

2010 (enacted March 30, 2010, Pub. L. No. 111-152).² Section 4980H applies to

safe harbor would not affect an employee's eligibility for a premium tax credit under § 36B. Treasury and the IRS requested and received comments on the safe harbor, and the comments were generally favorable. Subsequently, Notice 2012-17 (2012-9 I.R.B. 430)⁷ stated that, as described in Notice 2011-73, Treasury and the IRS intend to issue proposed regulations or other guidance permitting employers to use an employee's Form W-2 wages (as reported in Box 1) as a safe harbor in determining the affordability of employer coverage.

E. Notice 2012-17

Notice 2012-17 also described and requested comments on a potential approach for determining the full-time status of new employees for purposes of § 4980H if, based on the facts and circumstances at the start date, it cannot reasonably be determined whether the new employee is expected to work full-time because the employee's hours

notice states that coverage must be offered to an employee by a specified date, it means that the offer that must be made to the employee, if accepted by the employee, would result in the employee actually receiving coverage that is effective as of the specified date. Absent such an offer, the employer may be subject to an assessable payment under § 4980H. In addition, unless otherwise specified below, solely for the

determines that the employee did not work full-time during the standard measurement period, the employer would be permitted to

in the plan. Previously-determined full-time employees already enrolled in coverage continue to be offered coverage through the administrative period.

Employee A and Employee B have been employed by Employer W for several years, continuously from their start date. Employee A worked full-time during the standard measurement period that begins October 15 of Year 1 and ends October 14 of Year 2 and for all prior standard measurement periods. Employee B also worked full-time for all prior standard measurement periods, but is not a full-time employee during the standard measurement period that begins October 15 of Year 1 and ends October 14 of Year 2.

Conclusions. Because Employee A was employed for the entire standard measurement period that begins October 15 of Year 1 and ends October 14 of Year 2, Employee A is an ongoing employee with respect to the stability period running from January 1 through December 31 of Year 3. Because Employee A worked full-time during that standard measurement period, Employee A must be offered coverage for the entire Year 3 stability period (including the administrative period from October 15 through December 31 of Year 3). Because Employee A worked full-time during the prior standard measurement period, Employee A would have been offered coverage for the entire Year 2 stability period, and if enrolled would continue such coverage during the administrative period from October 15 through December 31 of Year 2.

Because Employee B was employed for the entire standard measurement period that begins October 15 of Year 1 and ends October 14 of Year 2, Employee B is also an ongoing employee with respect to the stability period in Year 3. Because Employee B did not work full-time during this standard measurement period, Employee B is not required to be offered coverage for the stability period in Year 3 (including the administrative period from October 15 through December 31 of Year 3). However, because Employee B worked full-time during the prior standard measurement period, Employee B would be offered coverage through the end of the Year 2 stability period, and if enrolled would continue such coverage during the administrative period from October 15 through December 31 of Year 2.

Employer W complies with the standards of this section because the measurement and stability periods are no longer than 12 months, the stability period for ongoing employees who work full-time during the standard measurement period is not shorter than the standard measurement period, the stability period for ongoing employees who do not work full-time during the standard measurement period is no longer than the standard measurement period, and the administrative period is no longer than 90 days.

C. New Employees: Reasonably Expected to Work Full-Time

If an employee is reasonably expected at his or her start date to work full-time, an employer that sponsors a group health plan that offers coverage to the employee at or before the conclusion of the employee's initial three calendar months of employment

will not be subject to the employer responsibility payment under § 4980H by reason of its failure to offer coverage to the employee for up to the initial three calendar months of employment. For rules on compliance with the 90-day waiting period limitation under PHS Act § 2708, see the guidance cited at footnote 1.

D. New Employees: Safe Harbor for Variable Hour and Seasonal Employees

If an employer maintains a group health plan that would offer coverage to the employee only if the employee were determined to be a full-time employee, the employer may use both a measurement period of between three and 12 months (the same as allowed for ongoing employees) and an administrative period of up to 90 days for variable hour and seasonal employees. However, the measurement period and the administrative period combined may not extend beyond the last day of the first calendar month beginning on or after the one-year anniversary of the employee's start date (totaling, at most, 13 months and a fraction of a month). These periods are described in greater detail below.

1. Initial Measurement Period and Associated Stability Period

For variable hour and seasonal employees, employers are permitted to determine whether the new employee is a full-time employee using an "initial measurement period" of between three and 12 months (as selected by the employer). The employer measures the hours of service completed by the new employee during the initial measurement period and determines whether the employee completed an average of 30 hours of service per week or more during this period. The stability period for such employees must be the same length as the stability period for ongoing employees. As in the case of a standard measurement period, if an employee is determined to be a full-time employee during the initial measurement period, the stability period must be a period of at least six consecutive calendar months that is no shorter in duration than the initial measurement period and that begins after the initial measurement period (and any associated administrative period).

If a new variable hour or seasonal employee is determined not to be a full-time employee during the initial measurement period, the employer is permitted to treat the employee as not a full-time employee during the stability period that follows the initial measurement period. This stability period for such employees must not be more than one month longer than the initial measurement period and, as explained below, must not exceed the remainder of the standard measurement period (plus any associated administrative period) in which the initial measurement period ends.⁸

⁸ In these circumstances, allowing a stability period to exceed the initial measurement period by one month is intended to give additional flexibility to employers that wish to use a 12-month stability period for new variable hour and seasonal employees and an administrative period that exceeds one month. To that end, such an employer could use an 11-month initial measurement period (in lieu of the 12-month

An employee or related individual is not considered eligible for minimum essential coverage under the plan (and therefore may be eligible for a premium tax credit or cost-sharing reduction through an Exchange) during any period when coverage is not offered, including any measurement period or administrative period prior to when coverage takes effect.

2. Transition from New Employee Rules to Ongoing Employee Rules

Once a new employee, who has been employed for an initial measurement period, has been employed for an entire standard measurement period, the employee must be tested for full-time status, beginning with that standard measurement period, at the same time and under the same conditions as other ongoing employees. Accordingly, for example, an employer with a calendar year standard measurement period that also uses a one-year initial measurement period beginning on the employee's start date would test a new variable hour employee whose start date is February 12 for full-time status first based on the initial measurement period (February 12 through February 11 of the following year) and again based on the calendar year standard measurement period (if the employee continues in employment for that entire standard measurement period) beginning on January 1 of the year after the start date.

An employee determined to be a full-time employee during an initial measurement period or standard measurement period must be treated as a full-time employee for the entire associated stability period. This is the case even if the employee is determined to be a full-time employee during the initial measurement period but determined not to be a full-time employee during the overlapping or immediately following standard measurement period. In that case, the employer may treat the employee as not a full-time employee only after the end of the stability period associated with the initial measurement period. Thereafter, the employee's full-time status would be determined in the same manner as that of the employer's other ongoing employees.

In contrast, if the employee is determined not to be a full-time employee during the initial measurement period, but is determined to be a full-time employee during the overlapping or immediately following standard measurement period, the employee must be treated as a full-time employee for the entire stability period that corresponds to that standard measurement period (even if that stability period begins before the end of the stability period associated with the initial measurement period). Thereafter, the employee's full-time status would be determined in the same manner as that of the employer's other ongoing employees.

3. Optional Administrative Period for New Employees

initial measurement period that would otherwise be required) and still comply with the general rule that the initial measurement period and administrative period combined may not extend beyond the last day of the first calendar month beginning on or after the one-year anniversary of the employee's start date.

In addition to the initial measurement period, the employer is permitted to apply an administrative period before the start of the stability period. This administrative period must not exceed 90 days in total. For this purpose, the administrative period includes all periods between the start date of a new variable hour or seasonal employee and the date the employee is first offered coverage under the employer's group health plan, other than the initial measurement period. Thus, for example, if the employer begins the initial measurement period on the first day of the first month following a new variable hour or seasonal employee's start date, the period between the employee's start date and the first day of the next month must be taken into account in applying the 90-day limit on the administrative period. Similarly, if there is a period between the end of the initial measurement period and the date the employee is first offered coverage under the plan, that period must be taken into account in applying the 90-day limit on the administrative period.

In addition to the specific limits on the initial measurement period (which must not exceed 12 months) and the administrative period (which must not exceed 90 days), there is a limit on the combined length of the initial measurement period and the administrative period applicable for a new variable hour or seasonal employee.

5. Seasonal Employee Defined

The Affordable Care Act addresses the meaning of seasonal worker in the context of whether an employer meets the definit

Example 1 (12-Month Initial Measurement Period Followed by 1+ Partial Month Administrative Period). (i) Facts. For new variable hour employees, Employer B uses a 12-month initial measurement period that begins on the start date and applies an administrative period from the end of the initial measurement period through the end of

(ii) Conclusion. Same as Example 1.

Example 4 (12-Month Initial Measurement Period Preceded by Partial Month Administrative Period and Followed by 2-Month Administrative Period)

(ii) Conclusion. Employer B is not subject to any payment under § 4980H and complies with PHS Act § 2708 for 2016 with res

Employee Z works an average of 30 hours per week. Employer C offers coverage to Employee Z for a stability period that runs from January 1, 2015 through June 30, 2015

(ii) Conclusion. Employer C uses (1) an initial measurement period that does not exceed 12 months; (2) an administrative period totaling not more than 90 days; and (3) a combined initial measurement period and administrative period that does not last longer than the final day of the first calendar month beginning on or after the one-year anniversary of Employee Z's start date. From Employee Z's start date through June 30, 2015, Employer C is not subject to any payment under § 4980H, because Employer C

(ii) Conclusion. Employer D uses (1) an initial measurement period that does not exceed 12 months; (2) an administrative period totaling not more than 90 days; and (3) a combined initial measurement period and administrative period that does not extend beyond the final day of the first calendar month that begins on or after the one-year anniversary of an employee's start date. Accordingly, from Employee S's start date through November 14, 2015, Employer D is not subject to any payment under § 4980H, because Employer D complies with the standards for the initial measurement period and stability periods for a new seasonal employee with respect to Employee S. PHS Act § 2708 does not apply to Employee S during this period because, pursuant to the plan's eligibility conditions, Employee S does not become eligible during this period for coverage under the plan. Accordingly, Employer D also complies with PHS Act § 2708 with respect to Employee S during this period.

IV. RELIANCE

For compliance with § 4980H at least through the end of 2014, employers may rely on (1) the safe harbor method for ongoing employees described in section III.A and B, above; (2) the rule for new employees reasonably expected to work full-time described in section III.C, above, (3) the safe harbor method for new variable hour and seasonal employees described in section III.D, above, and (4) the safe harbor based on Form W-2 wages described in Notice 2011-73 and Notice 2012-17. Employers will not be required to comply with any subsequent guidance on these issues that is more restrictive until at least January 1, 2015.

This reliance covers a measurement period that begins in 2013 or 2014 and the associated stability period (which may extend into 2014, 2015 or 2016). For example, the use of a 12-month measurement period in accordance with this notice beginning on July 1, 2013 and ending on June 30, 2014 might be used to classify employees for a stability period that runs from July 1, 2014 through June 30, 2015. In addition, as stated earlier, use of any of the safe harbor methods described in this notice is not required, but rather is optional for all employers.

V. PUBLIC COMMENTS

Treasury and the IRS intend that upcoming regulations on the employer shared responsibility provisions under § 4980H will address the issues described in this notice, including the specific issues identified below, in addition to other aspects of § 4980H.

As part of the efforts to develop workable and flexible rules on the application of § 4980H, with extensive input from stakeholders, Treasury and the IRS have issued several notices describing potential approaches to interpreting § 4980H and requesting public comments. In response, numerous helpful comments have been received and reviewed. Those comments continue to be considered and taken into account in the process of formulating regulations and other administrative guidance that stakeholders will be able to rely on. Among the specific issues currently under consideration with respect to the identification of full-time employees under § 4980H are the following:

(1) Whether and, if so, what types of safe harbor methods should be available to employers for use in determining the full-time status of short-term assignment