



ACA: Temporary and Variable Hour Employees

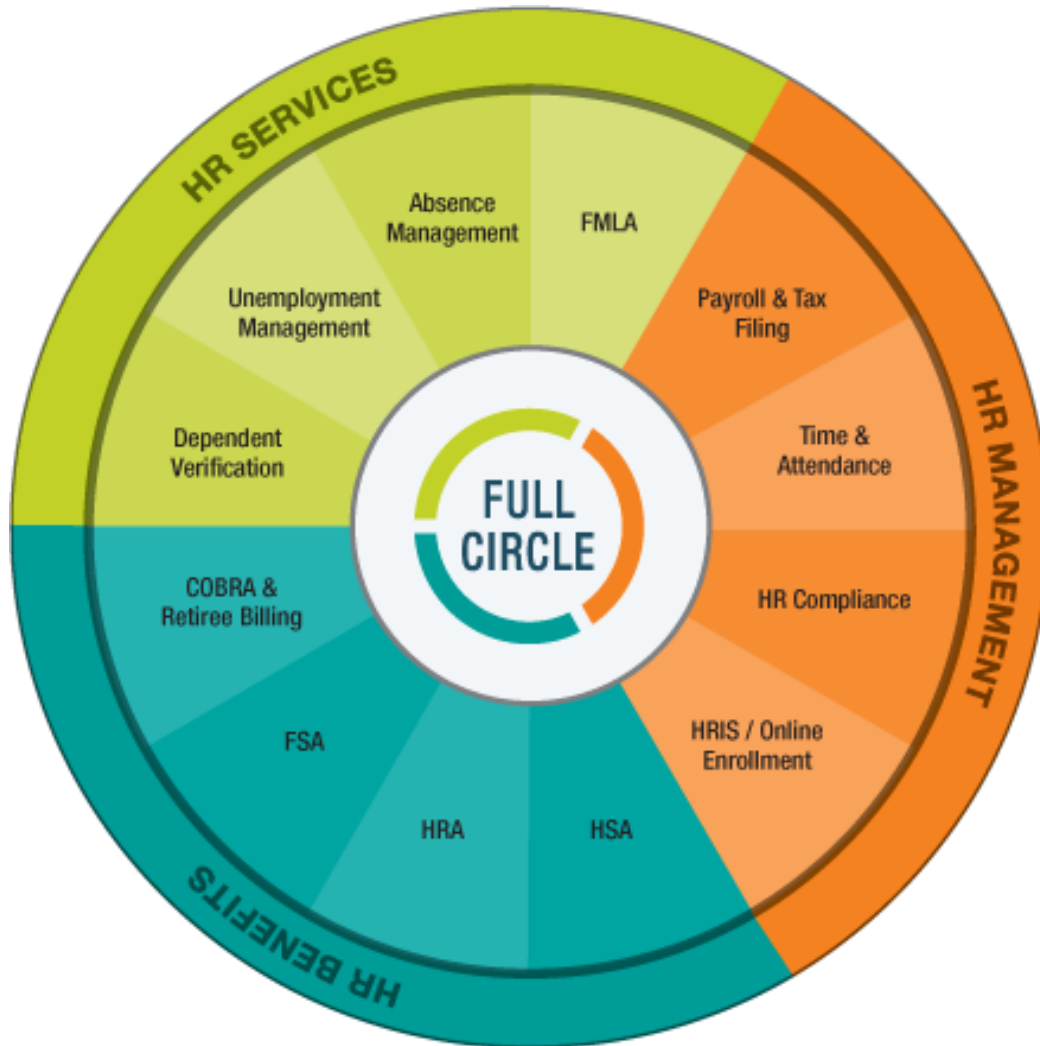
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The Issues



- Many employers hire temporary and contract workers from staffing agencies.
- Some workers are hired on a short-term temporary basis, while others are hired for longer-term projects or even indefinitely.
- Since the employer mandate provisions of the Affordable Care Act (ACA) will soon apply, a critical issue for both staffing agencies and client employers who hire contingent workers is:
- **Which party is the common law employer of these workers**

The Issues



- The short answer is that the final regulations suggest:
 - **“Temporary: staffing firms** - Generally will be the common law employer of the workers they place on temporary or short-term assignment at various client employers.
 - **“Other” staffing firms and PEOs** - Typically the client employer will be the common law employer.

The Issues



- This is a critical issue because a common law employer who is an applicable large employer (ALE) risks being subject to significant penalties unless it offers health coverage to substantially all full-time employees.
- Generally, an ALE is an employer who employed on average at least 50 full-time employees or full-time equivalents during the prior calendar year, but for 2015 the threshold is 100 rather than only 50.)
- The penalties could skyrocket for an ALE who is audited several years after the mandate has been in effect if the IRS re-classifies workers as common law employees, and the ALE had not included them in its prior calculations of whether it was meeting ACA requirements.

Provisions on Staffing Agencies



- The final regulations provide much clarity, but leave some issues unresolved.
- The final regulations differentiate between temporary staffing firms and other staffing firms including Professional Employer Organizations (PEOs).



- **Temporary staffing firms**
 - Generally will be the common law employer of the workers they place on temporary or short-term assignment at various client employers.
- **“Other” staffing firms and PEOs**
 - Typically , the client employer will be the common law employer.

Provisions on Staffing Agencies



- The final regulations do not provide safe harbor relief if an employer misclassifies a worker as the common law employee of another employer, and the IRS later determines the worker is a common law employee of the first employer.
- This means an employer could be liable retroactively for penalties from prior years.
- If the client employer is the common law employer (such as in the PEO situation), the final regulations provide a safe harbor method by which the staffing agency or PEO can provide health benefits to workers on behalf of the client employer.

Provisions on Staffing Agencies



- The final regulations require employers to use the Monthly measurement method (rather than the Look-back measurement method) for new hires who are —reasonably expected at date of hire to be full-time; and list factors the employer (whether it's the staffing firm or client employer) can consider to determine whether or not a new-hire is a full-time employee.

Provisions on Staffing Agencies



- The Final regulations differentiate between temporary and other staffing firms (including PEOs) when it comes to which employer will be the common law employer and thus liable to offer coverage or face potential penalties.
- The regulations suggest that a temporary staffing firm will be the common law employer of the workers it places on temporary or short-term assignment at various client employers, but that other staffing firms and PEOs typically will not be the common law employer of the workers they place at client employers.
- Instead, the client employer will be the common law employer.

Temporary Staff Firms



- Client employers can accept or reject particular workers that are assigned to them, but they generally do not determine whether a particular worker will be terminated from employment with the staffing agency.
- Only the staffing firm has the right to fire the worker, to discipline or impose sanctions, or to control the worker's behavior by requiring compliance with employment policies and procedures.

PEOs



- The client employer retains the right to discipline and terminate these long-term workers and also retains day to-day control over how and where workers perform their jobs.
- The PEO and client employer become joint employers or co-employers for employment law purposes, but not for tax or benefits purposes (so not for ACA purposes).

Common Law Employment Test



- The IRS believes temporary staffing firms generally meet enough of the factors under the standard common law employment test, and PEOs generally do not.
- The basic common law employment test is whether the employer (or which employer) has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which the result is accomplished.
- Other factors include the right to train, supervise, discipline and discharge the worker.

Common Law Employment Test



- The temporary staffing agency meets most of the requirements of a common law employer because it hires, trains, supervises, has the right to direct and control the individual (through the policies and procedures it sets, and through its placement of the workers at various client employers), and has the right to terminate the employment relationship.
- The PEO, on the other hand, does not have most of these rights.
- Instead, the client employer recruits particular workers (but sends them to the PEO to be hired or payrolled), trains them, has day-to-day control over their behavior, and has authority to terminate the employment relationship.

Common Law Employment Test



- It is particularly important that both client employers and staffing agencies correctly determine which entity will be the common law employer because, as noted above, the final regulations do not provide safe harbor relief if the client employer misclassifies a worker as the common law employee of the staffing firm (or vice-versa), and the IRS later determines the worker is a common law employee of the first employer.
- This is a departure from the section 530 relief available under the Revenue Act of 1978, which protected employers from after-the-fact liability for employment taxes if the employer had a good faith reasonable basis for classifying certain workers as independent contractors.

Common Law Employment Test



- Under the ACA final regulations, a client employer could become liable after the fact for penalties if a worker who should have been considered a full-time employee (and offered coverage) was instead considered an employee of the staffing agency, was not offered coverage, bought health insurance in the public exchange or marketplace and received a subsidy to do so.
- This could also work in reverse if the staffing agency considers the client employer to be the common law employer, and the staffing agency is subsequently deemed the common law employer.

Safe Harbor- PEOs



- The final regulations provide a new safe harbor rule:
 - A staffing agency or PEO that is not the common law employer can offer health coverage to a worker on behalf of the client employer who is the common law employer.
 - If the staffing firm offers an employee coverage in the staffing firm's health plan, on behalf of the client employer, the coverage is treated as coverage offered by the client employer (for pay-or-play purposes) but only if the client employer pays a higher fee to the staffing agency or PEO for an employee enrolled in health coverage than for the same employee if the employee did not enroll.

Is a New Hire a Variable Hour or Full-Time Employee?



- The employer can also consider additional factors, and no one factor is determinative.
 - Whether the new employee is replacing an employee who was a full-time or a variable hour employee.
 - Whether the hours worked by employees in the same or similar positions have actually varied above and below an average of 30 hours per week in recent measurement periods.
 - Whether the position was advertised, or otherwise communicated to the new employee or otherwise documented (for example, through contract or a job description) as requiring on average more or less than 30 hours per week, or variable hours.

Is a New Hire a Variable Hour or Full-Time Employee?



- The final regulations specify that one factor the employer may not take into account is whether it is likely the employee will terminate employment before the end of the initial measurement period (for example, because most workers in this position only remain for a short time).

Is a New Hire a Variable Hour or Full-Time Employee?



- The final regulations list the following additional factors a temporary staffing firm can use to determine whether a new hire is a full-time employee or a variable hour employee.
- The agency also can consider other factors, and no one factor is determinative.
- A staffing agency would apply this analysis if the agency is the common law employer and hires employees for placement at a client employer who is not the common law employer.
- It seems under the final regulations that temporary staffing agencies can make the new-hire determination based on the employment position for which a new employee is hired, rather than on an employee-by-employee basis.

Is a New Hire a Variable Hour or Full-Time Employee?



- **A staffing agency can consider whether employees in the same position of employment with the staffing agency:**
 - have the right to reject temporary placements the temporary agency offers
- 1. typically have periods during which no offer of temporary employment is made**
 - typically are offered temporary jobs for differing periods of time, and
 - typically are offered temporary jobs that do not last beyond 13 weeks.
- **Under the break in service rules, if an employee has no hours of service for at least 13 weeks and then returns to work, the employer can treat the employee as a new employee rather than a continuing employee, and can disregard hours worked prior to the break in service.**

Short-term Employees & High-turnover Positions



- The final regulations do not adopt any special rules for short-term employees or high turnover positions
- It has to be determined whether the new employee is reasonably expected at date of hire to work on average at least 30 hours per week (whether for this client employer or for several different ones).

Home Care Workers Hired through Staffing Agencies



- The final regulations include a special rule for home care workers.
- Often a home care worker is hired through a staffing agency (either for a short-term or an indefinite period of time) and paid by the home care staffing agency, but under the common law test the workers would be classified as the employee of the service recipient.
- This is because the service recipient sometimes will select the individual who will provide the care, and usually will set the hours of work and the tasks to be performed.
- The special rule allows a home care worker to be considered the employee of the service recipient, rather than the agency.
- Since the service recipient probably employs only one (possibly two) home care workers, the recipient would not be a large employer and the home care worker would not be entitled to health insurance.

Steps to Consider



- **Evaluate the staffing company's credentials.**
 - Before signing up with a temporary agency or leasing firm, investigate to make sure it is reputable, financially stable, and that the staffing or leasing plans don't violate IRS or other federal employment guidelines.
 - If the agency fails to pay all payroll expenses, workers' compensation and benefits for a temporary employee, your organization could become liable for these benefits as the joint employer.

Steps to Consider



- **Relinquish control.**

- Wherever possible, defer control and responsibility of temporary employees to the staffing agency.
- Allow the agency to maintain control of employment actions such as recruiting, training, job assignments, firing, complaints, raises and payroll issues.

Steps to Consider



- **Differentiate workers.**
 - Set up clear differences between temporary and permanent staff.
 - This means that temporary workers should ordinarily be excluded from using company facilities like gyms and stores.
 - Even badges or other employee identification should be distinct from those of permanent staff.

Steps to Consider



- **Compare plans.**

- Employers should know and understand exactly what benefits the temporary agency offers.
- Comparing the agency's benefits to those offered by the client company helps employers assess risk in case an employee is misclassified.
- While federal law does not prohibit joint employers from excluding contingent staff from employee benefit plans, there are exceptions.
- If an employee is otherwise eligible, an employer can't impose minimum age or length-of-service requirements to deny participation.

Steps to Consider



- **Evaluate after 1,000 hours.**
 - Temporary employees might become eligible for participation in your defined benefit retirement plan under the 1,000 hour rule.
 - Title 1 of ERISA requires defined benefit pension plans to credit part-time workers who work 1,000 hours or more per year with a portion of the benefit in proportion to what they would have earned if they were employed full-time.
 - However, your company might not have to cover the worker if the plan contains a proper exclusion provision or if the worker does not otherwise fit the definition of a common law employee (such as one hired for a specific project or work of a type not done by direct employees).

Steps to Consider



- **Ensure temps have leave benefits.**
 - Leased and temporary employees are eligible for Family and Medical Leave Act (FMLA) protection as long as they meet the other requirements for coverage.
 - Under FMLA, joint employers must both count the temporary/leased employee in staffing levels to determine employee coverage and employer liability.
 - As primary employer, the temporary agency/leasing firm is responsible for giving required notice to the employees, providing FMLA leave and maintaining health benefits.



Full-Time Employee Status Determination

Introduction



- Effective for plan years beginning in 2015, employers with 100 (50 in 2016) or more full-time equivalent employees must offer at least 70% (95% in 2016) of its full-time employees (and their dependents) “affordable” health coverage with a “minimum value,” or face possible penalties.
- An employee averaging at least 30 hours of service per week is considered full-time for this mandate.

Introduction



- The IRS guidance addresses how to measure full-time status for ongoing employees and new hires, with special rules for new variable-hour or seasonal employees who may work 30 hours per week during some months but not others.
- The guidance creates enforcement safe harbors; employers measuring full-time employee status as described in the relevant safe harbors may avoid paying shared-responsibility penalties.

Who Are Employees?



- An employee is an individual who is an employee under the common law standard, and an employer is the person that is the employer of an employee under the common law standard.
- Under the common law standard, an employment relationship exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished.

To whom must an employer offer coverage?



- An employer must offer coverage to anyone who is considered full time and their dependents.
- A full-time employee is anyone who works on average at least 30 hours per week or 130 hours per month (sometimes referred to as the “minimum-hours threshold”).
- Full-time status is easy enough to determine when an employee is hired to work a regular number of hours each week on an ongoing basis.
- But for variable-hour employees, such as part-time or seasonal staff, the task is more challenging.

What hours are counted to determine full-time status?



- For employees paid on an hourly basis, employers must calculate actual hours of service from records of hours worked and hours for which payment is made or due for vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence.
- For employees not paid on an hourly basis, employers are permitted to calculate the number of hours of service under any of the following three methods:
 - counting actual hours of service (as in the case of employees paid on an hourly basis) from records of hours worked and hours for which payment is made or due for vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence;
 - using a days-worked equivalency method whereby the employee is credited with eight hours of service for each day for which the employee would be required to be credited with at least one hour of service under these service crediting rules; or
 - using a weeks-worked equivalency of 40 hours of service per week for each week for which the employee would be required to be credited with at least one hour of service under these service crediting rules.

Safe Harbors



- There are three safe harbors that employers can use to decide if an employee has averaged 30 or more hours per week.
- One applies on a monthly basis.
- The others apply a “look back” measurement period of 3 to 12 months for to ongoing employees and to new employees.
- The safe harbors are complex, but both rely on some defined time periods that generally must be measured in a uniform fashion for all employees.

Safe Harbors



- Under the monthly measurement method, employees will be identified as a full-time employee of initial eligibility using their hours of service of each calendar month and not based on averaging over a prior look back measurement period.
- These employees must be offered coverage at the beginning of the month after three full calendar months of employment.



- ***Look Back Defined time periods.*** The look back safe harbors allow employers to use these time periods to predict whether an employee will qualify as full-time for shared-responsibility purposes:
 - **Look Back Measurement period.** Employers select a fixed three- to 12-month look back measurement period for determining whether an employee has averaged at least 30 hours of service per week.



- **Stability period.** After meeting the minimum-hours threshold during the look back measurement period, employees must be treated as full-time – regardless of actual hours worked – during a subsequent “stability period,” provided they remain employed.
- Employees who fail to meet the minimum-hours threshold during the look back measurement period do not have full-time status during the stability period and will not trigger shared-responsibility penalties.

Safe Harbors



- The stability period can't be shorter in duration (number of months) than its associated prior look back measurement period.
- If an employee meets the minimum-hours threshold during the look back measurement period, then the ensuing stability period for coverage availability must last at least six full, consecutive calendar months.
- If the employee did not meet the minimum-hours threshold, the stability period cannot be longer than the look back measurement period.



- **Optional administrative period.** Employers may need time after the look back measurement period ends to decide which employees must be offered coverage during the ensuing stability period.
- The safe harbor allows an optional “administrative period” between the look back measurement and stability periods so employers can notify employees qualifying for coverage and handle enrollment tasks.
- The administrative period can’t exceed 90 days or be applied in a way that imposes a gap in employees’ coverage.

Safe Harbors



- **Uniform periods, except between certain employee groups.** An employer generally must apply its selected look back measurement and stability periods on a consistent basis to employees.
- But an employer's look back measurement and stability periods can vary in length and/or in starting and ending dates for different specified categories of employees:
 - Collectively bargained versus noncollectively bargained employees,
 - Each group of collectively bargained employee covered by separate collectively bargaining agreement
 - Salaried versus hourly employees,, and
 - Employees located in different US states.

Safe Harbors for Ongoing Employees



- One of two main look back safe harbors for determining full-time status applies to “ongoing employees”: those who have worked for the employer throughout at least one “standard” look back measurement period.
- **Standard look back measurement and stability periods.** The look back measurement and stability periods that an employer selects to apply to its ongoing employees are called its “standard” look back measurement and stability periods.
- **Optional administrative period.** Where employers decide to use this option, the administrative period adopted can’t reduce or increase the length of the standard look back measurement or standard stability period.
- To prevent the administrative period from causing any gaps in a person’s coverage (once the periods have completed a full cycle), the administrative period must overlap with the prior standard stability period.

Safe Harbors for Ongoing Employees



- **Example of ongoing employee safe harbor and calendar-year plan:**
- **Standard Look Back measurement period:**
 - 10/15/2013 -10-14-2014
- **Administration Period:**
 - 10/15/2014- 12/31-14
- **Standard Stability Period:**
 - 1/1/15-12/31/2015

Safe Harbors for New Employees



- A second safe harbor applies for determining which new employees must be treated as meeting the minimum-hours threshold.
- This safe harbor has a simple rule for new hires expected to meet the threshold from their start dates, plus a series of more complex rules for new variable-hour and seasonal employees.
- In addition, an employer must establish separate “initial” look back measurement and stability periods for new hires that may overlap with its “standard” look back measurement and stability periods for ongoing employees.

Safe Harbors for New Employees



- **New hires expected to work full time:** If a new employee in an eligible class is reasonably expected to average at least 30 hours of service per week, offering qualifying coverage that takes effect by the end of the employee's initial three full calendar months of employment satisfies the shared-responsibility mandate.
- But that may not satisfy the 90-day cap on waiting periods.
- Interaction with 90-day maximum waiting period.
 - The waiting-period guidance sets stricter timelines than the shared-responsibility safe harbor for these new employees.
 - Coverage for new hires expected to meet the minimum-hours threshold must become effective by the first of the month after the employee becomes eligible (assuming the employee timely completes any enrollment steps).



- **Initial look back measurement and stability periods.** The initial look back measurement and stability periods are unique to each new variable-hour or seasonal employee, reflecting the individual's actual start date or, alternatively, the start of the first calendar month after that date.
- Many employers might want to have all look back initial measurement periods start on the first of a calendar month; otherwise, every day of the year potentially could start a new look back measurement period.

Applicable Rules



- Several limitations, however, must be considered in setting these periods and measuring variable-hour and seasonal employees' status for shared-responsibility purposes.
- These restrictions are highlighted below, followed by examples illustrating the key principles:
 - The initial look back measurement period and administrative period, combined, can't extend beyond 13 months, plus a fraction of a month. Specifically, the combined periods must end by the last day of the calendar month that starts on or immediately after the first anniversary of an employee's start date.
 - New employees' initial stability periods can't be shorter than the standard stability period for ongoing employees.
 - In operation, this restriction will generally require a 12-month initial stability period for new employees if an employer uses a 12-month standard stability period.

Applicable Rules



- Once a new employee has completed an initial look back measurement period and stability period, the employee must be tested for full-time status using the standard look back measurement period.
- Starting with that standard look back measurement period, the employee's full-time status is determined at the same time and using the same conditions applied to other ongoing employees.
 - An employee who meets full-time status during the initial look back measurement period must be treated as full-time for the entire initial stability period.
 - This is so even if the employee's hours drop below the full-time threshold during the overlapping or immediately following standard look back measurement period.

Important Conditions



- If an employee fails to meet full-time status during the initial measurement period, then both of these conditions apply:
 - The initial stability period can't be more than one month longer than the employee's initial measurement period and can't extend beyond the standard look back measurement period (plus any administrative period) in which the employee's initial Look back measurement period ends.
 - If the employee meets full-time status during the overlapping or immediately ensuing standard look back measurement period, the employee must be treated as full-time for the entire stability period associated with that standard look back measurement period.
 - This is so even if that stability period starts before the close of the employee's initial stability period.

90 Day Waiting Period

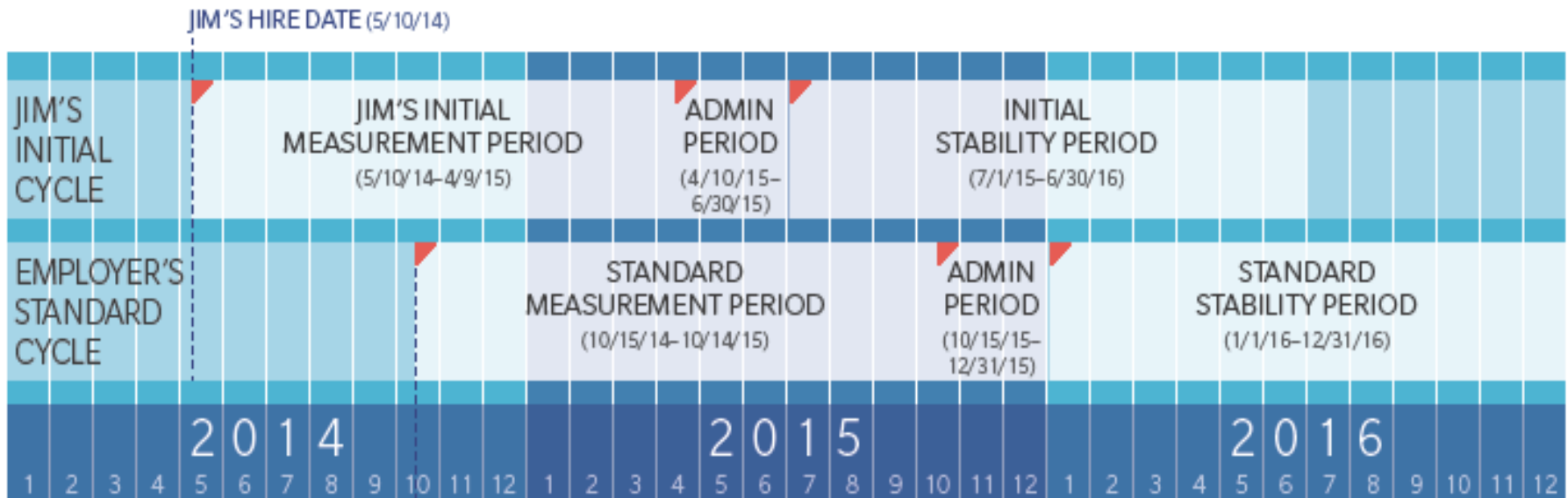


- For a new variable-hour or seasonal employee, calculating the 90-day limit on any administrative period uses total days between the start date and the date the employee is first offered coverage, reduced by the number of days in the initial look back measurement period.
- This means an employer choosing to simplify tracking by starting all initial look back measurement periods on the first of a month will have fewer days after the initial look back measurement period ends to handle the enrollment process before the employee's stability period must begin.

Example



- **Example of variable-hour employee safe harbor and calendar-year plan: 11-month initial measurement period followed by single administrative period:**

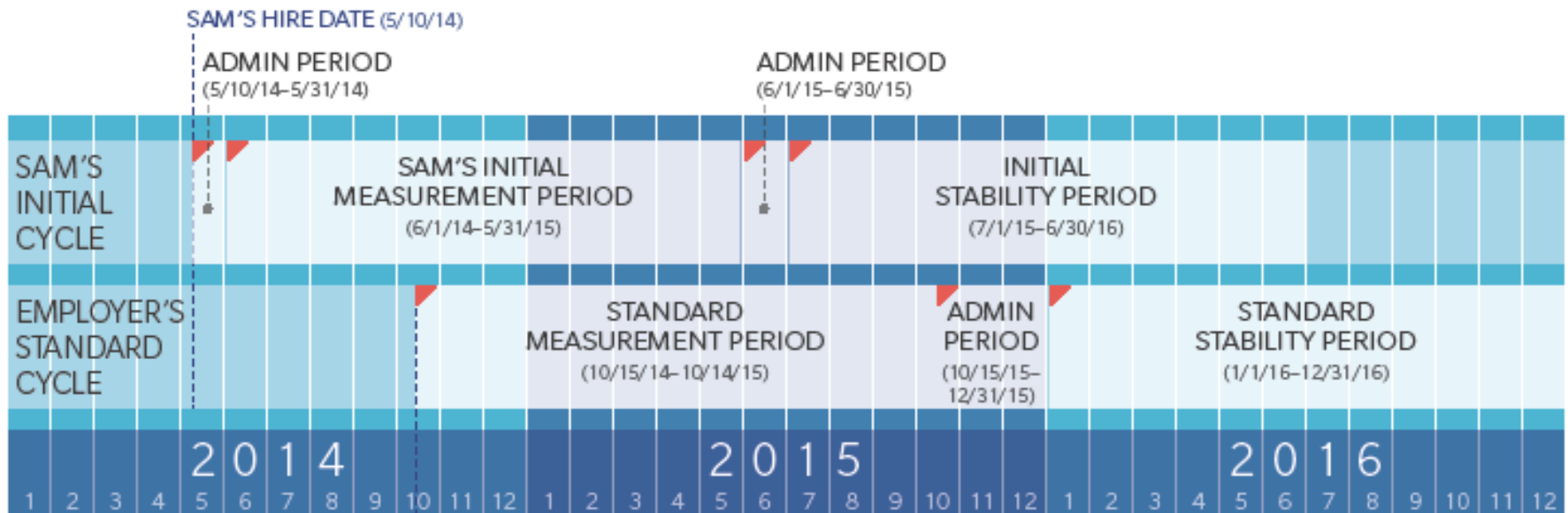


Employer must also begin measuring Jim's hours with its first standard measurement period occurring after his start date.

Example



- **Example of variable-hour employee safe harbor and calendar-year plan: 12-month initial measurement period using split administrative period**



Employer must also begin measuring Sam's hours with its first standard measurement period occurring after his start date.

Special Rules for Unpaid Absences



- New rules to prevent certain unpaid absences from inappropriately restarting an employee's initial measurement period or triggering a new 90-day waiting period for coverage.
- Absences of 13 or more weeks. If the period with no hours of service is at least 13 consecutive weeks, the employer may treat the employee as having been terminated and then rehired as a new employee.
- For educational employers , the period is still 26 weeks.

Special Rules for Unpaid Absences



- Rule of parity for absences shorter than 13 (26) weeks. An employer may choose to apply a “rule of parity” for periods of no service lasting less than 13 (26) weeks.
- An employee rehired after terminating employment may be treated as a new employee if the break in service is at least four weeks long and exceeds the employee’s period of employment immediately preceding the absence.

Special Rules for Unpaid Leave



- IRS has released two methods for averaging hours when lookback measurement periods include certain types of unpaid leave – that is, unpaid Family and Medical Leave Act (FMLA) leave, jury duty leave, or military leave under the Uniformed Services Employment and Reemployment Rights Act (USERRA).
- Under the rules, employers may choose to apply one of these methods:
 - Exclude leave. Exclude the period of special unpaid leave to determine the average hours of service per week during the entire measurement period.
 - Credit hours. Credit an employee’s special unpaid leave with hours of service at a rate equal to the employee’s average weekly rate during weeks when no special unpaid leave is taken.

Establishing safe-harbor time periods.



- **When to start measuring hours worked.** Some employers may want to impose a 12-month look back measurement period followed by an administrative period, with a stability period matching the calendar year.
- To do so, employers need to begin tracking hours of service by **Oct. 15, 2013**, to set the first stability period equal to calendar-year 2015.
- For employers that currently record hours of service, this may simply involve sharing already-captured payroll or workforce management data with benefit staff and enrollment vendors.
- For other employers, however, settling on a strategy and beginning to track needed data this autumn may prove more daunting.

Establishing safe-harbor time periods



- For employers with large numbers of short-term employees, shorter look back measurement and stability periods may be optimal, at least for certain permitted categories of employees.
- But when designing a health benefit strategy to minimize shared-responsibility penalties, a 12-month stability period generally should be considered before alternative approaches to determine eligibility.

Transition Measurement Period



- Solely for purposes of stability periods beginning in 2015, employers may adopt a transition measurement period that is shorter than 12 months but that is no less than 6 months long and that begins no later than July 1, 2014 and ends no earlier than 90-days before the first day of the plan year beginning on or after January 1, 2015 (90- days being the maximum permissible administrative period).

Establishing safe-harbor time periods



- The shared-responsibility safe harbors, applied with the waiting-period guidance, are quite complex, but many employers' current processes for determining employee benefit eligibility may generally fit within the safe harbors.
- One of the first compliance tasks for any employer is to determine appropriate measurement, administrative and stability periods for its plan.
- Onset of first measurement and stability periods is unclear.

Establishing safe-harbor time periods



- For employers with large numbers of short-term employees, shorter measurement and stability periods may be optimal, at least for certain permitted categories of employees.
- But when designing a health benefit strategy to minimize shared-responsibility penalties, a 12-month stability period generally should be considered before alternative approaches to determine eligibility.

Employer Next Steps



- Employers may want to consider the following actions:
 - Decide whether or how to adjust plan waiting periods.
 - Gather data to determine whether or how the safe harbors are relevant.
 - Consider safe-harbor approaches for offering 2014 health coverage.
 - If using safe harbors, determine optimal measurement, administrative and stability periods.
 - Amend plan documents and other related materials.



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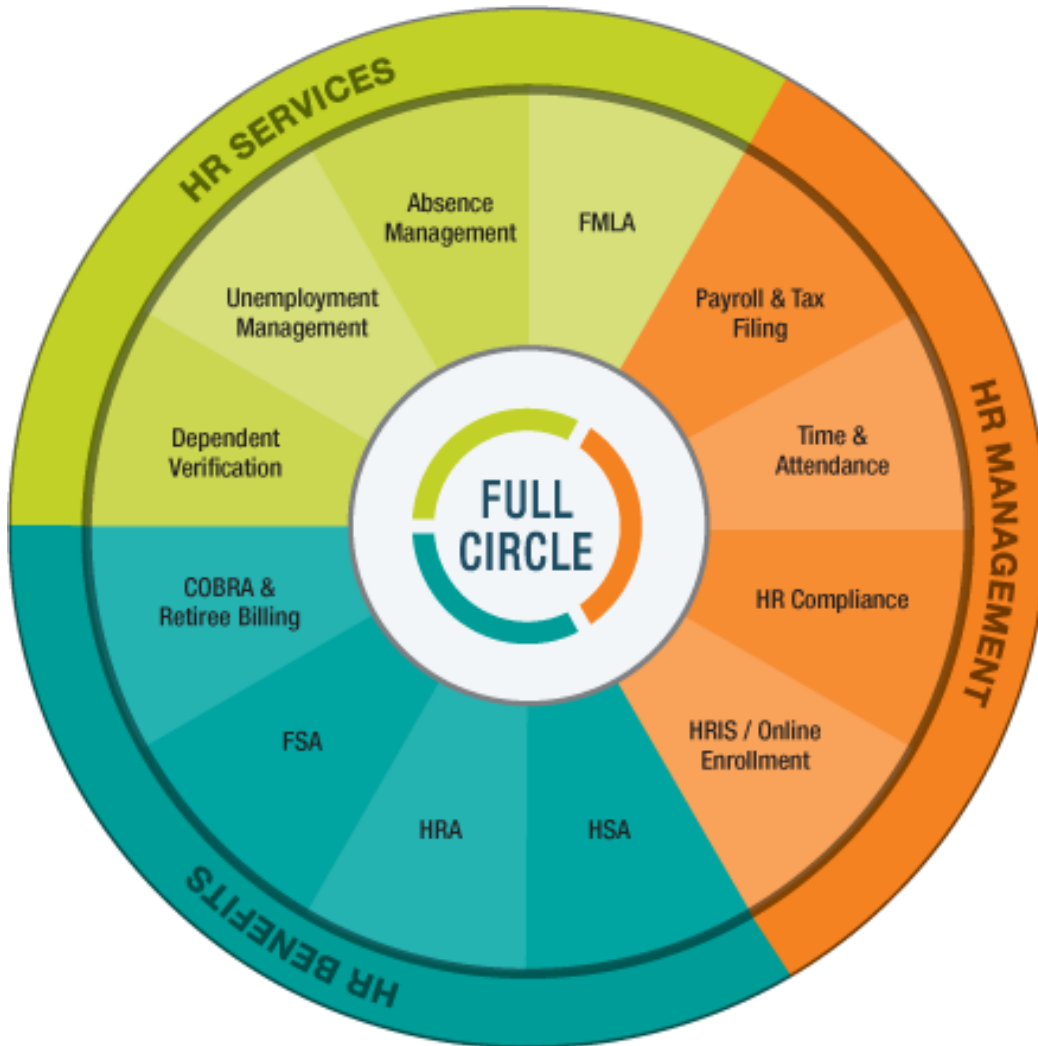
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