Determining Full-Time Employees for Purposes of Shared Responsibility for Employers Regarding Health Coverage (§ 4980H)

Notice 2012-58

## I. PURPOSE AND OVERVIEW

This notice describes safe harbor methods that employers may use (but are not required to use) to determine which employees are treated as full-time employees for purposes of the shared employer responsibility provisions of § 4980H of the Internal Revenue Code (Code). Specifically, the administrative guidance in this notice, modifying and expanding on previous guidance, includes a safe harbor method that employers may apply to specified newly-hired employees.

As described more fully below, this notice –

- Expands the safe harbor method described in a previous notice to provide employers the option to use a look-back measurement period of up to 12 months to determine whether new variable hour employees or seasonal employees are full-time employees, without being subject to a payment under § 4980H for this period with respect to those employees. An employee is a variable hour employee if, based on the facts and circumstances at the date the employee begins providing services to the employer (the start date), it cannot be determined that the employee is reasonably expected to work on average at least 30 hours per week. (The 30 hours per week average reflects the statutory definition of full-time employee in § 4980H(c)(4) and is the definition of "full-time employee" as used in this notice.) Seasonal employee is defined in section III.D.5, below.

- Provides employers the option to use specified administrative periods (in conjunction with specified measurement periods) for ongoing employees (as defined in section III.A, below) and certain newly hired employees;

- Facilitates a transition for new employees from the determination method the employer chooses to use for them to the determination method the employer chooses to use for ongoing employees; and

- Provides employers reliance, at least through the end of 2014, on the guidance contained in this notice and on the following approaches described in prior notices:

  (1) for ongoing employees, an employer will be permitted to use measurement and stability periods of up to 12 months;

  (2) for new employees who are reasonably expected to work full-time, an employer that maintains a group health plan that meets certain requirements

will not be subject to an assessable payment under § 4980H for failing to offer coverage to the employee for the initial three months of employment; and

(3) for all employees, an employer will not be subject to an assessable payment under § 4980H(b) for an employee if the coverage offered to that employee was affordable based on the employee's Form W-2 wages reported in Box 1 (often referred to as the affordability safe harbor).

This guidance is intended to encourage employers to continue providing and potentially to expand group health plan coverage for their employees by permitting employers to adopt reasonable procedures to determine which employees are full-time employees without becoming liable for a payment under § 4980H, to protect employees from unnecessary cost, confusion, and disruption of coverage, and to minimize administrative burdens on the Affordable Insurance Exchanges (Exchanges).

Simultaneously with the issuance of this notice, the Department of the Treasury, the Department of Labor (DOL), and the Department of Health and Human Services (HHS) (the Departments) are jointly providing administrative guidance under § 2708 of the Public Health Service Act (PHS Act).[1] PHS Act § 2708 applies to group health plans and group health insurance issuers and provides that any waiting period under a group health plan must not exceed 90 days. To clarify how the PHS Act § 2708 90-day waiting period limitation coordinates with § 4980H, this notice applies portions of the Departments' separate and simultaneous PHS Act § 2708 guidance. DOL and HHS concur in the application of PHS Act § 2708 in this notice.

This notice consists of a background section briefly summarizing the § 4980H and PHS Act § 2708 statutory framework and the administrative guidance issued to date (section II); a description of the safe harbors available for employers for determining full-time employee status in the case of ongoing employees and newly-hired variable hour and seasonal employees (including the transition from newly-hired to ongoing employees and a series of examples illustrating how the safe harbors apply) (section III); a description of the reliance provided to employers through at least 2014 (section IV); and a request for comments (section V).

## II. BACKGROUND

### A. Section 4980H

Section 4980H was added to the Code by § 1513 of the Patient Protection and Affordable Care Act (Affordable Care Act) (enacted March 23, 2010, Pub. L. No. 111-148) and amended by § 1003 of the Health Care and Education Reconciliation Act of

[1] Notice 2012-59, DOL Technical Release 2012-02 and HHS Bulletin titled Guidance on 90-Day Waiting Period Limitation under Public Health Service Act § 2708.

2010 (enacted March 30, 2010, Pub. L. No. 111-152).[2] Section 4980H applies to "applicable large employers" (generally, employers who employed at least 50 full-time employees, including full-time equivalent employees, on business days during the preceding calendar year).

Generally, § 4980H provides that an applicable large employer is subject to an assessable payment if either (1) the employer fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage[3] under an eligible employer-sponsored plan and any full-time employee is certified to receive a premium tax credit or cost-sharing reduction (§ 4980H(a)), or (2) the employer offers its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage and one or more full-time employees is certified to receive a premium tax credit or cost-sharing reduction (generally because the employer's coverage either is not affordable within the meaning of § 36B(c)(2)(C)(i) or does not provide minimum value within the meaning of § 36B(c)(2)(C)(ii)) (§ 4980H(b)). Under § 36B(c)(2)(C)(i), coverage under an employer-sponsored plan is affordable to a particular employee if the employee's required contribution (within the meaning of § 5000A(e)(1)(B)) to the plan does not exceed 9.5 percent of the employee's household income for the taxable year. Section 4980H(c)(4) provides that a full-time employee with respect to any month is an employee who is employed on average at least 30 hours of service per week.[4]

### B. PHS Act Section 2708

PHS Act § 2708[5] provides that, for plan years beginning on or after January 1, 2014, a group health plan or group health insurance issuer shall not apply any waiting period that exceeds 90 days. PHS Act § 2704(b)(4), ERISA § 701(b)(4), and Code § 9801(b)(4) define a waiting period to be the period that must pass with respect to an individual before the individual is eligible to be covered for benefits under the terms of

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[2] Section 4980H was further amended by section 1858(b)(4) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011 (enacted April 15, 2011, Pub. L. No. 112-10), effective for months beginning after December 31, 2013.

[3] Minimum essential coverage is defined in § 5000A(f) of the Code. The definition of "eligible employer-sponsored plan" in § 5000A(f)(2) applies for purposes of § 4980H.

[4] For this purpose, proposed regulations are expected to provide (as stated in Notice 2011-36) that 130 hours of service in a calendar month would be treated as the monthly equivalent of 30 hours of service per week.

[5] The Affordable Care Act adds section 715(a)(1) to the Employee Retirement Income Security Act (ERISA) and section 9815(a)(1) to the Code to incorporate the provisions of part A of title XXVII of the PHS Act into ERISA and the Code, and to make them applicable to group health plans and health insurance issuers providing health insurance coverage in connection with group health plans. The PHS Act sections incorporated by these references are sections 2701 through 2728. Accordingly, PHS Act § 2708 is subject to shared interpretive jurisdiction by DOL, HHS, and Treasury.

the plan. In 2004 regulations,[6] the Departments defined a waiting period to mean the period that must pass before coverage for an employee or dependent who is otherwise eligible to enroll under the terms of a group health plan can become effective.

### C. Notice 2011-36

Public comments were requested and received on a number of issues and potential approaches to interpreting and applying § 4980H and PHS Act § 2708. In particular, Notice 2011-36 (2011-21 I.R.B. 792) described and requested comments on a possible approach that would permit employers to use an optional "look-back/stability period safe harbor" to determine whether ongoing (rather than newly-hired) employees are full-time employees for purposes of § 4980H. The use of this safe harbor approach would be voluntary.

Under the look-back/stability period safe harbor method, an employer would determine each employee's full-time status by looking back at a defined period of not less than three but not more than 12 consecutive calendar months, as chosen by the employer (the measurement period), to determine whether during the measurement period the employee averaged at least 30 hours of service per week. If the employee were determined to be a full-time employee during the measurement period, then the employee would be treated as a full-time employee during a subsequent "stability period," regardless of the employee's number of hours of service during the stability period, so long as he or she remained an employee. For an employee determined to be a full-time employee during the measurement period, the stability period would be a period of at least six consecutive calendar months that follows the measurement period and is no shorter in duration than the measurement period. If the employee were determined not to be a full-time employee during the measurement period, the employer would be permitted to treat the employee as not a full-time employee during a stability period that followed the measurement period, but the stability period could not exceed the measurement period. Comments on this approach were favorable.

### D. Notice 2011-73

In Notice 2011-73 (2011-40 I.R.B. 474), Treasury and the IRS described a safe harbor under which employers would not be subject to an assessable payment under § 4980H(b) with respect to an employee if the coverage offered to that employee was affordable based on the employee's Form W-2 wages (as reported in Box 1) instead of household income. Under the safe harbor, an employer would not be subject to a penalty under § 4980H(b) with respect to an employee if the required contribution for that employee was no more than 9.5 percent of the employee's Form W-2 wages. The proposed affordability safe harbor would apply only for purposes of determining whether an employer is subject to the assessable payment under § 4980H(b). For example, the

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[6] 26 CFR 54.9801-3(a)(3)(iii), 29 CFR 2590.701-3(a)(3)(iii), 45 CFR 146.111(a)(3)(iii).

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 are variable or otherwise uncertain. Under the potential approach described in Notice 2012-17, employers would be given three months or, in certain cases, six months, without incurring a payment under § 4980H, to determine whether a variable hour new employee is a full-time employee.

In response to Notice 2012-17, commenters requested that employers be allowed to use a look-back measurement period of up to 12 months to determine the status of new variable hour employees, similar to the method permitted to determine the status of ongoing employees.

### F. Revised Approach in This Notice

After considering the comments, Treasury and the IRS are revising the approach outlined in Notice 2012-17 for new variable hour employees. Treasury and the IRS anticipate that the revised approach, which is generally similar to the approach for ongoing employees, will be a flexible and workable option for determining the full-time status of new variable hour employees, and will provide employees and employers with greater stability and predictability. Treasury and the IRS also are providing a similar safe harbor for certain seasonal employees and are modifying the rule for ongoing employees to provide greater flexibility by allowing use of an administrative period, described below, between the measurement and stability periods. This revised guidance is described in section III, below.

Note that unless specified otherwise, all references in this notice to an offer of coverage to an employee refer to an offer of minimum essential coverage that is affordable within the meaning of § 36B(c)(2)(C)(i) (or is treated as affordable coverage under the Form W-2 safe harbor described in section II.D of this notice) and that provides minimum value within the meaning of § 36B(c)(2)(C)(ii). Also, whenever this

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[7] Simultaneously with the issuance of Notice 2012-17, DOL and HHS issued parallel guidance. See DOL Technical Release 2012-01 and HHS FAQs issued February 9, 2012.

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 purpose of the guidance in this notice, the term "calendar month" means one of the full months named in the calendar (such as January, February or March), and the term "month" means the period from a day in one month to the prior day of the following month (such as from January 15 to February 14).

## III. DETERMINING FULL-TIME STATUS OF EMPLOYEES

### A. Ongoing Employees: Safe Harbor

For ongoing employees, employers generally will be permitted to use the safe harbor method based upon measurement and stability periods described in Notices 2011-36 and 2012-17. The measurement period the employer chooses to apply to ongoing employees is referred to in this notice as the "standard measurement period."

An "ongoing employee" is generally an employee who has been employed by the employer for at least one complete standard measurement period. As stated in Notice 2011-36, different rules may apply to employees who move into full-time status during the year. Additional rules regarding the treatment of employees who experience a change in employment status are expected to be included in upcoming regulations.

Under the safe harbor method for ongoing employees, an employer determines each ongoing employee's full-time status by looking back at the standard measurement period (a defined time period of not less than three but not more than 12 consecutive calendar months, as chosen by the employer). The employer has the flexibility to determine the months in which the standard measurement period starts and ends, provided that the determination must be made on a uniform and consistent basis for all employees in the same category. (See below in this section for permissible categories.) For example, if an employer chose a standard measurement period of 12 months, the employer could choose to make it the calendar year, a non-calendar plan year, or a different 12-month period, such as one that ends shortly before the start of the plan's annual open enrollment season. If the employer determines that an employee averaged at least 30 hours per week during the standard measurement period, then the employer treats the employee as a full-time employee during a subsequent "stability period", regardless of the employee's number of hours of service during the stability period, so long as he or she remained an employee.

For an employee whom the employer determines to be a full-time employee during the standard measurement period, the stability period would be 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, as discussed in section III.B, below). If the employer

determines that the employee did not work full-time during the standard measurement period, the employer would be permitted to treat the employee as not a full-time employee during the stability period that follows, but is not longer than, the standard measurement period.

Subject to the rules governing the relationship between the length of the measurement period and the stability period, employers may use measurement periods and stability periods that differ either in length or in their starting and ending dates for the following categories of employees: (1) collectively bargained employees and non-collectively bargained employees; (2) salaried employees and hourly employees; (3) employees of different entities; and (4) employees located in different States. (These categories are adapted from existing regulatory guidance and also reflect public comments received in response to Notice 2011-36.) The rules described in this paragraph apply both to the standard measurement periods described in this section III.A and the initial measurement periods described below in section III.D.

### B. Ongoing Employees: Option to Use Administrative Period Under Safe Harbor

Because employers may need time between the standard measurement period and the associated stability period to determine which ongoing employees are eligible for coverage, and to notify and enroll employees, an employer may make time for these administrative steps by having its standard measurement period end before the associated stability period begins. However, any administrative period between the standard measurement period and the stability period may neither reduce nor lengthen the measurement period or the stability period. The administrative period following the standard measurement period may last up to 90 days. To prevent this administrative period from creating any potential gaps in coverage, it will overlap with the prior stability period, so that, during any such administrative period applicable to ongoing employees following a standard measurement period, ongoing employees who are eligible for coverage because of their status as full-time employees based on a prior measurement period would continue to be offered coverage.

**Example**

Facts. Employer W chooses to use a 12-month stability period that begins January 1 and a 12-month standard measurement period that begins October 15. Consistent with the terms of Employer W's group health plan, only an ongoing employee who works full-time (an average of at least 30 hours per week) during the standard measurement period is offered coverage during the stability period associated with that measurement period. Employer W chooses to use an administrative period between the end of the standard measurement period (October 14) and the beginning of the stability period (January 1) to determine which employees worked full-time during the measurement period, notify them of their eligibility for the plan for the calendar year beginning on January 1 and of the coverage available under the plan, answer questions and collect materials from employees, and enroll those employees who elect coverage

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]

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[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

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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. Specifically, the initial measurement period and administrative period together cannot extend beyond the last day of the first calendar month beginning on or after the first anniversary of the employee's start date. For example, if an employer uses a 12-month initial measurement period for a new variable hour employee, and begins that initial measurement period on the first day of the first calendar month following the employee's start date, the period between the end of the initial measurement period and the offer of coverage to a new variable hour employee who works full time during the initial measurement period must not exceed one month.

### 4. Variable Hour Employee Defined

For purposes of this notice, a new employee is a variable hour employee if, based on the facts and circumstances at the start date, it cannot be determined that the employee is reasonably expected to work on average at least 30 hours per week. A new employee who is expected to work initially at least 30 hours per week may be a variable hour employee if, based on the facts and circumstances at the start date, the period of employment at more than 30 hours per week is reasonably expected to be of limited duration and it cannot be determined that the employee is reasonably expected to work on average at least 30 hours per week over the initial measurement period. As one example, a variable hour employee would include a retail worker hired at more than 30 hours per week for the holiday season who is reasonably expected to continue working after the holiday season but is not reasonably expected to work at least 30 hours per week for the portion of the initial measurement period remaining after the holiday season, so that it cannot be determined at the start date that the employee is reasonably expected to average at least 30 hours per week during the initial measurement period.

### 5. Seasonal Employee Defined

The Affordable Care Act addresses the meaning of seasonal worker in the context of whether an employer meets the definition of an applicable large employer. Specifically, § 4980H(c)(2)(B) generally provides that if an employer's workforce exceeds 50 full-time employees for 120 days or fewer during a calendar year, and the employees in excess of 50 who were employed during that period of no more than 120 days were seasonal employees, the employer would not be an applicable large employer. Furthermore, § 4980H(c)(2)(B)(ii) provides that, for this purpose, seasonal worker means a worker who performs labor or services on a seasonal basis, as defined by the Secretary of Labor, including (but not limited to) workers covered by 29 CFR 500.20(s)(1) and retail workers employed exclusively during holiday seasons. The statute does not address how the term "seasonal employee" might be defined for purposes other than the determination of applicable large employer status, such as the determination of whether a new employee of an applicable large employer is reasonably expected to work full time for purposes of determining the amount of any assessable payment under § 4980H. Through at least 2014, employers are permitted to use a reasonable, good faith interpretation of the term "seasonal employee" for purposes of this notice.

## E. Examples

The examples that follow illustrate how the safe harbors described above apply to variable hour employees and seasonal employees. For the rules that apply to full-time new employees, see section III.C, above. For rules that apply to part-time new employees, see section IV, example 5, of the notice (issued concurrently with this notice) interpreting PHS Act § 2708.

In all of the following examples**,** the coverage offer is an offer of minimum essential coverage that is affordable within the meaning of § 36B(c)(2)(C)(i) (or is treated as affordable coverage under the Form W-2 safe harbor described in section II.D of this notice) and that provides minimum value within the meaning of § 36B(c)(2)(C)(ii).

### 1. Examples of New Variable Hour Employees with an Administrative Period.

In Examples 1 through 8, the new employee is a new variable hour employee, and the employer has chosen to use a 12-month standard measurement period for ongoing employees starting October 15 and a 12-month stability period associated with that standard measurement period starting January 1. (Thus, during the administrative period from October 15 through December 31 of each calendar year, the employer continues to offer coverage to employees who qualified for coverage for that entire calendar year based upon working on average at least 30 hours per week during the prior standard measurement period.) Also, the employer offers health plan coverage only to full-time employees (and their dependents).

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 the first calendar month beginning on or after the end of the initial measurement period. Employer B hires Employee Y on May 10, 2014. Employee Y's initial measurement period runs from May 10, 2014, through May 9, 2015. Employee Y works an average of 30 hours per week during this initial measurement period. Employer B offers coverage to Employee Y for a stability period that runs from July 1, 2015 through June 30, 2016.

(ii) Conclusion. Employee Y works an average of 30 hours per week during his initial measurement period and Employer B 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 beyond the final day of the first calendar month beginning on or after the one-year anniversary of Employee Y's start date. Accordingly, from Employee Y's start date through June 30, 2016, Employer B is not subject to any payment under § 4980H with respect to Employee Y, because Employer B complies with the standards for the initial measurement period and stability periods for a new variable hour employee. Employer B also complies with PHS Act § 2708. Employer B must test Employee Y again based on the period from October 15, 2014 through October 14, 2015 (Employer B's first standard measurement period that begins after Employee Y's start date).

Example 2 (11-Month Initial Measurement Period Followed by 2 + Partial Month Administrative Period). (i) Facts. Same as Example 1, except that Employer B uses an 11-month initial measurement period that begins on the start date and applies an administrative period 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. Employer B hires Employee Y on May 10, 2014. Employee Y's initial measurement period runs from May 10, 2014, through April 9, 2015. Employee Y works an average of 30 hours per week during this initial measurement period. Employer B offers coverage to Employee Y for a stability period that runs from July 1, 2015 through June 30, 2016.

(ii) Conclusion. Same as Example 1.

Example 3 (11-Month Initial Measurement Period Preceded by Partial Month Administrative Period and Followed by 2-Month Administrative Period) . (i) Facts. Same as Example 1, except that Employer B uses an 11-month initial measurement period that begins on the first day of the first calendar month beginning after the start date and applies an administrative period that runs from the end of the initial measurement period through the end of the second calendar month beginning on or after the end of the initial measurement period. Employer B hires Employee Y on May 10, 2014. Employee Y's initial measurement period runs from June 1, 2014, through April 30, 2015. Employee Y works an average of 30 hours per week during this initial measurement period. Employer B offers coverage to Employee Y for a stability period that runs from July 1, 2015 through June 30, 2016.

(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). (i) Facts. For new variable hour employees, Employer B uses a 12-month initial measurement period that begins on the first day of the first month following the start date and applies an administrative period that runs from the end of the initial measurement period through the end of the second calendar month beginning on or after the end of the initial measurement period. Employer B hires Employee Y on May 10, 2014. Employee Y's initial measurement period runs from June 1, 2014, through May 31, 2015. Employee Y works an average of 30 hours per week during this initial measurement period. Employer B offers coverage to Employee Y for a stability period that runs from August 1, 2015 through July 31, 2016.

(ii) Conclusion. Employer B does not satisfy the standards for the safe harbor method in section III.D because the combination of the initial partial month delay, the twelve-month initial measurement period, and the two month administrative period means that the coverage offered to Employee Y does not become effective until after the first day of the second calendar month following the first anniversary of Employee Y's start date. Accordingly, Employer B is potentially subject to a payment under § 4980H and fails to comply with PHS Act § 2708.

Example 5 (Continuous Full-Time Employee). (i) Facts. Same as Example 1; in addition, Employer B tests Employee Y again based on Employee Y's hours from October 15, 2014 through October 14, 2015 (Employer B's first standard measurement period that begins after Employee Y's start date), determines that Employee Y worked an average of 30 hours a week during that period, and offers Employee Y coverage for July 1, 2016 through December 31, 2016. (Employee Y already has an offer of coverage for the period of January 1, 2016 through June 30, 2016 because that period is covered by the initial stability period following the initial measurement period, during which Employee Y was determined to be a full-time employee.)

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

Example 6 (Initially Full-Time Employee, Becomes Non-Full-Time Employee). (i) Facts. Same as Example 1; in addition, Employer B tests Employee Y again based on Employee Y's hours from October 15, 2014 through October 14, 2015 (Employer B's first standard measurement period that begins after Employee Y's start date), and determines that Employee Y worked an average of 28 hours a week during that period. Employer B continues to offer coverage to Employee Y through June 30, 2016 (the end of the stability period based on the initial measurement period during which Employee Y was determined to be a full-time employee), but does not offer coverage to Employee Y for the period of July 1, 2016 through December 31, 2016.

(ii) Conclusion. Employer B is not subject to any payment under § 4980H and complies with PHS Act § 2708 for 2016 with respect to Employee Y, provided that it offers coverage to Employee Y from July 1, 2015 through June 30, 2016 (the entire stability period associated with the initial measurement period).

Example 7 (Initially Non-Full-Time Employee). (i) Facts. Same as Example 1, except that Employee Y works an average of 28 hours per week during the period from May 10, 2014 through May 9, 2015 and Employer B does not offer coverage to Employee Y in 2015. Employer B tests Employee Y again based on Employee Y's hours from October 15, 2014 through October 14, 2015 (Employer B's first standard measurement period that begins after Employee Y's start date).

(ii) Conclusion. From Employee Y's start date through the end of 2015, Employer B is not subject to any payment under § 4980H, because Employer B complies with the standards for the measurement and stability periods for a new variable hour employee with respect to Employee Y. PHS Act § 2708 does not apply to Employee Y during this period because, pursuant to the plan's eligibility conditions, Employee Y does not become eligible during this period for coverage under the plan. Accordingly, Employer B also complies with PHS Act § 2708 with respect to Employee Y during this period.

Example 8 (Initially Non-Full-Time Employee, Becomes Full-Time Employee). (i) Facts. Same as Example 7; in addition, Employer B tests Employee Y again based on Employee Y's hours from October 15, 2014 through October 14, 2015 (Employer B's first standard measurement period that begins after Employee Y's start date), determines that Employee Y works an average of 30 hours per week during this standard measurement period, and offers coverage to Employee Y for 2016.

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

**2. Examples of New Variable Hour Employees with an Administrative Period and Six-Month Standard Measurement Period and Stability Period.**

In Examples 9 and 10, the new employee is a new variable hour employee, and the employer uses a six-month standard measurement period, starting each May 15 and November 15, with six-month stability periods associated with those standard measurement periods starting January 1 and July 1.

Example 9. (i) Facts. For new variable hour employees, Employer C uses a six-month initial measurement period that begins on the start date and applies an administrative period that runs from the end of the initial measurement period through the end of the first full calendar month beginning after the end of the initial measurement period. Employer C hires Employee Z on May 10, 2014. Employee Z's initial measurement period runs from May 10, 2014, through November 9, 2014, during which

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 complies with the standards for the measurement and stability periods for a new variable hour employee with respect to Employee Z. Employer C also complies with PHS Act § 2708. Employer C must test Employee Z again based on Employee Z's hours during the period from November 15, 2014 through May 14, 2015 (Employer C's first standard measurement period that begins after Employee Z's start date).

Example 10 (Initially Full-Time Employee, Becomes Non-Full-Time Employee). (i) Facts. Same as Example 9; in addition, Employer C tests Employee Z again based on Employee Z's hours during the period from November 15, 2014 through May 14, 2015 (Employer C's first standard measurement period that begins after Employee Z's start date), during which period Employee Z works an average of 28 hours per week. Employer C continues to offer coverage to Employee Z through June 30, 2015 (the end of the initial stability period based on the initial measurement period during which Employer C worked an average of 30 hours per week), but does not offer coverage to Employee Z from July 1, 2015 through December 31, 2015.

(ii) Conclusion. Employer C is not subject to any payment under § 4980H and complies with PHS Act § 2708 with respect to Employee Z for 2015.

### 3. Example of Seasonal Employee

Example 11 (12-Month Initial Measurement Period; 1+ Partial Month Administrative Period). (i) Facts. Employer D offers health plan coverage only to full-time employees (and their dependents). Employer D uses a 12-month initial measurement period for new variable hour employees and seasonal employees that begins on the start date and applies an administrative period from the end of the initial measurement period through the end of the first calendar month beginning after the end of the initial measurement period. Employer D hires Employee S, a ski instructor, on November 15, 2014 with an anticipated season during which Employee S will work running through March 15, 2015. Employer D determines that Employee S is a seasonal employee based upon a reasonable good faith interpretation of that term. Employee S's initial measurement period runs from November 15, 2014, through November 14, 2015. Employee S works 60 hours per week from November 15, 2014 through March 15, 2015, but is not reasonably expected to average 30 hours per week for the 12-month initial measurement period. Accordingly, Employer D does not treat Employee S as a full-time employee, and does not offer Employee S coverage.

(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 employees, temporary staffing employees, employees hired into high-turnover positions, and other categories of employees that may present special issues?

(2) Whether to develop additional guidance (such as relevant factors or safe harbors) to assist employers and employees in determining, as of an employee's start date, whether the employee is reasonably expected to work an average of at least 30 hours per week, including whether the employee is a variable hour employee. If so, what types of factors or safe harbors should apply for this purpose?

(3) What rules should be provided to address coordination of differing measurement and stability periods during the transition following a merger or acquisition?

(4) How the term "seasonal worker" should be defined under § 4980H, including: (a) the practicability of using different definitions for different purposes (such as status as an applicable large employer or, with respect to an applicable large employer, status of a new employee as full-time); and (b) whether other, existing legal definitions should be considered in defining a seasonal worker under § 4980H (such as the safe harbor for seasonal employees in the final sentence of Treas. Reg. § 1.105-11(c)(2)(iii)(C)).

In view of the anticipated timing of regulations and other guidance that stakeholders will be able to rely on, it is requested that those who wish to submit any further comments on these or other issues relating to this notice do so by September 30, 2012. Comments should include a reference to Notice 2012-58. Send submissions to CC:PA:LPD:PR (Notice 2012-58), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered **Monday through Friday** between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (Notice 2012-58), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC 20044, or sent electronically, via the following e-mail address: *Notice.comments@irscounsel.treas.gov*. Please include "Notice 2012-58" in the subject line of any electronic communication. All material submitted will be available for public inspection and copying.

## VI. NO INFERENCE

No inference should be drawn from any provision of this notice concerning any other provision of § 4980H or any other provision of the Affordable Care Act.

## VII. DRAFTING INFORMATION

The principal author of this notice is Mireille Khoury of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). For further information regarding this notice contact Ms. Khoury at (202) 622-6080 (not a toll-free call).