PPACA

Questions and Answers

1. What constitutes a “large employer?”

Answer: PPACA provides that an employer that has 50 or more full-time employees or full-time employee equivalents (a “large employer”) must provide health coverage, or pay one of two penalties. (See Section 8 for details on the penalties.) PPACA also says that:

- An employer is a “large employer” for a calendar year if it employed an average of at least 50 full-time or full-time equivalent employees during the prior calendar year
- An employee is considered full-time for a particular month if he works an average of at least 30 hours per week during that month
- Part-time employees count on a pro-rata basis as “full-time equivalent” employees. The method of counting these employees is to divide the total hours of service of all employees who are not full-time for the month by 120
- All members of a controlled group or an affiliated service group count when deciding if the employer has 50-plus full-time employees or equivalents
- Seasonal employees are counted toward the 50 employee threshold unless:
  - the employer crossed the 50 employee threshold for 120 or fewer days during the calendar year, and
  - employment of seasonal employees is why the employer exceeded the 50 employee threshold

2. Who is considered an “employee?”

Answer: The agencies have stated that they will likely define an employee as a “common-law employee.” This means, for example, that independent contractors, directors and partners likely will not count. Unfortunately, there is not a black and white definition of who is a “common-law” employee. Typically, the more control the hirer has over how an individual performs a task, the likelier it is that the person is a common-law employee. See Attachment A for additional information on how to decide if a person is a common-law employee.

Note: the government has been cracking down on entities that misclassify employees as independent contractors. This definition will provide another area of potential dispute. Employers who choose to consider individuals in unclear situations as non-employees should take care to document their reasoning and should consult with legal counsel.
It is unclear how leased employees will be handled; the agencies have said they will address this later. There are no special provisions for employers with unions, so employees covered by a collective bargaining agreement are treated the same as any other employee.

To date there are no rules that address how the employer mandate applies to U.S. citizens working overseas or to non-citizens working in the U.S. Since employees working overseas are specifically exempted from the individual mandate and would not be purchasing coverage from an exchange, it seems reasonable to assume the play or pay penalty will not apply to these individuals. Conversely, foreign workers likely are subject to the individual mandate and could be exchange-eligible, so it is quite possible that they will be considered “employees” for purposes of the employer penalties. Until regulations are issued, however, there will not be a clear answer on this issue.

3. **How will an employer count hours?**

**Answer:** It is expected that current DOL rules for counting hours for pension plan purposes will be used to count an employee’s hours of service as a full-time employee or full-time employee equivalent. Under these rules, a person is considered to have completed an “hour of service” with each hour for which he is paid for work, vacation, holiday, sick time, layoff, jury duty, military duty, etc.

When converting time to a monthly basis, 30 hours per week would mean 130 hours per calendar month.

The agencies are considering several possible methods of counting hours and have said that they expect that employers will be able to use different counting methods for different classes of employees. The proposed methods include:

- For employees who are paid hourly, actual hours worked or paid would need to be used
- For employees who are not paid hourly, alternatives would include:
  - Counting actual hours worked or for which vacation, holiday, etc. are paid
  - Crediting an employee with eight hours’ work for each day for which the person was paid for at least one hour of work, vacation, holiday, etc.
  - Crediting an employee with 40 hours’ work for each week for which the person was paid for at least one hour of work, vacation, holiday, etc.

4. **How will part-time employees be counted?**

**Answer:** Employees who work less than full-time (30 hours per week) count towards “full-time equivalent employees” when deciding if the employer has 50 employees. Full-time equivalent employee numbers would be determined by:
COUNTING EMPLOYEES UNDER PPACA: Q &A

- Using the hours of service each month for each person who worked an average of less than 30 hours per week during the month
  - This includes the hours of seasonal employees who averaged less than 30 hours for that month
  - A maximum of 120 hours of service should be considered for any employee who is not full-time for a month
- Counting fractions for each monthly total, but rounding the total annual number down.

“Seasonal employees” would mean retail employees who work only during holiday seasons and others who perform work that by its nature is only performed at certain times of the year (such as harvesting or tax season).

5. How is the employee count to determine “large employer” status for play or pay penalties performed?

Answer: It is expected that large employer status would be determined by calculating the number of full-time and full-time equivalent employees for each month, totaling the monthly numbers and dividing by 12. The proposed process would be:

- Calculate the number of full-time employees for each month of the prior calendar year
- Calculate the number of FTEs for each month of the prior calendar year (if you get a fraction, keep the fraction)
- Add the number of FT and FTEs for each month
- Add the 12 monthly totals together
- Divide by 12

If the final result is a fraction, the employer would round down to the nearest whole employee.

If the result is 50 or more, the employer is a “large employer” and subject to the penalty, except that if the employer only exceeds the 50 FT/FTE threshold for fewer than 120 days (4 months) of the year and seasonal employees caused it to exceed the 50 threshold, the seasonal employees can be disregarded when deciding if the employer is large.

The normal controlled group rules will apply. Basically, if an employer is part of a family of companies, all of the companies may need to be added together to see if the employer is a large employer. So if Ann owns the Clean Car Wash, which has 22 employees and Diaper Day Care, which has 30 employees, both Clean Car Wash and Diaper Day Care are considered large, because 22 + 30 = 52. The employer’s tax person should know if the employer is part of a controlled group.
6. How does an employer determine average hours worked?

**Answer:** An employer may simply look at its population on a current, month by month basis if it wishes to. However, to avoid the complications that may arise if an employee alternates between working more and less than 30 hours, or to simply reduce calculation frequency, IRS Notice 2012-58 gives an employer the option of using longer calculation periods to get a smoother, more predictable result if it prefers to do that.

If the employer wants to use a smoothing technique, different processes apply to existing and new employees.

**A. The calculation option for existing (“ongoing”) employees**

Instead of tracking time currently, an employer may look at how many hours the employee averaged during a lookback period called a “standard measurement period.” Once the determination is made whether the employee worked full-time during the standard measurement period that determination will apply throughout the related stability period regardless how many hours the employee actually works. (Note that the employer will still have to track the employee’s hours during the stability period, as that information will be needed to make the determination for the next standard measurement period.) To use this option:

- The employer must choose a “standard measurement period” of three to 12 months. The standard measurement period is the “lookback” period that is used to track the employee’s hours and determine how many hours he worked, on average, during the standard measurement period.
- The employer must choose a start date for the standard measurement period. It can be Jan. 1, the first day of the benefit period, a date near the start of open enrollment, or any other date the employer chooses.
- The employer must choose a stability period. The stability period is the period for which the employee is considered “full-time” or not full-time, based on the average hours worked during the standard measurement period. The stability period must be:
  - At least as long as the standard measurement period
  - Not more than 12 months
  - No longer than the standard measurement period if the employee is determined to not be full-time
  - At least six months if the employee is determined to be full-time
- Employers may use different standard measurement and stability periods and period start dates for these classes of employees:
  - Collectively bargained and non-collectively bargained
  - Hourly and salaried
  - Employees of different entities
  - Employees located in different states
Example: ABC Corp. chooses to use a 6 month standard measurement period and a 6 month stability period. ABC’s first standard measurement period will begin on July 1, 2013 and end on Dec. 31, 2013 and its first stability period will run from Jan. 1, 2014 through June 30, 2014.

Bill works:

- 29 hours per week in July 2013
- 30 hours per week in Aug. 2013
- 28 hours per week in Sept. 2013
- 28 hours per week in Oct. 2013
- 26 hours per week in Nov. 2013
- 33 hours per week in Dec. 2013
- 35 hours per week in Jan. 2014
- 32 hours per week in Feb. 2014
- 30 hours per week in March 2014
- 33 hours per week in April 2014
- 31 hours per week in May 2014
- 28 hours per week in June 2014

Bill’s average is 29 hours per week during the July – Dec. 2013 standard measurement period. He will not be considered a full-time employee for purposes of the play or pay penalties during the stability period (Jan. – June 2014) even though he is regularly working more than 30 hours per week during that time.

When Jan. – June 2014 becomes the measurement period, the $35 + 32 + 30 + 33 + 31 + 28$ hours worked will be averaged, and because Bill is full-time (31.5 hours per week) during that measurement period, he will be considered full-time for play or pay purposes from July – Dec. 2014 even if his hours drop below 30/week during that period, as long as he remains employed by ABC.

An employee is considered “ongoing” once he has completed a full standard measurement period.

Note: Employers will want to weigh the administrative burden of using this method with the potential to exclude certain employees for purposes of the penalty. Employers who have employees work fewer hours during certain times of the year, such as schools, may find that using a 12-month standard measurement period will be advantageous.
**B. Option to add an “administrative period” for ongoing employees**

Because employers may need time to determine whether an employee is “full-time” during a standard measurement period and to provide time to enroll the employee if he is eligible, employers may elect to use an administrative period. However, the administrative period may not be used to extend either the standard measurement period or the stability period, which adds some complexity to the permitted calculation periods.

When using an administrative period, these are the rules that must be followed:

- The administrative period cannot be more than 90 days
- The administrative period cannot reduce or lengthen the standard measurement period or stability period
- The administrative period must overlap the prior standard measurement period
  - This means that employees who are full-time based on the prior standard measurement period must remain eligible through the end of the current stability period

**Example:** XYZ Co. has a calendar year plan and open enrollment is from Nov. 1 – Nov. 30. XYZ chooses a 12 month stability period that begins each Jan. 1 (to coincide with the plan year), a 12 month standard measurement period that begins each Oct. 1 (to maximize the standard measurement period, but allow for the administrative period) and a 3 month administrative period that begins each Oct. 1 (giving XYZ the month of October to determine who is eligible for open enrollment, November to conduct open enrollment and December to complete enrollment processing).

Jane averaged 32 hours per week during 2013 (the standard measurement period) and was provided minimum value, affordable coverage under XYZ’s plan during 2014 (the stability period). XYZ determines that Jane averaged 28 hours per month from Oct. 1, 2013 – Sept. 30, 2014. This means that (1) XYZ does not have to offer coverage to Jane during the Nov. 2014 open enrollment period to avoid penalties in 2015 and (2) XYZ must continue to offer Jane coverage through Dec. 31, 2014 (the full 2014 stability period).

**C. Handling new employees who are expected to work full-time**

To avoid penalties, a new employee who is reasonably expected to work 30 or more hours per week must be offered coverage following satisfaction of the eligibility waiting period. Under PPACA, the waiting period generally cannot be more than 90 days. No play or pay penalty will be owed during the waiting period if the employee is offered coverage that would be effective on or before the end of the permissible waiting period.

**D. Handling new employees who work variable hours or seasonally**

At least for 2014, employers who hire seasonal or variable hours employees have significant flexibility in determining whether the new employee is full-time. Employers in this situation may elect to use an
“initial measurement period” to determine whether the employee is full-time during a subsequent stability period. Additionally, no penalty is due during this initial measurement period, even if it is ultimately determined the employee averaged 30+ hours and was therefore a full-time employee during this time. **Note that this method may only be used when the employer truly expects the employee’s hours to fluctuate or the employee is a seasonal employee.**

“Seasonal employee” is not defined in the new notice and at least for 2014, an employer’s good faith determination that an employee is seasonal will be honored. Usually, seasonal employment means employment for a limited period to perform a specific function, such as retail during holiday seasons, tax preparation during tax season, or agriculture during harvesting season.

“Variable hours employees” are those whose hours are variable or are otherwise uncertain and who are not reasonably expected to average 30 or more hours per week over the measurement period. This would include both those expected to work full-time when initially hired but who are expected to have their hours reduced at some point (such as retail workers hired in November) and those whose hours vary from week to week, such as on-call employees.

To use the seasonal/variable hours option:

- An “initial measurement period” of three to 12 months must be chosen
- The stability period:
  - must be the same length as the stability period for ongoing employees
  - for new employees determined to be full-time:
    - it must be at least as long as the initial measurement period
    - it must be at least six months long
  - for new employees determined not to be full-time:
    - it must not be more than one month longer than the initial measurement period
    - it must not exceed the remainder of the standard measurement period, plus any associated administrative period, in which the initial measurement period ends
- Employers may use different initial measurement and stability periods and period start dates for these classes of employees:
  - Collectively bargained and non-collectively bargained
  - Hourly and salaried
  - Employees of different entities
  - Employees located in different states

Example: Because XYZ uses a 12-month stability period for ongoing employees, it must use a 12-month stability period for new hires. XYZ chooses an initial measurement period of 12 months for new variable hours and seasonal employees. Sally is hired May 10, 2014. Sally is a lifeguard who will work school vacations and XYZ considers her a seasonal employee. XYZ tracks Sally’s hours from May 10, 2014 – May 9, 2015, and determines she averaged 32 hours per week during that time. Sally must be offered coverage as of June 1, 2015. XYZ does not owe a penalty for Sally during the entire 12 month initial
measurement period, even though it was more than the 90 day waiting period generally allowed and she actually averaged more than 30 hours per week because of this special option for variable and seasonal employees.

E. Option to add an “administrative period” for new variable hours and seasonal employees

As with ongoing employees, employers using measurement and stability periods may elect to add an administrative period to allow time to calculate hours and work through the enrollment process. When using an administrative period with new variable hours and seasonal hires, these are the rules that must be followed:

- The administrative period cannot be more than 90 days
  - The administrative period can be split and applied both before and after the initial measurement period (to allow calculations based on calendar months) but the total administrative period cannot exceed 90 days

- The combined administrative period and initial measurement period cannot be longer than the last day of the first calendar month beginning on or after the first anniversary of the employee’s start date. (Basically, the calculation period cannot be more than 13 months, rounded to the start of the next calendar month.)

**Example:** QRS, Inc. decides it needs a 60-day administrative period. This means that its initial measurement period cannot be more than 11 months. QRS chooses to use an initial measurement period of 11 months (rounded to the next calendar month) and a stability period of 12 months (which is at least as long as the measurement period and not more than one month longer, as explained above). On May 15, 2013, QRS hires Sam as an on-call lab tech and hires Scott as orderly who is expected to work 32 hours per week.

- Because Sam is a “variable hours employee” QRS will track Sam’s hours from May 15, 2013, to April 14, 2014. QRS then has from April 15, 2014, to June 30, 2014, to determine if Sam is full-time, offer him coverage if he is full-time and have his coverage start on (or before if it prefers) July 1, 2014. QRS will not owe a penalty for Sam during the 13-month initial measurement and administrative periods, even though it was more than 90 days and Sam may have averaged more than 30 hours per week because of this special option for variable and seasonal employees.

- Because Scott has been hired into a job with steady hours, QRS must offer Scott coverage effective on or before Aug. 13, 2014 to avoid the penalty (assuming a waiting period of the first of the month after 90 days will not be allowed; there is still no answer on this issue).
F. Transitioning New Employees into Ongoing Employee Status

Transitioning a new variable hours or seasonal employee requires testing in both the initial measurement and subsequent standard measurement periods. If an employee is determined to be full-time in either period, he must be offered coverage for the full applicable stability period.

Example: Ridge, Inc. has chosen to use a 12-month standard measurement period for ongoing employees running from Oct. 15 – Oct. 14, an administrative period from Oct. 15 – Dec. 31, and a 12-month stability period running from Jan. 1 – Dec. 31. For new variable hour employees, Ridge has chosen to use an 11-month initial measurement period that begins on the employee’s start date and an administrative period that runs from the end of the initial measurement period until the end of the second calendar month beginning after the end of the initial measurement period. Ridge hires Tim on May 10, 2014, and cannot reasonably anticipate Tim’s hours. Tim’s initial measurement period runs from May 10, 2014, through April 9, 2015. Tim works an average of 32 hours per week during this initial measurement period. Ridge must offer Tim coverage for a stability period that runs from July 1, 2015 through June 30, 2016. Ridge must also test Tim’s hours during its Oct. 15, 2014 – Oct. 14, 2015, standard measurement period. Tim works an average of 34 hours per week during this time. Tim must be offered coverage during the standard stability period of Jan. 1, 2016 – Dec. 31, 2016. Had Tim’s hours dropped to 28 hours per week from Oct. 15, 2014 – Oct. 14, 2015, Ridge could terminate Tim’s coverage as of June 30, 2016.

G. Handling employees who move between classes mid-year

The agencies have said that they will issue guidance later addressing how to handle employees who move into full-time status or who have other changes in employment status during a stability period.