined to be not FT during the initial MP, the SP must be no more than one month greater than the initial MP and must not exceed the remainder of the first entire standard MP plus any associated AP.



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With an understanding of these terms and their associated rules, an employer can measure, track and record for its full-time employees for the requisite 12 monthly snapshots for the reporting calendar year.

The SP must begin immediately after the end of the MP.

**3** The AP refers to an optional period, selected by the employer, of no longer than 90 days following the end of a MP and ending immediately before the start of the associated SP. The AP includes the period between the new variable-hour employee's start date and his or her initial MP.

For new, variable-hour employees, the initial MP and AP together cannot extend beyond the last day of the first

calendar month beginning on or after the anniversary of the employee's start date. Together, the initial MP and AP cannot exceed one year plus a partial month.

There are additional rules that come into effect when a new, variable-hour employee experiences a change in employment during the initial MP such that, if he or she had begun employment in the new position or status, that employee would have been FT.

For such an employee, the employer generally will not be subject to Section 4980H until:

- The first day of the fourth full calendar

month following the change in employment status if the employer provides coverage at the end of that period (and the coverage meets Minimum Value and is Affordable) or

- If earlier, and the employee is FT based on the initial MP, the first day of the first month following the end of the initial MP (including any optional AP associated with the initial MP)

**4** The "waiting period" (WP) is a period that the employer selects as a requirement to pass with respect to an



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individual before he or she is eligible for healthcare coverage.

This ties in with the initial MP as follows: except in cases in which a WP that exceeds 90 days is imposed in addition to a MP, the time period for determining whether a new, variable-hour employee meets the employer's hours of service per period eligibility condition will not be considered to be designed to avoid compliance with the 90-day waiting period limitation if coverage is made effective no later than 13 months from the employee's start date. If the employee's start date is not the first day of a calendar month, added to this period is the time remaining until the first day of the next calendar month.

Notably, the WP is different from an orientation period, which an employer may also impose, provided that it is reasonable and bona fide employment-based. Once these conditions are met, the 90-day maximum for WPs applies.

The orientation period must be a "substantive eligibility condition," such as:

- "Being in an eligible job classification"
- "Achieving job-related licensure requirements specified in the plan's terms"
- "Satisfying a reasonable and bona fide employment-based orientation period"

With an understanding of these terms and their associated rules, an employer can measure, track and record for its FT employees for the requisite 12 monthly snapshots for the reporting calendar year. The information will need to be

distributed to the applicable employees by January 1 of the following year, and subsequently filed by either the end of February or the end of March, depending on whether the employer will be electronically filing. The measuring process is complicated, and you will likely need additional professional help to prepare the reports for proper employee distribution and IRS filing. **CBO**

*This article is the third in a five-part series in which Robert Sheen provides essential information about the Affordable Care Act and what it means for your company's business operations.*

*Robert S. Sheen is founder and president of First Capitol Consulting Inc., which advises employers nationwide on issues related to the Affordable Care Act. He is also editor-in-chief of The ACA Times (acatimes.com), an online news and information journal about the law.*



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