

American Benefits Council Preparing for PPACA Webinar

Session #17

Employer Responsibility Guidance (Part II – Waiting Period Limitations (Notice 2012-59))

Begins on Slide #27

Includes revised slides from P4P Session #16
Employer Responsibility Guidance
(Part I – Definition of "full-time employee")

Slides #2-26

Seth T. Perretta

Overview of Today's Discussion

- » **Overview of new guidance**
- » **Important terminology/definitions**
- » **Notice 2012-58**
- » **Notice 2012-59**
- » **Open issues**

Overview of New Guidance

» Two new notices

- IRS Notice 2012-58
- IRS Notice 2012-59 (also released as DOL Technical Release 2012-02 and HHS Bulletin – Guidance on 90-Day Waiting Period Limitation under PHSA § 2708)

» Builds on conceptual framework set forth in Notice 2011-36

- With some important changes and additions

Overview of New Guidance

» IRS Notice 2012-58 – Generally

- Rules may be relied upon through 2014
- Comments requested on host of issues; many open issues remain
- Employers will generally be permitted to use the look-back and stability periods as set forth in Notices 2011-36 and 2012-17 with respect to “ongoing” and “new” employees who are “variable hour employees” and who are not reasonably expected to work full-time hours
 - NEW terminology: “look-back period” now referred to as “measurement period”
- Provides rules regarding how to apply the employer mandate to:
 - Ongoing variable hour employees
 - New employees
 - Seasonal employees

Important Terminology/Definitions

» IRS Notice 2012-58 – Generally

– Important terminology/definitions

- **“New employee”** – An employee who has not yet been employed for at least one complete “standard measurement period”
- **“Ongoing employee”** – An employee who has been employed for at least one complete “standard measurement period”
- **“Variable hour employee”** – Based on the facts and circumstances as of the hire date, it cannot be that the employer is reasonably expected to work at least 30 hours per week determined over the initial measurement period

– Examples:

- » Part-time worker expected to work on average 20 hours per week on an indefinite basis
- » Retail worker hired on at full-time hours for the holiday season, but who is expected to work on a part-time basis for an indefinite time after the holiday season ends
- **“Seasonal employee”** – Employers are permitted to use a reasonable, good faith interpretation for purposes of applying IRS Notice 2012-58

Important Terminology/Definitions

» IRS Notice 2012-58 – Generally

– Important terminology/definitions

- **“Measurement period”** – The look-back period that is used to determine whether a variable hour employee is working a full-time schedule
- **“Initial measurement period”** – The first measurement period that applies to new employees
- **“Standard measurement period”** – The measurement period that applies to ongoing employees
- **“Stability period”** – The period of time that follows the close of a measurement period during which a variable rate employee must be treated as a full-time employee or otherwise
- **“Administrative period”** – A period of time not to exceed 90 days that applies following the close of a measurement period to enable employers to make available coverage as necessary in advance of the next stability period
- **“Waiting period”** – The period of time that must pass before coverage for an employee or dependent who is otherwise eligible to enroll under the terms of the plan can become effective

Hour of Service

» Hour of Service (based on Notice 2011-36)

- “Hour of service” includes:
 - **Hours Worked.** Each hour for which the employee is paid, or entitled to payment, “for the performance of duties”; **AND**
 - **Paid-Time Off.** Each hour for which the employee is paid, or entitled to payment, for the period of time due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty, or leave of absence (up to 160 continuous hours)
- How to calculate an “hour of service” for non-hourly employees:
 - Prior guidance sets forth three possible methods:
 1. **Actual Hours** - Count actual hours of service worked “from records”, as well as other non-worked hours for which he or she is paid, or entitled to payment
 2. **Days-Worked Equivalency** – Credit 8 hours of service per day for each day for which the employee would be credited with at least one hour of service
 3. **Weeks-Worked Equivalency** – Credit 40 hours of service per week for each week for which the employee would be credited with at least one hour of service
 - Rule would allow employers to use different methods for different classes of employees so long as reasonable and applied consistently; may change method annually
 - Includes anti-abuse rule

Notice 2012-58 – Full-Time Employees

» Measurement and Stability Periods

- Notice 2012-58 retains safe harbor from Notice 2011-36 whereby employers can use a measurement period (formerly referred to as a “look-back” period) to determine full-time employees for a coverage period
 - Permits a look-back/measurement period of 3-12 consecutive calendar months to determine whether an employee was a full-time employee; then must apply determination for duration of immediately preceding stability period
 - If an employee is determined to be a full-time employee during the measurement period, he or she must be treated as a full-time employee for a proceeding stability period that is no less than the greater of (i) 6 months, or (ii) the duration of the measurement period
 - Example:

6-Month Measurement Period

6-Month Stability Period

Notice 2012-68 – Full-Time Employees

» Measurement and Stability Periods

6-Month Measurement Period						6-Month Stability Period					
Hours Worked Per Month Using 130 Hours/Month Rule						Hours Worked: N/A					
Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
122	143	114	151	118	135	N/A	N/A	N/A	N/A	N/A	N/A
PT	FT	PT	FT	PT	FT	Full-Time Employee					

Is Employee a Full-Time Employee for Purposes of Stability Period?

122
 143
 114
 151
 118
 + 135
 783 hours

783 hours / 6 months = 130.5

Average of 130.5 hours/month = full-time employee

Notice 2012-58 – Full-Time Employees

» Ongoing Employees – Measurement and Stability Periods

- Employer may use standard measurement period of no less than 3 months and no more than 12 months
- Employer may determine when the standard measurement period begins and ends
 - Provided that the determination applies on a uniform and consistent basis for all employees in the following categories:
 - Collectively bargained employees
 - Salaried and hourly employees
 - Employees of different entities
 - Employees located in different states
- Subsequent stability period must be no less than the greater of (i) six months, or (ii) the duration of the standard measurement period

Notice 2012-58 – Full-Time Employees

» Ongoing Employees – Administrative Period

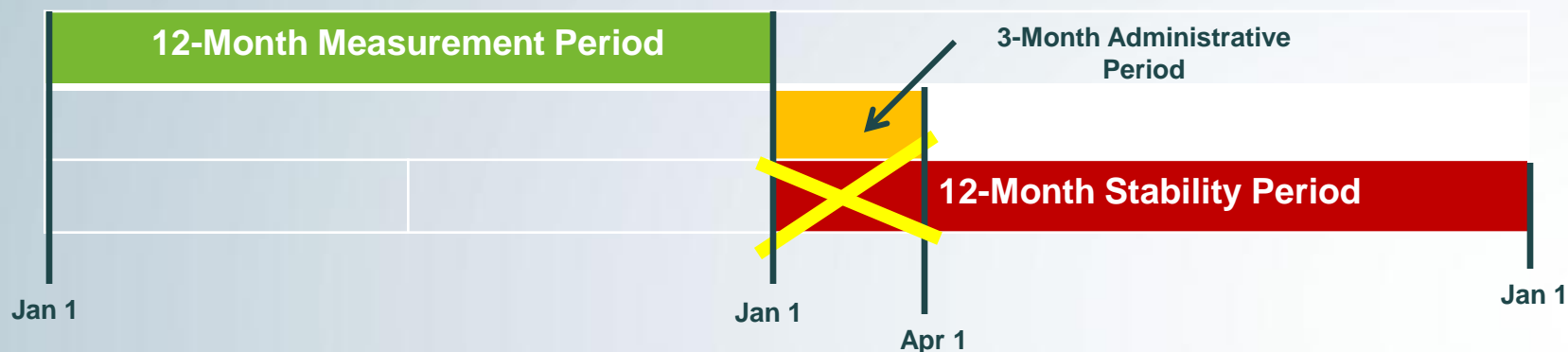
- Provides for the optional use of an “administrative period” between the close of the standard measurement period and the start of the next stability period
 - This is intended to facilitate enrollment and build in time to notice people of coverage and to allow them to elect coverage
- However –
 - The use of an administrative period cannot reduce or extend the duration of the standard measurement period or the stability period
 - May last up to no more than 90 days
 - To prevent the use of an administrative period from resulting in any gaps in coverage, the administrative period must overlap with the prior stability period
 - Except for new employees

Notice 2012-58 – Full-Time Employees

» Ongoing Employees – Administrative Period

- **Example 1:** Employer W chooses to use a 12-month stability period that begins January 1 and a 12-month standard measurement period that also begins January 1. 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 a 90-day administrative period that runs for the first three months of the stability period.

Conclusion: Because the administrative period runs concurrent with the stability period and could operate to reduce the effective length of the stability period to less than the length of the corresponding standard measurement period, this violates the rule.

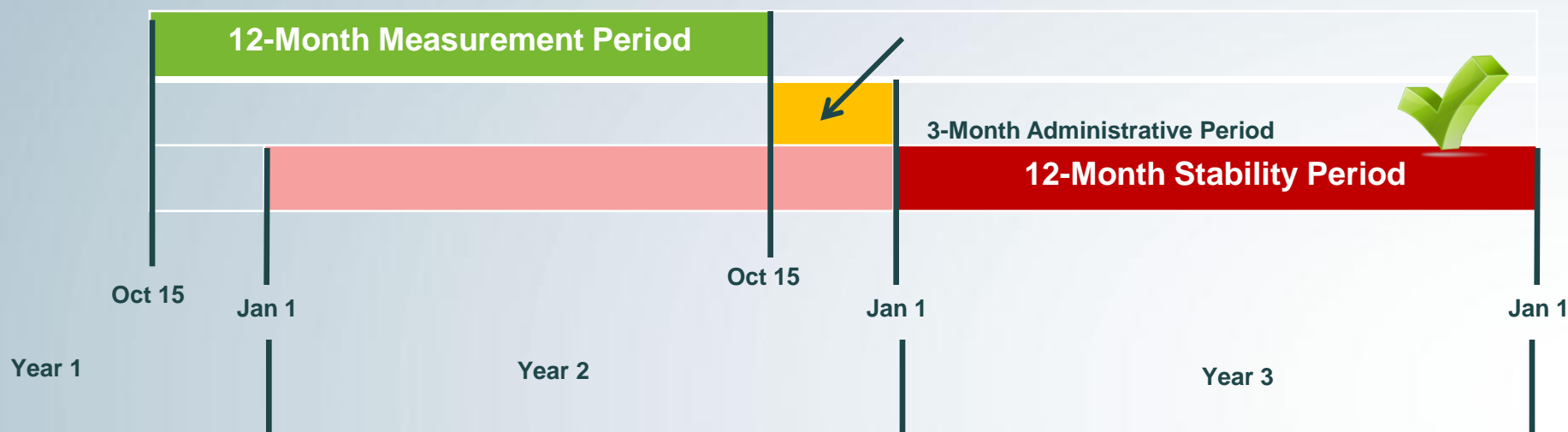


Notice 2012-58 – Full-Time Employees

» Ongoing Employees – Administrative Period

- **Example 1:** Employer W chooses to use a 12-month measurement period that begins October 15 of Year 1 and ends on October 14 of Year 2. Prior to the start of the 12-month stability period on January 1 of Year 3, Employer W uses a 2.5 month administrative period that is intended to allow for enrollment by employees who are found to have worked a full-time schedule during the 12-month measurement period.

Conclusion: Because the administrative period runs after the close of the measurement period and BEFORE the start of the immediately preceding stability period, it complies.



Notice 2012-58 – Full-Time Employees

» Ongoing Employees – Administrative Period

- **Example 1:** Employer W chooses to use a 12-month stability period that begins January 1 and a 12-month standard measurement period that also begins January 1. 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 a 90-day administrative period that runs for the first three months of the stability period.

Conclusion: Because the administrative period runs concurrent with the stability period and could operate to reduce the effective length of the stability period to less than the length of the corresponding standard measurement period, this violates the rule.

Notice 2012-58 – Full-Time Employees

» Ongoing Employees – Administrative Period

Example 2: 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). Previously-determined full-time employees already enrolled in coverage continue to be offered coverage through the administrative period.

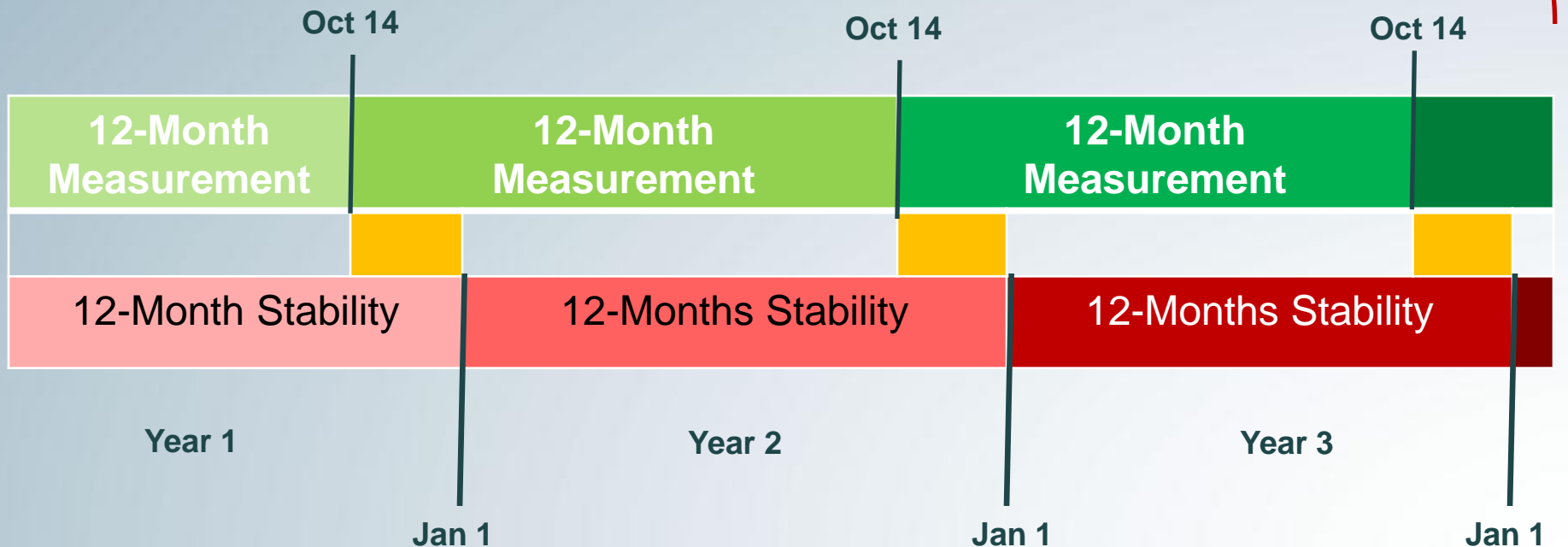
Employee A and Employee B have been employed by Employer W for several years, continuously from their start date. Employee A worked full-time during the standard measurement period that begins October 15 of Year 1 and ends October 14 of Year 2 and for all prior standard measurement periods. Employee 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.


Conclusion: 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) and for the administrative period from October 15 through December 31 of Year 2. 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, Employee B must 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.

Notice 2012-58 – Full-Time Employees

Employee B must be offered coverage though the close of the Year 2 stability period

Employee A must be offered coverage though the close of the Year 3 stability period



 = 2.5-month administrative period

Notice 2012-58 – Full-Time Employees

» New Employees – Reasonably Expected to Work Full-Time

- Distinguishes between those reasonably expected to work full-time and otherwise
- For those new employees reasonably **expected to work full-time** hours, an employer can take up to three calendar months of employment to offer coverage to such new employee
 - But see discussion below regarding coordination with the maximum 90-day waiting period rule.

Notice 2012-58 – Full-Time Employees

» New Employees – Not Reasonably Expected to Work Full-Time

- For those new employees who are not reasonably expected to work full-time hours, rules similar to those for ongoing employees apply
 - An employer may use a measurement period of between 3 and 12 months
 - The corresponding stability period must be the same length that applies to similarly situated ongoing employees
 - An employer may use an administrative period of up to 90-days
 - **NOTE: The combined period cannot extend beyond the last day of the first calendar month beginning on or after the 1-year anniversary of hire**

Notice 2012-58 – Full-Time Employees

» New Employees – Measurement and Stability Periods

- For new employees, need to use an “initial” measurement period that is between 3 and 12 months
 - Note: The corresponding stability period must be the same length that applies to similarly situated ongoing employees
- If a new employee is found to be a full-time employee during the initial measurement period, he or she must be treated as a full-time employee for the duration of the stability period that follows

Notice 2012-58 – Full-Time Employees

» New Employees – Measurement and Stability Periods

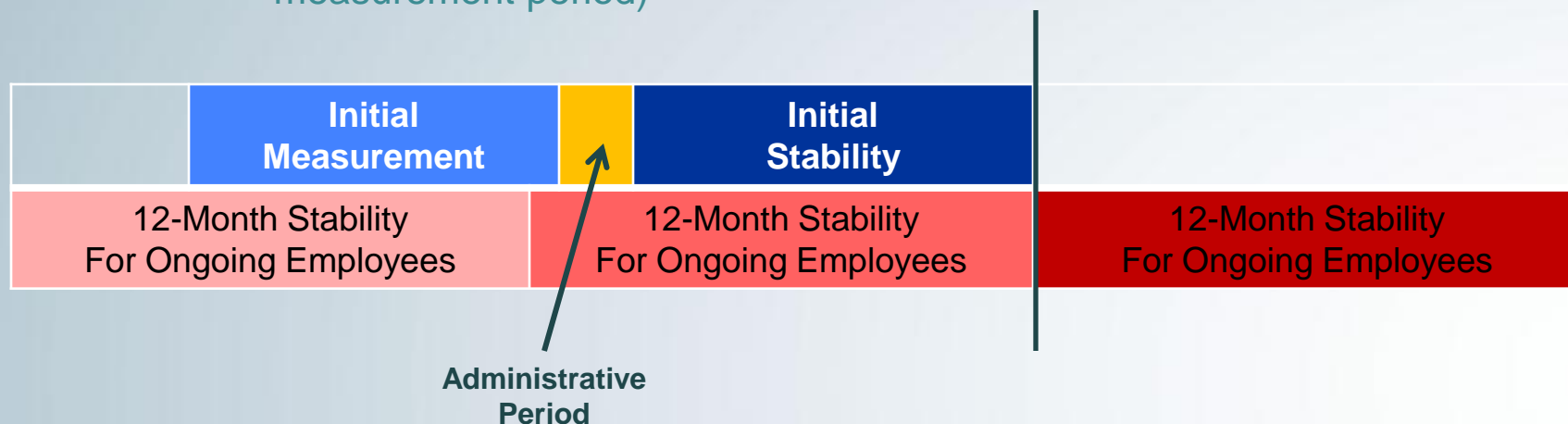
- Regarding the stability period --
 - Cannot be more than one month longer than the initial measurement period and cannot exceed the standard measurement period
 - Must not exceed the remainder of the standard measurement period in which the initial measurement period ends.



Notice 2012-58 – Full-Time Employees

» New Employees – Administrative Period

- In addition to the initial measurement period, for **new** employees, an employer may also impose an administrative period of up to 90 days following the close of the initial measurement period and prior to the start of the first stability period
 - Note that this period includes ALL periods between the hire date and the first date the employee is offered coverage (net of the initial measurement period)



Notice 2012-58 – Full-Time Employees

» New Employees – Administrative Period

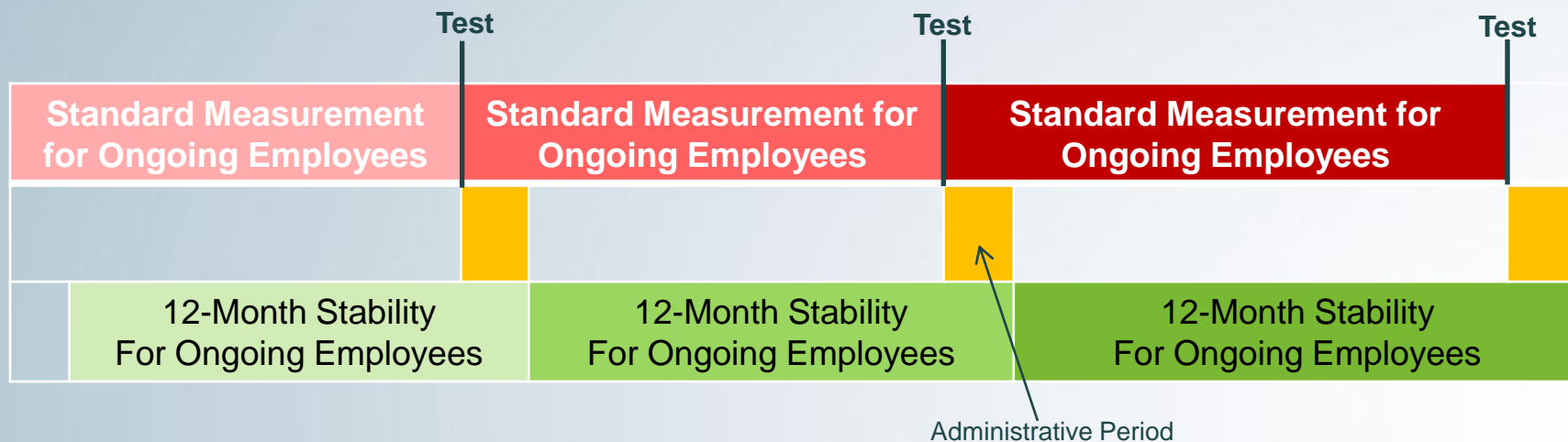
- In addition to the initial measurement period, for **new** employees, an employer may also impose an administrative period of up to 90 days following the close of the initial measurement period and prior to the start of the first stability period
 - Note that this period includes ALL periods between the hire date and the first date the employee is offered coverage (net of the initial measurement period)
 - **Example:** Employer's policy is to begin the initial measurement period on the first day of the first month following a new employee's start date. If Employee is hired on September 1, the initial measurement period would commence on October 1. The 30 days in September prior to the start of the initial measurement period therefore need to be counted for purposes of the 90-day administrative period. This would leave only 60 days for use as an administrative period between the close of the initial measurement period and the start of the stability period.

Notice 2012-58 – Full-Time Employees

» Transition from New to Ongoing Employee

- A new employee must be tested at the conclusion of the initial measurement period and after the close of the first standard measurement period for which he is employed for the full duration thereof even if the standard measurement period overlaps with the initial measurement period

Example of how to test ongoing employees only:

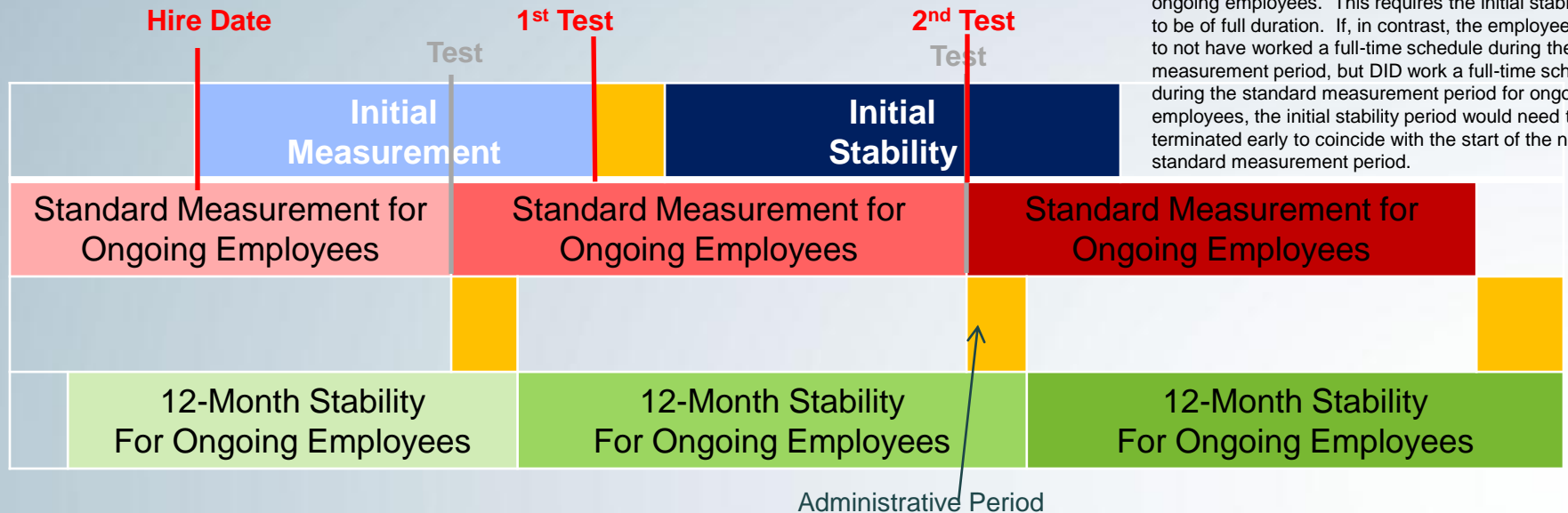


Notice 2012-58 – Full-Time Employees

» Transition from New to Ongoing Employee

- A new employee must be tested at the conclusion of the initial measurement period and after the close of the next first standard measurement period for which he is employed for the full duration thereof even if the standard measurement period overlaps with the initial measurement period

Example of how to test transitioning employees:



Note: This example assumes that the new employee is found to work a full-time schedule during the initial measurement period, but is not found to work a full-time schedule during the standard measurement period for ongoing employees. This requires the initial stability period to be of full duration. If, in contrast, the employee is found to not have worked a full-time schedule during the initial measurement period, but DID work a full-time schedule during the standard measurement period for ongoing employees, the initial stability period would need to be terminated early to coincide with the start of the next standard measurement period.

Notice 2012-58 – Full-Time Employees

» Transition from New to Ongoing Employee

- **Example:** Employer uses a 12-month initial measurement period beginning on date of hire and a calendar year standard measurement period. Employee is hired on February 12 of Year 1.

Employer would need to test Employee's full-time status (i) using the initial measurement period from February 12 of Year 1 through February 11 of Year 2, and (ii) using the standard measurement period from January 1 through December 31 of Year 2.

Thus, it is possible that Employee would not be a full-time employee for the stability period that follows the close of the initial measurement period, but would be a full-time employee for the stability period that commences on January 1 of Year 3 following the close of the first full standard measurement period

Notice 2012-58 – Full-Time Employees

» Seasonal Employees

- Employers may use reasonable, good faith interpretation in classifying employees as seasonal employees
 - Note: Focus is on expected short-term employment, NOT part-time hours
- The Notice allows employers to apply same measurement periods to seasonal employees as new employees
 - Appears to be the case that if the seasonal employee terminates employment prior to the start of the stability period, he or she not be provided coverage
 - If, however, he or she is employed by the start of the stability period, then the employer must provide coverage if the seasonal employee otherwise worked a full-time schedule on average during the measurement period
- The Notice requests comments on short-term employees and whether special safe harbors should be established

American Benefits Council Preparing for PPACA Webinar

**Session #17
Employer Responsibility Guidance
(Part II – Waiting Period Limitations (Notice 2012-59))**

Seth T. Perretta

Notice 2012-59 – 90-Day Waiting Period

- » New PHSA section 2708 provides that a group health plan may not use a waiting period that exceeds 90 days
 - Remember:
 - No requirement to provide coverage – although could be subject to penalty under IRC section 4980H if fail to provide qualifying coverage to certain “full-time employees(and their dependents)”
 - The waiting period rule of PHSA section 2708 applies to all group health plans regardless of the size of the employer plan sponsor

Notice 2012-59 – 90-Day Waiting Period

- » “Waiting Period” = the period of time that must pass before coverage for an employee or dependent who is otherwise eligible to enroll under the terms of the plan can become effective

Examples:

- All employees are eligible to participate on or after their 60th day of consecutive employment
- All employees may participate after working 1,000 hours

- » Eligibility criteria based on substantive eligibility conditions unrelated to the passage of time (such as job classifications or achieving certain licensure) are not a waiting period

Examples:

- Only employees who work at the Niagara facility can participate
- Only employees with payroll codes X, Y or Z may participate

Notice 2012-59 – 90-Day Waiting Period

- » How to measure compliance with the 90-day rule?
 - Per the Notice, this means that the employee must be able to elect coverage that commences within the 90-day window
 - Compliance with the rule is based solely on the ability of the employee to commence coverage within the 90-day window – actual enrollment is irrelevant
 - The maximum waiting period is 90 DAYS, not 3 full months
 - This is in contrast to the “pay-or-play” rule, which provides for no penalties until after the close of the third full month post-hire
 - Thus, subject to clarifying guidance, will need to use less than a 3-month waiting period even though IRC section 4980H is more generous in this regard

Notice 2012-59 – 90-Day Waiting Period

- What about if I base eligibility on an individual being a full-time employee?
 - If the employee is hired as a full-time employee, they must be permitted to commence coverage within 90 days of employment
 - If the employee is hired as a part-time worker and is not reasonably expected to, and does not actually, work a full-time schedule, then there is no need to ever allow the employee to participate ever and there is no violation of the 90-day waiting period
- What if the employee is hired as a part-time worker and is promoted to a position that is full-time?

Notice 2012-59 – 90-Day Waiting Period

- » **Example:** Employer X's group health plan limits eligibility for coverage to full-time employees. Coverage, if elected, becomes effective on the first day of the calendar month following the date the employee becomes eligible. Employee B is promoted to a full-time position and begins working full time for Employer X on April 11. Prior to this date, Employee B worked part time for X. Employee B is allowed to enroll in and commence coverage effective May 1. Employee B declines coverage

Conclusion: In this Example 2, the period from April 11 through April 30 is a waiting period. The period while B was working part time is not part of the waiting period because B was not in a class of employees eligible for coverage under the terms of the plan while working. Even though Employee B does not actually enroll in coverage, because the coverage could commence within 90-days of April 11, Employer B is in compliance with the 90-day waiting period rule

Notice 2012-59 – 90-Day Waiting Period

- What about if I base eligibility on an individual being a full-time employee?
 - What if the employee is a variable hour employee?

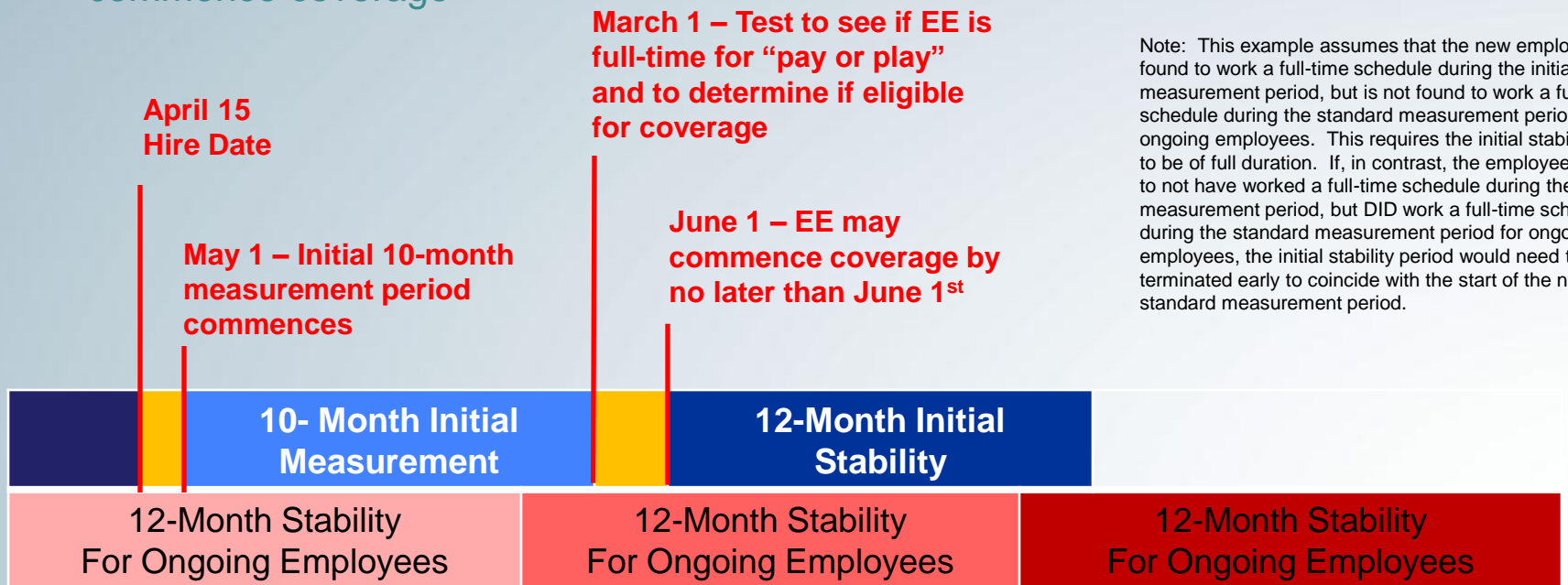
Notice 2012-59 – 90-Day Waiting Period

- » If it cannot be reasonably expected that a newly hired employee is expected to regularly work a specified number of hours for the period, the plan may take a reasonable period of time to determine whether the employee meets the plan's eligibility condition
 - Which may include use of a measurement period consistent with Notice 2012-58
 - An employer may use such a reasonable period of time even if they are not an “applicable large employer”
- » **In all events, however, the combined measurement period, administrative period, and 90-day waiting period cannot extend beyond the last day of the first calendar month beginning on or after the 1-year anniversary of hire**

 **Practical result is that cannot use a 12-month measurement period if seek to use a full 90-day waiting period**

Notice 2012-59 – 90-Day Waiting Period

- **Example:** Only employees of the “applicable large employer” that work at least 30 hours per week, i.e., full-time, on average are eligible to enroll in the plan. Employee is hired on April 15th and it is unclear whether he will work on average at least 30 hours per week. Employer utilizes an initial measurement period of 10 full calendar months for new hires and, if an employee is determined to have worked on average 30 hours per week, the employee is eligible to commence coverage



Note: This example assumes that the new employee is found to work a full-time schedule during the initial measurement period, but is not found to work a full-time schedule during the standard measurement period for ongoing employees. This requires the initial stability period to be of full duration. If, in contrast, the employee is found to not have worked a full-time schedule during the initial measurement period, but DID work a full-time schedule during the standard measurement period for ongoing employees, the initial stability period would need to be terminated early to coincide with the start of the next standard measurement period.

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