Q&A from Assurex Global Webinar "ACA Employer Pay or Play Rules and the Definition of Full-Time	May 22, 2013
Question	**Answer**
Q: If you have less than 50 employees but have a significant number of independent contractors as part of your organization, can these independent contractors ever be used to put your company over the 50 employee threshold? Q: We know we are a large company as we have 60+ employees. However, are we obligated to offer any of our many 1099 vendors health benefits?	A: If the individual is truly an independent contractor, they would not be included in the employer's count of FTEs for determining applicable large employer status, and do not need to be offered benefits. However, many employers misclassify individuals as independent contractors when they should be considered employees. The DOL and IRS are currently pursuing an aggressive program, unrelated to the ACA, to identify employers who misclassify employees as independent contractors. Employers should seek the advice of a competent employee law advisor in determining the correct classification of "independent" individuals.
Q: If a full-time employee quits and we pay out over 130 hours of PTO - do we have to cover them an additional month?	A: It depends on the nature of the employment agreement (i.e. what date does the employer use as the employee's termination date). There is no requirement to offer coverage beyond the date of termination.
Q: When an employee who earned fulltime status during the measurement period and during the stability period have their hours reduced to the point they do not have enough to pay their insurance when can you terminate coverage if they don't pay their portion of the premium?	A: Yes - the employer may terminate coverage for nonpayment under the same terms as any other employee would be terminated for non-payment of premium.
Q: Will this apply to the restaurant industry?	A: In general the ACA applies to employers in the restaurant industry in the same way as any other employer. Many employers in the restaurant industry have variable hour and/or seasonal employees. For applicable large employers (50 or more FTEs) required to offer coverage to all full-time employees (30 or more hours of service per week), the optional look-back measurement period may make the administration easier and allow the employer to subject such variable hour/seasonal employees to an additional 12-month measurement period rather than requiring coverage to be offered within 90 days of hire.
Q: A spouse is not required to be offered coverage as a dependent. If employee coverage is considered affordable, how does this impact a spouse that may be subsidy eligible? Q: If employers carve out spouses from eligibility, would that spouse be eligible to receive a subsidy or tax credit on the exchange?	A: If the spouse is not offered coverage under the employer's group health plan, and is not eligible for other coverage, the spouse may qualify for a subsidy on the Exchange if the spouse meets the income requirements (between 100-400% FPL). If the spouse is offered coverage under the employer's group health plan and the employee-only coverage is deemed affordable and provides minimum value, the spouse would not be eligible for a subsidy through the Exchange.
Q: If an employee who is covered under the employer plan which is affordable, but can't afford the dependant coverage premium, can they choose a subsidy plan? If so, is there a penalty to the employer?	A: No - if the employee contribution to employee-only coverage is affordable, dependents will not be eligible for a subsidy through the Exchange, regardless of whether or not the contribution for dependent coverage is affordable.
Q: What about covering dependents defined by the IRS - elder parent.	A: For purposes of employer shared responsibility rules under section 4980H, the proposed regulations define an employee's dependents as an employee's child (as defined in Code § 152(f)(1)) who is under 26 years of age. The definition does not include spouses, elderly parents, etc.

Q: A temporary employee works more than 1560 hrs during the initial measurement period. He elects to receive per diem payments in lieu of benefits. If he applies for health care subsidy, does the company get penalized?	A: There is nothing in the ACA that prohibits employers from providing an incentive for employees who choose not to elect coverage (such as per diem payments in lieu of benefits) and employers will not be penalized so long as all full-time employees are 'offered' the required coverage annually. The employer should be aware that the Medicare Secondary Payer (MSP) rules prohibit employers (with over 20 employees) from giving an incentive to an employee who is eligible for Medicare (due to age or disability) for not taking the employer coverage. In addition, depending on the details of the arrangement, there are some issues to consider: • The ACA requires employers to offer health insurance to all full time employees or face the risk of an employer penalty under §4980(H). These rules require that employees have an opportunity to enroll at least once each year. If the opt-out program does not allow an annual enrollment it would violate this rule. • If an employee initially waives coverage in a plan, HIPAA special enrollment rules require the plan to allow a mid-year enrollment after certain events (marriage, birth of a child, etc.). An employers failure to permit HIPAA special enrollment opportunities to these individuals could trigger penalties under the ACA shared responsibility rules.
Q: Are deductibles and co-pays included in the required contribution amount along with monthly premiums paid?	A: No - when considering 'affordability' for purposes of potential penalties under section 4980H(b), the employee contribution to the employer-only premium (not considering the deductibles and co-pays) must not exceed 9.5% of household income
Q: For the "b" penalty (4980H(b)), what if your health plans are age-banded, do you have to determine "affordable" for each band?	A: Typically age-banded plans are offered for small groups, who are not subject to the rules and associated penalties under 4980H; however, if an applicable large employer (50 or more FTEs) offers an age-banded plan, the plan would be affordable if the employee's contribution for self-only coverage in the applicable age band does not exceed 9.5% of the employee's household income.

Q: Does the cost of employee only coverage on our lowest cost plan to the employee have to include any premium differential for wellness, tobacco use, etc.?	A: A plan's affordability must be determined based on the cost for an employee to participate in the plan without taking into account incentives for wellness plan participation. The only exception to this rule is for a wellness program related to tobacco use. Employers are able to use the applicable "non-smoker" rate to determine a plan's affordability, as long as the smoking related incentive program meets the requirement of a HIPAA non-discriminatory wellness program. If smokers are charged a higher health insurance premium than non-smokers under an employer's health plan, affordability calculations would be based on the lower premiums charged to nonsmokers. For all other wellness incentives, the calculations would be based on the higher premiums charged to people who failed to meet the wellness standards. There is a 1 year employer penalty "grace period/safe harbor" in the rules. For 2014 only, the employer will not pay a penalty under 4980(H)(b) if the "wellness rate" is affordable...even if the employee qualifies for a subsidy due to the "non-wellness" rate being unaffordable.
Q: If an employer offers health coverage to all employees and pays 100% of the employees portion, do the "pay or play" rules apply?	A: Yes - if the employer has 50 or more FTEs (an applicable large employer), the employer is subject to the "pay or play" rules under section 4980H; however, so long as the employer offers health coverage to all full-time employees that is affordable and provides minimum value, no penalties will apply. Paying 100% of the employee portion will certainly make it affordable, but the health coverage must also provide minimum value (60% actuarial value).

Q: Is over-time pay included in the calculating of the affordability of the employee's contribution?
Q: To calculate the employee household income, do we use actual employee earnings or their hourly rate times 30 hours or the 35-40 hours they may work? 10 hours can make a big difference in determining affordability.

A: The IRS has provided employers with 3 safe harbors that "save" an employer from any penalty liability even if the cost of coverage exceeds the employee's actual household income (which the employer is not likely to know).

• Rate of Pay – An employer can take the hourly rate of pay for each hourly employee and multiply that rate by 130 hours per month to determine a monthly "rate of pay." The employee's monthly contribution amount (for the self-only premium) is affordable if it is equal to or lower than 9.5% of this computed monthly wage estimate, regardless of the number of hours the person actually works or is paid in the month.

• Federal Poverty Line - An employer may also rely on a design-based safe harbor using the Federal Poverty Level (FPL) for a single individual. Coverage offered to an employee is affordable if the employee's cost for self-only coverage does not exceed 9.5% of the FPL for a single individual. For example, using the 2013 FPL ($11,490) affordable coverage under this method would have been set at a monthly contribution in the lower 48 states of $90.96 for self-only coverage (FPL is higher in AK and HI).

• The Form W-2 - provides employers with an option for determining the affordability of health coverage that is based on information (unlike employees' household income) that the employer will know. To qualify for this safe harbor, the employee's required contribution must remain a consistent amount or a consistent percentage of all Form W-2 wages during the year. This safe harbor would be determined based on the employee's annual W-2 wages as reported in Box 1.

Q: We currently take employee health premiums on a bi-weekly basis. So twice a year there are 3 deductions per month. Do you know if this will impact the safe harbor calculation? E.G. $34 biweekly x 26 / 12 = $74 per month which is under the current Federal Poverty line. In the months there are 3 pay periods = $34 x 3 = $102 which is over the poverty line.

A: Affordability is calculated on a monthly basis. In this case the employer would take the annual required contribution and divide by 12 to determine affordability. It is not based on the payroll dates.

Q: Do schools still use the 1560 hours as the measurement period? Or do we subtract summer months?

Q: Educational Staff who work 10 months of the year, will not work 1560 hours in a 12 month period. Some employee groups are already offered benefits, would those who currently are not offered benefits (hourly) need be offered coverage?

A: There is a special rule that applies to most educational institutions. For those employees working in education (typically subject to a break in service over the summer), the proposed rules have issued guidance on how to determine whether or not such employee should be classified as full-time (30 or more hours of service per week). Employers can determine the employee's average hours of service by:
(i) excluding any employment break period occurring during the measurement period and applying that average for the remaining measurement period; or
(ii) imputing hours of service for the employment break period at a rate equal to the average weekly hours of service for weeks that are not part of an employment break period; however, an educational organization is not required to take into account more than 501 hours of service for all employment break periods occurring in a single calendar year.

These rules apply specifically to those educational institutions defined under section 1.170A-9(c)(1). If the educational institution does not fall under this definition and hours of service are not required to be credited during the break, those same employees may not reach the 1560 hours of service required to average 130 hours of service per month (or 30 hours of service per week).

Q: Are temporary employees from a staffing agency considered variable employees and eligible for the look back period even if their assignment is 40 hours a week for an indefinite period of time?
Q: Define again counting individuals on site at a company through a staffing agency. The person is an employee of the staffing agency and not the company. Does both the staffing agency and the company have to count that employee to determine the number of employees? Both could then be offering benefits if both counted that person.
Q: We have 48 employees and 4 that work here from a temporary employment agency, do those 4 from the employment agency count as employees? They are not on our payroll.

A: First of all, it is necessary to determine whether the employees are 'common-law employees' of the staffing agency or of the employer. The employer is only required to count its common-law employees in determining FTEs and to offer coverage to its own common-law employees to avoid potential penalties under section 4980H.

Second, for all employees (including temporary employees) for which it can reasonably be determined that they will average 30 hours of service per week (130/month or 1560/yr), such employees must be offered coverage within 90 days of hire. In the current guidance provided, employers may treat temporary employees (full-time or part-time who cannot be reasonably determined upon hire to average 30 hours of service per week) as variable hour employees through 2014, therefore allowing them to be subject to the optional look-back measurement period. It is expected that there will be additional guidance around temporary employees going forward that may place time limits and/or other restrictions in how temporary employees are treated; however, through 2014, temporary employees may be treated as variable hour employees.

Q: Do unpaid interns count as short term employees? Or do only paid internships count as short term employees?
Q: What about interns that are hired for a 2 to 4 month period and work 20, 30 or 40 hours a week sometimes? Does the fact that they are hired with agreement as 'intern' they are not eligible for coverage?

A: Classifying an individual as an "intern" has no bearing on the determination of full time. Interns must be treated the same as any other employee for purposes of the ACA employer shared responsibility rules. Hours of service are generally paid hours, so unpaid time would not be counted toward full-time status, however employer law rules unrelated to the ACA severely restrict most employers ability to legally have unpaid interns.

Q: We have a number of individuals who we bring back during the summer months while they are off from school. Would we be able to call these individuals variable hour employees each year, or would that only be applicable for the first time they're hired?

A: So long as the break in service exceeds 26 consecutive weeks (or meets the rule of parity - the break is longer than 4 weeks and exceeds the length of prior employment), the temporary summer employees may be treated as new hires each summer and may be subjected to a new initial measurement period so long as they are considered variable hour and/or seasonal employees (see below).

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Q: What if we have seasonal employees that work more than 1560 hours in the measurement period but they aren't employed at the beginning of the stability period. Do they get coverage when they come back?
Q: If an employee is laid-off and then is rehired, is a new measurement period started upon rehire?

A: If there is a break in service of (a) at least 26 consecutive weeks; or (b) if the break is at least 4 weeks and exceeds the length of prior employment, then the employee can be treated as a new hire upon resuming service and the process of measurement could be restarted. However, if the break does not meet (a) or (b) above, the employee is treated as a continuing employee, and the measurement/stability period applies as if the employee had not experienced a break in service (i.e. if the employee returns during a stability period in which the employee is treated as a full-time employee and eligible for benefits, this status remains throughout the remainder of the stability period and the employee must be offered coverage as soon as administratively possible upon resumption of service).

Q: So if I have a variable hour employee who works for 3 months, then is terminated for 5 months, I can re-start that employee's initial measurement period again upon rehire?

A: Yes - because the 'rule of parity' allows the employee to be treated as a new employee after a break in service so long as the break is longer than 4 weeks and is longer than the previous period of employment.

Q: For seasonal employees, if terminated at the end of the first season, and then rehired at the start of the next season, does that change the measurement period rules and create two measurements?

A: It depends on the length of the break in service. If the break in service is (a) at least 26 consecutive weeks; or (b) if the break is at least 4 weeks and exceeds the length of prior employment, then the employee can be treated as a new hire upon resuming service and the process of measurement could be restarted. However, if the break does not meet (a) or (b) above, the employee is treated as a continuing employee, and the measurement/stability period applies as if the employee had not experienced a break in service.

Q: If an EE worked for an ER long enough to qualify for health coverage, quits and then is rehired, if they are determined as having prior hours of service great enough to immediately qualify, you cannot make them wait 30 days from new date of hire, then covered on 1st day of next new month?	A: In the proposed regulations, the guidance states that an employee rehired after a break in service that is required to be treated as a continuing employee under the break in service rules must be offered coverage "as soon as administratively possible."
Q: Break of service employees, are they covered when they are on break in service? Would they go on COBRA?	A: If the employees remain employees during the break, the employer is required to continue offering coverage in accordance with the employee's eligibility status. However, if the employee is terminated during the break in service, the employer is no longer required to offer coverage, but would need to offer COBRA if the employee was covered immediately prior to termination.
Q: What about a landscape company where the season is 9 months of the year?	A: Seasonal employees may be subjected to a look-back measurement period if the employer chooses to do so. Such employees would need to achieve 1560 hours of service (over a 12-month measurement period) to earn full-time status for the corresponding stability period. If these seasonal employees do not achieve 1560 hours of service or more during the 9 months working, the employees would never be eligible for coverage.
Q: Does each new employee have their own initial measurement period and stability period? Q: So if you measure each new variable hour or seasonal employee separately for a 12-month period, you would have a different administration period for each one?	A: Yes, all ongoing employees are subject to the standard measurement and stability period. Each new hire variable hour and seasonal employee is subject to an initial measurement and stability period. Following the initial measurement/stability period, the employee is then subjected to the standard measurement/stability in place for all other ongoing variable hour employees. Initial measurement periods cannot be applied to regular full-time new hires, these employees can have a waiting period of no more than 90 days. For new variable hour and seasonal employees, the measurement period may begin any date between the employee's hire date and the first day of the first calendar month after the hire date. Starting the initial measurement period on the first of the month would be easier administratively, because the employer would only have 12 initial measurement periods to keep track of with multiple new hires in each one; using date of hire would mean a different initial measurement period for every employee. Also keep in mind, the initial 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 start date (at most, 13 months plus a fraction of a month).

Q: We decide to use a measurement period of 12 months from Jan 1 to Dec 31. If an employee is hired as temporary help Aug 1st and works 1040 hrs from Aug 1st to Dec 31st. Then continues to work 530 more hours Jan1st to Apr 30th of following year, do we use the look back of Jan to Dec of each year or do we look at the entire number of hours that particular employee worked from Aug 1st to Apr 30st?	A: The variable hour employee hired August 1 would have an initial measurement period that began any time between August 1 and September 1 and would continue for 12 months. Assuming a Sept 1 - Aug 31 initial measurement period, if the employee achieves 1560 hours of service, the employee would then be eligible for coverage (after a 1 month administrative period) an entire 12-month stability period (Oct 1 - Sept 30). The employee would also be measured against the next standard measurement period after his date of hire along with all other ongoing employees. After the initial stability period expires Sept 30, ongoing eligibility would be determined in accordance with the standard measurement period used for all other ongoing employees.
Q: Can a 30 hour or more employee waive coverage if they want too? Q: Can employees with coverage drop their coverage during their stability period?	A: Yes, an employee can always waive or drop the coverage if desired, but should keep in mind that this would not prevent ineligibility for a subsidy through the Exchange. If the coverage offered to the employee is affordable and provides minimum value, the employee is not eligible for a subsidy through the Exchange. Also keep in mind that pre-tax elections under a section 125 plan may not allow such mid-year election changes. In addition, the employer is only responsible for potential penalties under 4980H if the employee fails to OFFER coverage to full-time employees either (i) within 90 days of hire, or (ii) for the entire stability period (so long as the employee is not terminated) if eligibility is achieved during the previous measurement period. It is irrelevant whether or not the employee accepts or waives the coverage that is offered.
Q: How do we 'count' full-time employees that have waived health care coverage because they have coverage under a spouse's program?	A: When calculating potential penalties under 4980H, it is necessary to consider all full-time employees (30 or more hours of service per week). All full-time employees must be OFFERED coverage to avoid the penalty; it is irrelevant whether or not the employee has access to other coverage or whether the employee accepts or waives coverage through the employer's group health plan.
Q: If all eligible FT employees are offered medical insurance during annual enrollment, but only 50% actually take coverage, is the employer OK?	A: Yes - the employer is only required to OFFER the coverage to all full-time employees; it does not matter which employees or how many employees accept the coverage for penalty purposes.
Q: Does employee have to be on employer health plan by the 90th day?	A: The regulations state that “the waiting period may not extend beyond 90 days and all calendar days are counted beginning on the enrollment date, including weekends and holidays.” If the 91st day is a weekend or holiday, coverage may be made effective earlier than the 91st day, but coverage must be availed no later than the 91st day.

Q: If a variable hour employee satisfies 1560 hours of service within a 12 month measurement period and it is determined they are now full-time; do they then have to satisfy the 90 day waiting period?	A: No, the 12-month measurement period takes the place of the 90-day waiting period. The only additional time that may be added on to the 12-month measurement period is the administrative period (which cannot exceed 90 days). Also, keep in mind that for new hires, the initial 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 start date (at most, 13 months plus a fraction of a month).
Q: What if a plan renews in June 1, 2014? Does the 30 hour full-time calculation come into play for us this plan year or next? When do penalties apply?	A: If the non-calendar plan was in place as of December 27, 2012 and (a) at least 25% of ALL of the company's employees are covered under the non-calendar plan years (as of the end of the most recent enrollment period or any date between October 31, 2012 and December 27, 2012), or (b) 1/3 or more of ALL of the company's employees were offered coverage under those plans during the most recent open enrollment period before December 27, 2012, then the transition rule applies and compliance can be delayed and no penalties will apply until the plan year renewal (6/1/14). Otherwise, the penalties will apply 1/1/14.
Q: Under the PPACA transitional relief, non-calendar year plans in effect on or before 12/27/12, can avoid paying penalties during the transition period so long as the minimum essential, minimum value, and affordable coverage (below 9.5% of annual wage) is offered during the next open enrollment period with and effective date on the first day of the next plan year. My understanding of the transitional relief is ProU can differ adding the payroll contract staff (temporary staff) until the next open enrollment period without facing penalty for period 1/1/14 to 5/1/14. Please confirm that you agree with this statement.	A: So long as the transition relief criteria are satisfied, the employer would not face any penalties for failure to offer coverage to any employees (including full-time, temporary, variable hour or seasonal employees) until 5/1/14.
Q: What if you add a new plan for those employees you didn't offer coverage to, but you continue to use another plan that was already in place...when would the penalties apply? Q: Can employee premiums be different based on the number of hours they work? So can a 40 hr person have a different premium than a 30 hr person?	A: So long as the employer offers at least one plan to all full-time employees that is affordable and provides minimum value, the employer will not face any potential penalties under section 4980H. The ACA does not required the employer to offer all plan options to all employees, or even to contribute the same amounts toward coverage. However, any time there are different eligibility requirements, plan benefits or cost-sharing, potential discrimination issues should be considered. For self-funded groups (subject to nondiscrimination rules under section 105(h)), employers may not discriminate in favor of highly compensated individuals. For fully-insured groups, similar rules are likely to be released in the near future, making them effective in 2014 or 2015.
Q: If an employer offers two plans and only one plan meets the minimum essential coverage, does that meet the eligibility criteria or must both plans meet the criteria?	A: Yes - so long as the employer offers at least one plan option to all full-time employees that is affordable and provides minimum value, the employer will not be liable for any penalties under section 4980H.

Q: Does my measurement period for 2014 start in 2013?	A: Yes - To use the optional look-back measurement method for determining full-time status for the 2014 plan year, it will be necessary to begin the measurement period in 2013. Typically, the measurement period must match the stability period. However, for the 2014 plan year, the employer may use a measurement period that is (i) shorter than 12 months, but that is no less than 6 months; and (ii) must begin no later than 7/1/13 and end no earlier than 90 days before the first day of the 2014 plan year.
Q: How do you accurately measure hours worked in 2013 for 2014 if the person didn't work for at least 6 months in 2013?	A: If the employer chooses to use a shorter measurement period in 2013 (allowed under the transitional relief rule), it will be necessary to measure all ongoing employees for that measurement period (6 months at a minimum). Once the 2013 standard measurement period begins, all new hires from that point will be subject to an initial measurement period that must begin any date between the employee's hire date and the first day of the first calendar month after the hire date. Such initial measurement periods may be up to 12 months, even if the employer is using a shorter (6 month) transition measurement period for ongoing employees in 2013. Such initial measurement periods will extend into 2014; the new hire's eligibility will not be determined by 1/1/14 along with the other ongoing employees, but rather will be delayed until the expiration of the new hire's initial measurement period.
Q: Can an employer use a 9 month measurement period for 2013 or does it have to be 6 or 12?	A: Yes, a 9-month measurement period would be acceptable to determine eligibility for 2014.
Q: In the 2013 measurement period exception, can we use a 6 month, say 10/13 - 3/2014, period, leading up to a 7/1 renewal, then transition to a 1 year measurement period?	A: The measurement period cannot end more than 90 days before the plan renewal (administrative period cannot exceed 90 days), so you cannot have a measurement period that ends 3/31/2014 for a 7/1/2014 plan year. For a July 1, 2014 plan year, the following would work: Measurement Period: July 1, 2013 - April 30, 2014 (10 months) Administrative Period: May 1, 2014 - June 30, 2014 (2 months) Stability Period: July 1, 2014 - June 30, 2015 (12 months)
Q: If our company offers coverage for all employees and our renewal is March 1, can I use the 6 month measurement period which makes it start in September? Or does it HAVE to be July 1, 2013?	A: The transition rule for 2013 measurement periods must be at least 6 months and must start no later than July 1, 2013. Therefore, for a March 1, 2014 renewal, the measurement period would be required to start July 1, 2013. The employer could use a 7-month measurement period (July-December) and a 60-day administrative period (January-February).

Q: If my employer's plan renews May 1, does my employer have to start the measurement period for a January 1 date or can they wait for the 12-month period prior to May 1?	A: The measurement period must be started and ended in accordance with the non-calendar plan year, but cannot end more than 90 days before the plan renewal (administrative period cannot exceed 90 days). For a May - June plan year, if the employer chooses to use a 12-month measurement period and a 60-day administrative period, the following would work well: Measurement Period: March 1, 2013 - February 28, 2014 Administrative Period: March 1, 2014 - April 30, 2014 Stability Period: May 1, 2014 - April 30, 2015 Keep in mind, the employer is allowed to use a shorter measurement period in 2013 due to the transition relief rule (measurement period would need to begin no later than July 1, 2013).
Q: Can you show an example of a June 1 renewal for a 12-month measurement period?	A: It typically helps to work backwards from the renewal date… Measurement period (12 months): April 1 - March 31 Administrative period (60 days): April 1 - May 30 Stability period (12 months): June 1 - May 30
Q: Please diagram, i.e. list the dates of a Measurement Period that corresponds with a July 1, 2014 Plan Year.	A: For a July - June plan year (assuming a 12-month measurement period and 60-day administrative period): Measurement period: May 1 - April 30 Administrative period: May 1 - June 30 Stability period: July 1 - June 30
Q: Can we use the 130 hour definition for non-variable employees and use the safe harbor only for variable employees?	A: No - if the employer chooses to use the optional look-back standard measurement period, it must be used uniformly for all employees in a category. The rules allow different measurement periods to be applied differently for the following categories of employees: (a) collectively bargained versus noncollectively bargained employees; (b) employees covered by different collective-bargaining agreements; (c) salaried versus hourly employees; and (d) employees with primary places of employment in different states.
Q: When using a measuring period for ALL hourly employees - does that mean that ALL categories of hourly employees will be eligible for benefits if they achieve 1560 hours of service or more during the 12-month measurement period (including UNION employees)?	A: Yes, if the employer is using the optional look-back measurement method for Union employees. Although the measurement/stability period must be applied on a uniform basis for all employees, the employer is allowed to use different measurement/stability periods (or no measurement/stability period) based on the following categories of employees: (a) collectively bargained versus noncollectively bargained employees; (b) employees covered by different collective-bargaining agreements; (c) salaried versus hourly employees; and (d) employees with primary places of employment in different states.

Q: If they go from FT to PT - that is a status change and would take them out of any stability?! Also, I thought the safe harbor is ONLY used for variable hour employees and not those working regular hours?	A: For ongoing employees (those that have been employed for one standard measurement period), if the employee is using the look-back measurement method for determining eligibility, those employees changing employment status during the stability period (full-time to part-time or vice versa) would remain eligible/ineligible for the entire stability period, regardless of the change in employment status. Second, if the employer chooses to use the optional look-back measurement method, it must be used on a uniform basis for all employees; however, it can be applied differently for the following categories of employees: (a) collectively bargained versus noncollectively bargained employees; (b) employees covered by different collective-bargaining agreements; (c) salaried versus hourly employees; and (d) employees with primary places of employment in different states.
Q: Does the measurement period apply only if employer has variable hour employees? Q: Did I understand that employers need to track all employees in the measurement period even if it is known that they are FT or even PT under 30 hours?	A: Yes - The optional look-back measurement period may be used if the employer has variable hour and/or seasonal employees. Keep in mind, that if the employer chooses to use the optional look-back measurement period, typically it must be used uniformly for all employees (not just variable hour and/or seasonal employees); however, it can be applied differently for the following categories of employees: (a) collectively bargained versus noncollectively bargained employees; (b) employees covered by different collective-bargaining agreements; (c) salaried versus hourly employees; and (d) employees with primary places of employment in different states. Although hours of service will need to be tracked for all hourly employees, it will not have much impact on full-time and part-time employees who will be offered coverage within 90 days of hire or upon renewal depending upon eligibility; however, eligibility status is retained throughout the entire stability period.
Q: I have an employee whose position is 40 hrs/week. If that same employee moves to a new position that is expected to be less than 30 hrs/week, may we say they are not eligible for health insurance once they change position, or do we have to wait for the end of the measurement period to determine if they averaged less than 30 hrs/week?	A: If the employer is using the optional look-back measurement period, a new employee (not yet worked for a standard measurement period) would need to be offered coverage within 90 days of changing to full-time or could be dropped from coverage following the change to part-time in accordance with the employer's eligibility rules (i.e. at the end of the month or 1st of the month following reduction in hours).
Q: If you hire an employee expecting them to work full-time and you offer them coverage but they later ask to have reduced hours that would likely have them fall below the 30 hour average can their classification change and new rules apply?	For an ongoing employee (already worked for a standard measurement period), a full-time or part-time employee retains that status through the entire stability period. If there is a change in employment status, the change in eligibility would not be effective until the next stability period.
Q: What about the measurement period/stability period for excluding seasonal employees from coverage?	A: Seasonal employees cannot simply be excluded from being offered coverage; however, they can be subjected to a measurement period similar to new variable hour employees. Using a 12-month measurement period, a new seasonal employee would have to earn a minimum of 1560 hours of service during the initial 12-month measurement period to be eligible for coverage in the corresponding stability period.

Q: In the example with a New Variable EE who is hired 2/15/13... if they are re-tested during the standard measurement period and ARE still working 1561 hours, do they have a new stability period of 1/1 to 12/31?	A: Yes - if the employee achieves 1560 hours of service or more during the initial measurement period (March 1, 2013- February 28, 2014), the employee would be eligible for coverage April 1, 2014 - March 31, 2015. The employee would also be measured during the standard measurement period (November 1, 2013 - October 31, 2014). If the employee achieves 1560 hours of service or more during the standard measurement period, the employee would continue coverage through the remainder of the standard measurement period (April 1, 2015 - December 31, 2015).
Q: Is he saying that if we have a new hire that is full-time hourly and we know will most definitely meet the 1560 hours in the year and we also have another new hire who is variable hour, we have to force them both to have a 12-month measurement period?	A: The full-time employee must be offered coverage within 90 days of hire and then thereafter be subject to the standard measurement/stability periods for determining ongoing eligibility, while the variable hour employee may be subjected first to a 12-month initial measurement period prior to being offered coverage (if the employee meets 1560 hours of service during the initial measurement period).
Q: Our employees have variable schedules from week to week. When calculating hours, do we take an average of the hours worked per month for each employee?	A: If using the optional look-back measurement period, the hours of service for the variable hour employee are added together over the entire measurement period (3-12 months as chosen by the employer) and then divided by the number of months in the measurement period. If the employee averages 130 hours of service or more per month, the employee is considered full-time for the corresponding stability period.
Q: If an employer chooses to implement a measurement period for their hourly employees, but has hourly employees that are hired with the intention of working at least 30 hours a week, is that employee subject to the same measurement period?	A: Yes - all hourly employees would need to be measured against the standard measurement period to determine eligibility for each stability period. At hire date however, the full-time employee reasonably expected to work fulltime during the initial measurement period, must be offered coverage within 90 days of hire rather than being subjected to an initial 12-month measurement period prior to being eligible.
Q: What if you don't hire anyone as variable they are just under 29 hours a week.	A: If there are no variable hour or seasonal employees, just full-time (30 hours of service or more per week) and part-time (less than 30 hours of service per week), then the employer does not need to use the optional look-back measurement method. If the employer is an applicable large employer (50 or more FTEs), the employer must offer coverage to all full-time employees to avoid any potential penalties.
Q: If the variable hour employee meets the 1560 hours after year 1, is he considered full-time for the rest of his employment? Or must they be re-measured after the stability status?	A: When first hired, the variable hour employee is measured during the 12-month initial measurement period and then is eligible for the corresponding 12-month stability period if the employee achieves 1560 hours of service during the initial measurement period. Thereafter, the employee is measured during the standard measurement period each year with all other ongoing employees and eligibility is determined on an annual basis.

Q: So a person can work 150 hours a month, 120 another month etc.....as long as they are under 1560 they are not eligible for coverage?	A: Yes, that's correct. So long as the employee averages under 30 hours of service per week (or 130 hours of service per month) over the measurement period, the employee is not eligible for coverage for the corresponding stability period. Therefore, for a 12-month measurement period, if the employee does not achieve at least 1560 hours of service, regardless of the hours of service the employee may have in any particular month, the employee will not be considered full-time and eligible for coverage.
Q: Do municipal government entities automatically fall under the "large employer" category even if they have fewer that 50 FTE?	A: Public employers are subject to the same 50 FTE criteria in determining "applicable large employer" status as any other employer
Q: So if an employer is an applicable large employer for the shared responsibility rules for 2014, but falls below and is no longer an applicable large employer for the 2014 calendar year -- do they need to continue to comply for 2014 and then can cease compliance for 2015?	A: Yes - status is determined on an annual basis. The employer must use 2013 to determine status for the 2014 plan year, 2014 for status in 2015, etc.. Therefore, if the employer is an applicable large employer according to the 2013 calendar year (50 or more FTEs), than the employer is subject to the rules under section 4980H for the entire 2014 plan year.
Q: Do you include employees whose benefits are covered by a collective bargaining agreement when determining FTEs for applicable large employer status? Q: How do you calculate union employees when counting FTEs?	A: Employees working under a Union or collective bargaining agreement are included in counting FTEs for determination of applicable large employer status.
Q: Are K-1 partners counted as FTEs?	A: The general rule is that self-employed individuals, partners in a partnership, and more than 2% shareholders in an S-corporation are not considered employees and are not included in the determination of number of FTEs.
Q: Is overtime considered when using the FTE? Or do they max out at 40 hrs a week?	A: When determining applicable large employer status, the employer is required to measure FTEs on a monthly basis and average over the calendar year. Any employee who has at least 130 hours of service or more in a particular month is counted as one full-time employee, additional hours worked would net impact the counting of full time employees.
Q: If you have several companies with different EIN's, do you include the employees as a total or by EIN to determine status as an applicable large employer?	A: The answer depends upon whether or not the various companies are considered a controlled group or affiliated service group under section 414 rules. Different EINs do not necessarily make the companies separate entities, so it would be necessary to do an analysis to determine the status of the companies. If they are all part of a controlled group/affiliated service group, it would be necessary to aggregate all FTEs across the companies to determine applicable large employer status.

Q: If you are an applicable large employer with 2 companies in a Controlled Group, but they have different types of insurance policies due to historical reasons, does each company subtract 30 from the "employer penalty amounts" in their calculation?	A: Potential penalties under section 4980H would apply separately for each company; however, each group receives a pro rata share of the waiver allowed for the first 30 full-time employees under section 4980H(a). Example: Controlled group with 100 full-time employees (Company A - 40, Company B – 60); Company A offers coverage to all full-time employees; Company B chooses not to offer any coverage • Company A – no penalty • Company B – .6 x 30 total allowed to be waived = 18 waived, (60-18)*$2000 = $84,000 as a potential penalty under section 4980H(a)
Q: The penalty of $2000 per FTE does not count the first 30 FTE. Therefore, if you have a total of 50 FTE your penalty is only on 20 total, correct?	A: Almost correct. $2000 multiplied by total **full-time employees** minus the first 30. If there are 50 full-time employees (different than 50 FTEs), than the $2000 would be multiplied by 20.
Q: Are the penalties calculated using the current number of Full Time Employees or Full Time Equivalents?	A: The penalty is applied per full-time employee (not per FTE). 4980H(a) penalties for failure to offer 'minimum essential coverage' to all full-time employees (30 hours of service or more per week) are applied as $2000/full-time employee (not FTEs) minus a waiver for the first 30.
Q: We currently offer coverage to 40 employees who work over 36 hours/week. If we continue doing this, and we have about 15 employees who work 30 hours per week, and we do not offer these employees coverage, will we be charge a penalty for all 55 employees (less the first 30), even if only 1 or 2 use the exchange with a subsidy?	A: Yes - if the employer does not offer coverage to all full-time employees, under section 4980H(a), the employer would pay $2000 per year for each full-time employee minus the 30 waiver (so 25 in this case) if any one of those 55 full-time employees enrolls for coverage through the Exchange and qualifies for a tax subsidy.
Q: Does the employer penalty for not offering coverage increase over time or will it stay at $2000/employee/year?	A: The “applicable payment amount” for 2014 is under 4980H(a) is $2000/yr/full-time employee (or $166.67/month). The amount will be adjusted for inflation after 2014.
Q: Is there going to be a penalty to employers who have employees who have a reduction of hours and are offered COBRA, where the COBRA rate may no longer be affordable to the employee?	A: If the optional look-back measurement method is used, the employee would remain eligible through the entire stability period, even if there is a reduction in hours (unless the employee is terminated). If the employee is not subject to a measurement/stability period and there is a reduction in hours that causes loss of coverage, or the employee is terminated and loses coverage, then COBRA must be offered. At that point, the employee is no longer a full-time employee eligible for coverage and the employer would not be liable for any penalties under 4980H.

Q: For an applicable large employer with 60 full-time employees that does not offer coverage and one of the full-time employees qualifies for subsidy on the Exchange, then less the waiver of the first 30, that would bring them down to 30 employees. They would not be subject to the penalty right?	A: No - under 4980H(a), the employer pays a penalty of $2000/yr per full-time employee (less a waiver for the first 30). Therefore, to your example…60 minus 30 multiplied by $2000 = $60,000.
Q: For "Hours of Service" - is that all paid time or just actual worked time? (i.e. are vacation hours counted?)	A: For purposes of determining 'hours of service', the IRS has defined an hour of service as: (a) Each hour an employee is paid, or entitled to payment, for the performance of duties for the employer; and (b) Each hour for which an employee is paid, or entitled to payment, for vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty, or leave of absence.
Q: I'm assuming since we're to count all hours worked that overtime hours are included? What about vacation or other personal time off where the employee is paid for the time off but did not actually work those hours?	A: Yes, both regular and over-time hours, as well as vacation and other PTO or sick-time hours. Hours of service generally include any hours that the employee is paid or entitled to payment.
Q: Is vacation or paid time off counted as hours in the measurement period?	A: Yes - all hours of service are counted during the measurement period to determine eligibility for coverage.
Q: Question on how overtime hours are counted. Does overtime count as 1.5 hours worked or just 1 hour worked?	A: Overtime hours, although maybe being paid at 1.5 times regular rate of pay, would be counted simply as 1 additional hour of service for each hour of overtime worked.
Q: Does workers' compensation pay fall into the hours of service?	A: No - workers' compensation as well as unemployment pay is not counted toward hours of service. Typically, hours of service must include payments made directly or indirectly by the employer. This is addressed in § 2530.200b-2(a)(2)(ii) of the IRS proposed regulations.

Q: How do unpaid FMLA hours fall into the Hours of Service guideline? Q: Is unpaid leave (i.e. job suspension, FMLA) count towards hours of service?	A: Typically, no hours of service need to be credited for periods of unpaid leave.; however, there is a special rule in regards to periods of 'special unpaid leave' (FMLA, USERRA or jury duty). To prevent periods of special unpaid leave from reducing hours of service during the measurement period, the employer is required to treat the special unpaid leave in one of two ways: (i) determine average hours of service by excluding any periods of special unpaid leave during the measurement period and applying that average for the remaining measurement period; or (ii) impute hours of service during the periods of special unpaid leave at a rate equal to the average weekly hours of service for weeks that are not part of a period of special unpaid leave.
Q: How are commission only salespersons handled? FT? Q: Is there any guidance in determining full-time status for an employee paid based on a daily rate? Just assume a day is 8 hours? Q: We have employees who are Drivers who get paid by the distance they travel not by the hour. Are they included in the part time category? They are on our payroll. Q: What about salaried employees? Most are hired by FTE for example, 1.0 or .75 or .92. The organization would not track hours.	A: For employees not paid on an hourly basis, employers may calculate hours of service using one of three methods: (i) Counting actual hours worked and non-worked hours for which payment is due; (ii) Using a days-worked equivalency method - counting 8 hours of service for each day for which the employee is entitled to pay; or (iii) Using a weeks-worked equivalency - counting 40 hours of service per week for each week for which the employee is entitled to pay. However, an employer is not permitted to use the days-worked or weeks-worked equivalency if the result is to substantially understate an employee's hours of service.
Q: For variable hour or seasonal employees subject to a 12-month measurement period, may they go to the Exchange during that year for coverage? Q: What does an employee do for insurance during the initial measurement period? The Exchange?	A: Yes - such employees could go to the Exchange for coverage and may qualify for a subsidy if income requirements are met (between 100% and 400% FPL). Also, the employer would not face any potential penalties under 4980H for such employees.
Q: So if a person works 150 one month, 120 another month, etc., but on annual basis does not exceed 1560 total hours, they would be considered not eligible for coverage? Or does the measurement period overview eliminate the need for counting as long as not over 1560?	A: If the employer chooses the look-back measurement method, the employer must track hours of service earned by employees over the chosen measurement period (3-12 months) to determine eligibility. If the employer uses 12 months, the employee must achieve 1560 or more hours of service to be considered full-time and therefore eligible for coverage; however, it does not matter if the hours of service are above or below 130 hours of service from one month to the next so long as the average over the entire measurement period is 130 hours of service per month (or 30 hours of service per week).
Q: How does Grandfathered Status affect all of this?	A: All applicable large employers are subject to the employer shared responsibility rules and potential penalties under section 4980H, whether the plans have grandfathered status or not.

Q: I may have missed something, but I keep hearing, "if you use the measurement period option..." Is there another option?

Q: If you continue determining eligibility on a monthly basis, is there any obligation to continue to offer coverage to an employee during any sort of stability period? We often hire employees who start out full-time then drop to part-time hours. If you don't use a measurement period, can you then terminate coverage for an employee who drops hours? I would also assume then that I would then need to monitor their hours on a monthly basis and re-offer benefits if their hours pick up?

A: An employer may still determine full-time status on a monthly basis rather than using the look-back measurement period to determine eligibility. In that case, the concept of a stability period would not exist, and the employer would be required to monitor eligibility and add/drop coverage accordingly on a monthly basis.

Q: In your example of a new hire... After the first 12-month initial measurement period, are you able to look at your 12-month standard measurement period at some point in employment?

A: After the initial measurement period, the new hire transitions to the standard measurement period used for all other ongoing employees.
Assume the following for the new hire: • New hire date Mar 15, 2014 • Initial measurement period: Apr 1, 2014 – Mar 31, 2015 • Administrative period: Apr 1, 2015 – Apr 30, 2015 • Initial stability period: May 1, 2015 – Apr 30, 2016
Assume the following for ongoing employees: • Standard measurement period: Nov 1 – Oct 31 • Administrative period: Nov 1 – Dec 31 • Standard stability period: Jan 1 – Dec 31
The new hire must achieve at least 1560 hours of service Apr 1, 2014 - Mar 31, 2015 to be eligible for coverage May 1, 2015. The new hire will also be measured Nov 1, 2015 – Oct 31, 2016 (note that the 2 measurement periods will overlap in order to transition the new hire to the ongoing measurement period). During the standard measurement period, the employee must achieve at least 1560 hours of service to determine eligibility starting May 1, 2016. If the employee does achieve 1560 hours of service, the employee will be eligible for coverage through at least Apr 30, 2016. If the employee then fails to achieve 1560 hours of service during the standard measurement period, the employee's coverage could be terminated May 1, 2016 (otherwise it would continue through Dec 31, 2016). If the employee does not achieve 1560 hours of service, the employee will not be eligible for coverage May 1, 2015, but could be eligible for coverage upon open enrollment (Jan 1, 2016) if achieving 1560 hours of service during the standard measurement period.

Q: If the employer wants to cover employees working 20 hours, would the 4980H(a) rule apply to those working less than 30 hours? In other words, do you define full-time as 30 hours even if the employer offers to employees working fewer hours?
Q: What about offering benefits to employees expected to work less than 30 hours per week? Any problems/risks?

A: The employer can certainly offer coverage to more than those employees required to be offered coverage under section 4980H. Potential penalties will only apply if the employer fails to offer affordable, minimum value coverage to employees with 30 or more hours of service per week.

Q: Aside from the variable hour - full-time employee requirement to allow those determined to be full-time to come on the plan during the stability period, are employers required to have an open enrollment every year for existing employees?

A: Yes - applicable large employers (50 or more FTEs) are required to offer coverage to all full-time employees at least annually to be in compliance with the rules under section 4980H. This rule applies regardless of whether or not the employer chooses to use the optional look-back measurement period.

Q: If an employee is considered full-time for one stability period and then is not full-time for the next stability period, does the employer have to offer them COBRA due to reduction in hours?

A: Yes - this should be treated just like when an employee experiences a reduction in hours that causes a loss of coverage.