

**A Reference Guide for non-BEACON Employing Units to the Pay or Play Rules
under the Affordable Care Act**

Prepared by the State Health Plan

October 21, 2014

Disclaimer: Nothing contained in this reference guide is or should be considered as the rendering of legal advice to the employing unit with respect to the topics addressed herein. Each employing unit is responsible for obtaining such advice from their own legal counsel. This reference guide is intended for educational and informational purposes only.

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NOTE: CERTAIN TERMS ARE CAPITALIZED THROUGHOUT THIS MANUAL. THOSE CAPITALIZED TERMS REFLECT KEY TERMS UNDER THE 4980H RULES AND YOU SHOULD PAY SPECIAL ATTENTION TO THEM. EACH CAPITALIZED TERM IS SPECIFICALLY DEFINED IN THIS INSTRUCTION MANUAL.

Introduction

Overview of 4980H

Effective January 1, 2015, “applicable large employers” (“ALEs”) with 100 or more Full-time Equivalents who fail to offer certain group health insurance coverage to a Qualifying Full-Time Employee who receives a premium tax credit or advance premium subsidy (collectively, the “Premium Subsidy”) for health insurance in the “Marketplace” will be subject to one of two excise taxes imposed under Code Section 4980H (“4980H Rules”).

Once ALE status is determined, each employing unit that is a member of the controlled group that constitutes an ALE (“ALE Member”) must comply with the 4980H rules.

Practice Pointer-Which employing units are part of controlled groups?: ALE status is determined on a “controlled group” basis. The controlled group rules are defined in Internal Revenue Code Sections 414(b), (c) and (m). There is much uncertainty surrounding the application of the controlled group rules to governmental entities. For purposes of this Manual, we are making the assumption that each employing unit ALE Member has a separate and independent responsibility for compliance with 4980H.

4980H imposes one of two excise taxes on an ALE Member for *each month* that the ALE Member fails to offer qualifying coverage to an employee who qualifies as a full-time employee in accordance with the 4980H Rules (herein referred to as a “Qualifying Full-time Employee”) who receives a Premium Subsidy in the Marketplace *for that month*.

Interaction between 4980H Rules and the applicable State statutes governing the State Health Plan

Effective January 1, 2015, the General Assembly revised the General Statutes to add an additional category of employee who is eligible for coverage under the State Health Plan. Under the revised statutes any employee who is a Qualifying Full-time Employee, *as determined by the ALE Members consistent with the 4980H Rules*, will be eligible for coverage under the Plan. Consequently, the key compliance requirement for ALE Members participating in the State Health Plan will be identifying Qualifying Full-time Employees. Fortunately, the statute provides each ALE Member maximum flexibility to determine which of its employees are Qualifying Full-time Employees.

NOTE: The State Health Plan will rely on the ALE Members to notify the State Health Plan which employees are Qualifying Full-time Employees in accordance with the methods they have adopted.

Purpose of Manual

The primary purpose of this instruction manual is to describe the two methods made available by the IRS for identifying Qualifying Full-time Employees: the Look Back Measurement Period Method and the Monthly Measurement Period Method. Each ALE Member must identify the method that best suits the ALE Member with respect to each of its employees. Although it is each ALE Member's responsibility to adopt the appropriate methods for identifying Qualifying Full-time Employees, the State Health Plan recommends that each ALE Member that participates in the State Health Plan use the Look Back Measurement Period subject to the following terms and conditions:

- First Standard Measurement Period: April 15, 2014 through October 14, 2014.
- Subsequent Standard Measurement periods: October 15 through October 14.
- Initial Measurement Periods for variable employees: 11 month period beginning the first day of the month coinciding with or next following the hire date.

If each ALE Member utilizes the look back measurement period according to these terms and conditions, administration of the State Health Plan following the effective date of 4980H will be uniform and consistent.

Identifying Qualifying Full-Time Employees for purposes of 4980H compliance

Overview

- Each ALE Member is independently responsible for identifying its Qualifying Full-Time Employees (as defined by 4980H) for purposes of reporting and assessment of excise taxes (if any).
- The Full-Time Employee determination is based on specific Hours of Service rules, which includes certain paid leaves of absence defined in 29 C.F.R. 2530.200b-2(a). See Appendix A for a more detailed overview of the Hours of Service rules.
- ALE Members are subject to an excise tax under 4980H for a month if qualifying coverage is not offered to a Qualifying Full-time Employee during a month in which the Qualifying Full-time Employee receives a Premium Subsidy in the Marketplace.
- The 4980H Rules identify two methods for identifying Qualifying Full-Time Employees: the Look Back Measurement Period Method and the Monthly Measurement Period Method (collectively, the Full-time Employee Determination Method).
- Generally, the ALE Member must apply the same Full-Time Employee Determination Method to *every* employee within one of the distinguishable classes (e.g. salaried or hourly).
- The application of the Look Back Measurement Period Method will vary depending on whether the employee is a new employee or an Ongoing Employee.

An ALE Member may be subject to excise taxes under 4980H for each month that the ALE Member fails to offer qualifying coverage to a Qualifying Full-Time Employee if that Qualifying Full-Time Employee also receives a Premium Subsidy in the Marketplace. Thus, each ALE Member must identify employees who qualify as a Full-Time Employee *each month*. The IRS has identified two methods for identifying Full-Time Employees with respect to whom the failure to offer qualifying coverage could result in an excise tax: the Look Back Measurement Period Method and the Monthly Measurement Period Method.

Under the Look Back Measurement Period Method, an ALE Member identifies certain new employees and all “Ongoing” Employees as Qualifying Full-time Employees based on the employee’s aggregate Hours of Service over an applicable Measurement Period. If the employee is employed, on average, 30 or more Hours of Service per week during that Measurement Period, then the employee is a Qualifying Full-time Employee for each month in the corresponding Stability Period.

Under the Monthly Measurement Period Method, ALE Members identify Qualifying Full-Time Employees based on the employees’ Hours of Service *each month* except during months that are part of a Limited Non-Assessment Period. (Under State Health Plan enrollment rules the Limited Non-Assessment Period is very short, i.e., the first partial month of employment.)

The Look Back Measurement Period Method

Fundamental Principles for Identifying Full-Time Employees.

Both methods for identifying full-time employees are subject to the following fundamental principles:

1. Qualifying Full-Time Employee: Generally, an employee with respect to whom the failure to offer coverage in a month could trigger excise taxes for the ALE Member if that employee receives a Premium Subsidy. An employee will be a Qualifying Full-time Employee in the following months (depending on the specific method adopted by the ALE Member):

Look Back Measurement Period Method

- If a new employee to whom the Initial Measurement Period applies (as described below) averages 30 Hours of Service or more during that Initial Measurement Period, then the employee will be a Qualifying Employee during each month of the Stability Period that follows, regardless of the employee's Hours of Service during that Stability Period.

Practice Pointer-Are ALE Members subject to excise taxes during the Initial Measurement Period? Generally, the answer is no. However, the Initial Measurement Period for an employee who becomes a Qualifying Full-time Employee is a Limited Non-Assessment Period. Consequently, excise taxes could apply for each month during the Initial Measurement Period that the Qualifying Full-time Employee had 130 Hours of Service or more IF qualifying coverage is NOT offered to the Qualifying Full-time Employee by the first day of the applicable Stability Period.

- For employees to whom the Initial Measurement Period does NOT apply (e.g. Non-Variable Employees), the employee is a Qualifying Full-time Employee every month that the employee has 130 Hours of Service unless the month is part of a Limited Non-Assessment Period.
- All "Ongoing Employees" (as described below) who average 30 Hours of service or more per week during the Standard Measurement Period will be a Qualifying Employee during each month of the following Stability Period.

Monthly Measurement Period

- Any month that the employee has 130 Hours of Service (unless the Weekly Method described below is used) unless the month is part of a Limited Non-Assessment Period.
2. Hours of Service: 4980H prescribes specific *Hours of Service* rules. Generally, an hour of service includes any periods for which the employee is paid or entitled to payment for services performed as well as certain periods during which the employee is paid or entitled to payment even though the

employee is not performing services. For more details on the Hours of Service rules, see Appendix A.

3. **Common Law Employee:** All common law employees of the employer are considered when you identify Qualifying Full-Time Employees. The IRS has prescribed a 20-factor common law employee test. For more details on the common law employee test, see Appendix B. NOTE: The manner in which an ALE Member classifies an employee isn't relevant to the 4980H rules (except in the case of seasonal employees). The common law analysis focuses on who has the right to control the manner in which services are performed, regardless of whether that right is exercised or not—not the manner in which the employee is classified by the employer. In addition, Seasonal Employees must also be considered in the analysis if they are common law employees of the ALE Member; however, a special rule applies to Seasonal Employees.

Once the ALE Member understands these fundamental terms and concepts, the ALE Member must then decide which method is best under the circumstances.

Practice Pointer: The final regulations clarify the application of the 4980H Rules to a number of special employees, such as:

- Bona fide volunteers
- Students
- Interns
- Adjunct professors

See Appendix A for a more detailed discussion regarding these special employees.

The Look Back Measurement Period Method-General Operating Principles

The Look Back Measurement Period Method generally operates according to the following, fundamental principles :

- ALE Members will establish an “Initial Measurement Period” for new employees during which a new Variable Hour, Seasonal Employee, or Part-Time Employee’s aggregate Hours of Service are collected over that Initial Measurement Period. Non-Variable Employees (as defined herein) will be subject to the Monthly Measurement Period Method until the Stability Period following the Standard Measurement Period.
- The employer will also establish a Standard Measurement Period for Ongoing Employees during which each Ongoing Employee’s aggregate Hours of Service are collected.

Practice Pointer: ALE Members who adopt the Look Back Measurement Period Method must establish procedures for new employees and procedures for Ongoing Employees.

- During an Administrative Period that follows the applicable Measurement Period, the ALE Member will identify the employees that averaged 30 Hours of Service or more per week during the applicable Measurement Period.
- Each employee who averaged 30 Hours of Service or more per week during the applicable Measurement Period will be a Qualifying Full-time Employee during each month of a Stability Period that follows.
- The manner in which the Look Back Measurement Period Method is applied differs slightly depending on whether the employee is a *new employee* or an *Ongoing Employee*.
 - Ongoing Employees are defined as employees who have been employed for one entire *Standard Measurement Period*, which is the static Measurement Period chosen by the ALE Member to measure the Hours of Service for existing employees.

Practice Pointer: All employees in a distinguishable class to which the ALE Member applies the Look Back Measurement Period are subject to a Standard Measurement Period. The Variable and Non-Variable distinction applicable to new employees does NOT apply to Ongoing Employees.

- There are four types of “new employees” (i.e. employees who are not Ongoing Employees): Non-Variable, Variable, Part-time and Seasonal Employees. The Look Back Measurement Period Method is applied differently to Variable/Part-time/Seasonal Employees than it is to Non-Variable Employees.

The following provides a roadmap for implementing the Look Back Measurement Period Method for both Ongoing Employees and new employees. We begin with Ongoing Employees.

Application of the Look Back Measurement Period Method to “Ongoing Employees”

As noted above, an Ongoing Employee is an employee who is employed by the employer for an entire Standard Measurement Period. The following summarizes the application of the Look Back Measurement Period Method to Ongoing Employees:

- Establish the Standard Measurement Period. The Standard Measurement Period is subject to the following requirements:
 - *Duration of Standard Measurement Period.* The Standard Measurement Period must be no less than three months and generally no more than 12 months. See “Additional Considerations” below for a more detailed discussion regarding additional factors to consider when establishing the Standard Measurement Period.
 - *Payroll Period:* For payroll periods that are one week, two weeks or semi-monthly in duration, an employer is permitted to treat as a Standard Measurement Period a period that ends on the last of the payroll period preceding the payroll period that

includes the date that would otherwise be the last day of the Standard Measurement Period so long as the first day of the Standard Measurement Period begins on the first day of the payroll period that includes the date that would otherwise be the first day of the Standard Measurement Period. Likewise, an ALE Member may treat as a Standard Measurement Period a period that begins on the first day of the payroll period that includes the date that would otherwise be the first day of the Standard Measurement Period so long as the Standard Measurement Period ends on the last of the payroll period that includes the date that would otherwise be the last day of the Measurement Period.

- *Identify Breaks in Service.* An employee who has a period during which the employee has no Hours of Service for 13 full weeks (26 full weeks for employees of an “Educational Organization”) or longer is treated as having a Break in Service. Thus, an employee who resumes Hours of Service after 13/26 full weeks is considered a new employee whereas an employee who resumes Hours of Service after less than 13/26 full weeks is considered a Continuous Employee for purposes of the 4980H Rules. There is also a rule of parity that treats as a Break in Service as any period with no Hours of Service that is at least four weeks in duration and greater than the prior period of employment (determined after applying the special rule for Special Unpaid Leaves and Employment Breaks). See Appendix C for examples that illustrate the application of the Break in Service rules.

Practice Pointer: For purposes of the Standard Measurement Period, it doesn’t matter whether the period with no Hours of Service is due to an unpaid leave of absence (other than a Special Unpaid Leave or Employment Break) or the employee’s employment was terminated. For example, if the employee’s employment is terminated and then is rehired within 13/26 weeks (as applicable), the employee will be treated as a Continuous Employee for purposes of the Standard Measurement period.

- *Averaging Rules for Special Unpaid Leaves and Employment Breaks.* There are special averaging rules for Continuous Employees who take an unpaid leave of absence that is a Special Unpaid Leave or who experience an “Employment Break” (if the employer is an Educational Organization). See Appendix D for a more detailed overview of the special for Special Unpaid Leaves and Employment Breaks.
- *Different Standard Measurement Periods may apply to each distinguishable class of employees.* ALE Members may vary the Standard Measurement Period for each of the following distinguishable classes of employees:
 - Employees subject to a collectively bargained agreement and employees not subject to a collectively bargained agreement
 - Each group of collectively bargained employees covered by a different collectively bargained agreement
 - Salaried
 - Hourly employees
 - Employees located in different states

Practice Pointer: Can the ALE Member apply the Look Back Measurement Period Method to some but not all Ongoing Employees in the same distinguishable class? NO!!!!

- *Impact of employment status change.* A change in positions during a Standard Measurement Period generally has no impact on the application of the Standard Measurement Period to that employee. See Appendix C for examples on applying the look back Measurement Period to employees.
- Establish a Stability Period for Qualifying Full-Time Employees. The employer must establish a Stability Period following the Standard Measurement Period (and any associated administrative period). The Stability Period for employees who averaged 30 Hours of Service or more per week over the Standard Measurement Period is subject to the following fundamental requirements:
 - *Employee's status during Stability Period.* The employee is a Qualifying Employee during each month of Stability Period to the extent employed by the ALE Member, *even if the employee changes employment status during the Stability Period* (e.g. full-time position to a part-time position, or takes a leave of absence). There is, however, a new exception to the general rule:
 - If an employee experiences a change in positions during a Stability Period such that had the employee initially been hired into the new position, the employee would not have been reasonably expected to average 30 Hours of Service per week each month, then the ALE Member may apply the Monthly Measurement Period Method to that employee for the remainder of that Stability Period beginning on the 1st day of the fourth full month following the date that the change in status occurred, if the following conditions are satisfied:
 - The employee has continuously been offered coverage that provides minimum value throughout the period beginning on the 1st day of the 4th full month of employment through the date that the employment status change occurs,
 - The employee does not average full-time Hours of Service during any of the three full calendar months following the change in status. During this three full-calendar month period following the change in status, the employee retains the same status he or she had for that particular Stability Period.

See Appendix C for examples that illustrate the rule on changing positions during a Stability Period.

- *Address Breaks in Service.* A Break in Service doesn't appear to impact an employee's status as a Qualifying Full-Time Employee during the Stability Period unless the Break in Service is due to a termination of employment. If a Qualifying Full-time Employee

terminates employment during the Stability Period and then resumes employment as a Continuous Employee during the same Stability Period (i.e. the employee did NOT have a Break in Service), the employee will again be a Qualifying Full-time Employee, even if not hired as a full-time employee, as of the first day the employee is credited with an Hour of Service or as soon as reasonably possible thereafter (no later than the first day of the month following rehire as a Continuous Employee). If, however, the Qualifying Full-time Employee was previously offered affordable minimum value coverage during the same Stability Period and that employee elected to forgo such coverage, the employee is not required to be offer coverage again for the remainder of the Stability Period. If the employee terminates employment and resumes employment after a Break in Service, then the employee will not be a Qualifying Full-time Employee for the remainder of the Stability Period. See Appendix C for an example that applies the Break in Service rules to a Qualifying Full-time Employee during the Stability Period.

- *Duration of Stability Period for Qualifying Full-Time Employees.* The Stability Period following the Standard Measurement Period for Qualifying Full-time Employees must be at least six months in duration, and no shorter in duration than the Standard Measurement Period and it must begin immediately following the Standard Measurement Period and any applicable Administrative Period. See “Additional Considerations” below for a more detailed discussion on the duration of the Stability Period.
- Establish a Stability Period for employees who do not have the requisite Hours of Service during the Standard Measurement Period to be a Qualifying Full-time Employee. The Stability Period for employees who do not have the requisite Hours of Service over the Standard Measurement Period is subject to the following requirement:
 - *Duration of Stability Period for employees who are NOT Qualifying Full-time Employees.* The Stability Period for such an employee cannot be longer than the Standard Measurement Period (even if the Standard Measurement Period is less than six months).
 - *Status during Stability Period.* If an employee does not average the requisite Hours of Service during the applicable Measurement Period, then he or she is not a Qualifying Full-time Employee during each month of the following Stability Period (i.e., there is no penalty for failing to offer coverage during that Stability Period)—regardless of the employee’s actual Hours of Service during that Stability Period.
- Establish an Administrative Period. The Administrative Period is the period during which employees are identified as full-time or not based on their Hours of Service during the preceding Measurement Period and, if identified as full-time, offered the opportunity to enroll. The administrative period following the Standard Measurement Period may not exceed 90 calendar days.
- Additional Considerations. In light of the above mentioned fundamental rules, ALE Members should consider the following factors in establishing their safe harbor and Measurement Periods:

- *Equal measurement and Stability Periods.* ALE Members should consider establishing a Standard Measurement Period that is the same duration as the Stability Period and that ends near the start of the annual enrollment period for the State Health Plan. Since the Stability Period for employees who are NOT full-time must be no shorter in duration than the Standard Measurement Period, an employer who implements a Measurement Period that is shorter in duration than the Stability Period will have to implement two sets of rules—one for employees who are considered to be full-time and another for employees who are not considered to be full-time.

Practice Pointer: The State Health Plan recommends that each ALE Member establish a 12 month standard measurement period that begins each year on October 4 and ends the following October 3. The subsequent stability period would be the 12 month calendar year, which coincides with the State Health Plan’s plan year.

- *Transition relief for 2015:* Notwithstanding the general rule above, ALE Members may establish a Standard Measurement Period in 2014 that is at least 6 months in duration and a 12 month Stability Period for all Ongoing Employees (including non-full-time) beginning in 2015 so long as the Standard Measurement Period begins no later than July 1, 2014.

See Appendix C for an illustration of look back measurement method for Ongoing Employees, including the impact of cafeteria plan rules on employee’s elections for a Stability Period.

Application of the Look Back Measurement Period Method to “New Employees”

The application of the Look Back Measurement Period Method to new employees differs slightly than the application of the Look Back Measurement Period rules to Ongoing Employees. The following describes the fundamental requirements of the Look Back Measurement Period method as applied to new employees:

- Determine which of the four “buckets” the employee fits based on the applicable facts and circumstances on the date of hire: The 4980H Rules identify four different types (or “buckets”) of new employees, each of which is described below. The rules vary depending on which bucket the employee fits. Thus, each ALE Member must determine which bucket a new employee fits in order to know the specific rule to apply.
 - *Non-variable full-time.* A Non-Variable Hour new employee is an employee for whom it can be determined by the ALE Member on the start date that the employee is reasonably expected to average 30 Hours of Service or more per week during each month employed, *regardless of the duration of employment.* The determination whether an employee is a Non-Variable Employee (or not) is reasonable is based on the facts and circumstances

that exist at the time of employment. The final regulations provide an inclusive list of factors, such as:

- Whether the employee is replacing an employee who is or was full-time;
- The extent to which Hours of Service for Ongoing Employees in comparable positions vary above or below the 30 Hours of Service threshold during recent Measurement Periods;
- Whether the job was advertised as full-time or not.

No single factor is determinative. The duration of employment is *not* a factor. Thus, if the ALE Member only expects the employee to be employed for 5 months, but the ALE Member reasonably expects the employee to average 30 Hours of Service per week during those 5 months, the employee is generally non-variable.

Practice Pointer: AN EMPLOYEE WHO QUALIFIES AS A SEASONAL EMPLOYEE IS NOT CONSIDERED A NON-VARIABLE EMPLOYEE, even if the ALE Member determines at the start date that the employee is reasonably expected to average 30 Hours of Service per week during each month the employee is employed. The 4980H Rules allow ALE Members who use the Look Back Measurement Period Method to treat employees who qualify as Seasonal Employees the same as a “Variable Employee. See below for more details on who qualifies as a Seasonal Employee.

- *Variable Employee:* An employee is a Variable Employee if, at the start date, the ALE Member cannot make a determination that the employee is reasonably expected to average 30 Hours of Service each month employed because the employee’s hours will vary or are otherwise uncertain. The ALE Member would use the same factors described above with respect to non-variable to determine whether the employee was variable or non-variable.
- *Seasonal Employees:* Employees that qualify as “Seasonal Employees” are treated as Variable Employees for purpose of the look back Measurement Period, even if the ALE Member can make a determination on the hire date that the employee is reasonably expected to average 30 Hours of Service or more per week for each month employed during the Initial Measurement Period. An employee qualifies as a “Seasonal Employee” if the following requirements are satisfied: (i) the employee is hired into a position for which the customary employment is 6 months or less (although it can be longer under unusual circumstances) and (ii) the period of employment customarily begins during the same date each calendar year. See Appendix C for a more detailed application of the special Seasonal Employee rule.
- *Part-time employee.* A Part-Time Employee is an employee for whom the ALE Member can make a determination on the start date that the employee is not reasonably expected to average 30 Hours of Service for each month employed during the Standard Measurement Period. During an Initial Measurement Period, Part-Time Employees are subject to the same rules as variable employees.

- Apply the Monthly Measurement Period Method to Non-Variable Employees. Unlike variable/seasonal/Part-Time Employees, ALE Members will apply the Monthly Measurement Period Method approach to a Non-Variable Employee until the start of the Stability Period following the first Standard Measurement Period for that employee. Whether a non-variable employee is a Qualifying Full-time Employee each month depends on the employee's Hours of Service for those months and whether the month is part of a Limited Non-Assessment Period. The following Limited Non-Assessment Periods apply to a Non-Variable Employee: (i) the first partial month of employment; (ii) any of the first three full-calendar months following the date of hire provided that (A) the employee is otherwise eligible for coverage under a plan and is not offered coverage during any such month due solely to a waiting period (ii) coverage providing minimum value is offered to the Qualifying Full-time Employee (if still employed) by no later than the 1st day of the 4th full calendar month following the employee's start date.

Practice Pointer: Coverage for such an employee under the statute would be effective on the first day of the month following date of hire. Thus, the only Limited Non-Assessment Period applicable to such an employee is the first partial month of employment.

- Establish an Initial Measurement Period for new Variable, Seasonal, and Part-Time Employees: If an employee is a Variable, Seasonal, or Part-time Employee (as defined above), the ALE Member may apply an Initial Measurement Period to determine if the employee is a Qualifying Full-time Employee for the following Stability Period.
 - *Duration of Initial Measurement Period.* The Initial Measurement Period must be no less than three months and generally no more than 12 months. It may begin on the date of hire or the first day of the month following the date of hire; however, any delay in the Initial Measurement Period must be factored into the duration of the Administrative Period (which cannot exceed 90 calendar days in the aggregate). Also, the duration of the Initial Measurement Period is impacted directly by the desired duration of the Administrative Period. See "Additional Considerations" below for a more detailed discussion on establishing the Initial Measurement Period.
 - *Payroll periods:* For payroll periods that are one week, two weeks or semi-monthly in duration, an employer is permitted to treat as an Initial Measurement Period a period that ends on the last of the payroll period preceding the payroll period that includes the date that would otherwise be the last day of the Initial Measurement Period so long as the first day of the Initial Measurement Period begins on the first day of the payroll period that includes the date that would otherwise be the first day of the Initial Measurement Period. Likewise, an ALE Member may treat as an Initial Measurement Period a period that begins on the first day of the payroll period that includes the date that would otherwise be the first day of the Initial Measurement Period so long as the Initial Measurement Period ends on the last of the payroll period that includes the date that would otherwise be the last day of the Initial Measurement Period.

- *Identify Breaks in Service.* An employee who has a period during which the employee has no Hours of Service for at least 13 full weeks or longer (26 weeks or longer for employees of Educational Organization) is treated as having a Break in Service. An employee who resumes Hours of Service after a Break in Service is considered a new employee whereas an employee who does not experience a Break in Service is considered a Continuous Employee. There is also a rule of parity that treats as a Break in Service as any period with no Hours of Service that is at least four weeks in duration and greater than the prior period of employment (determined after applying the special rule for Special Unpaid Leaves and Employment Breaks). See Appendix C for examples that illustrate the Break in Service rules.
- *Averaging Rules for Special Unpaid Leaves and Employment Breaks.* There are special averaging rules for Continuous Employees whose Break In Service during the Measurement Period was due in whole or part to a “special unpaid leave” or to “employment breaks” (if the employer is an Educational Organization). See Appendix D for a more detailed overview of the special averaging rules for special unpaid leaves.
- *Different Measurement Periods for different classes of distinguishable employees.* Employers may vary the Initial Measurement Period among the distinguishable class of employees in the same manner as the Standard Measurement Period.
- *Changes in employment status during Initial Measurement Period.* If a Variable/Seasonal/Part-time Employee experiences a change in employment status before the end of the Initial Measurement Period such that the employee, if hired into that new position, would reasonably be expected to be employed on average at least 30 Hours of Service per week, then a Limited Non-Assessment Period will apply with respect to (i) any full-calendar month that the employee is otherwise eligible for coverage providing minimum value but is not offered coverage due solely to a waiting period (not to exceed 3 full calendar months) and (ii) the employee is offered coverage providing minimum value by no later than the 1st day of the 4th full calendar month following the employment status change or, if earlier the 1st day of the Stability Period (if the employee averaged 30 Hours of Service or more per week during the Initial Measurement Period).

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| <p>Practice Pointer: State Health Plan coverage for such an employee under the statute would be effective on the first day of the month following the employment status change.</p> |
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- Establish a Stability Period for employees who averaged the requisite Hours of Service during the Initial Measurement Period. The employer must establish a Stability Period following the Initial Measurement Period (and any associated administrative period). The Stability Period for employees who averaged the requisite Hours of Service during the Initial Measurement Period is subject to the following fundamental requirements:

- *Qualifying Full-time Employees are in a Limited Non-Assessment Period during the Initial Measurement Period.* Consequently, Qualifying Full-time Employees who are not offered coverage by the first day of the Stability Period could trigger excise taxes for each month of the Qualifying Full-time Employee's Initial Measurement Period that the employee had 130 Hours of Service or more.
- *Status during Stability Period.* The employee is a Qualifying Full-time Employee for each month of the Stability Period (or until the employee's employment is terminated, whichever is earlier)—regardless of the actual Hours of Service during such month. See Appendix C for examples that illustrate this rule.
- *Address Breaks in Service.* A Break in Service doesn't appear to impact an employee's status as a Qualifying Full-Time Employee (or not) during the Stability Period unless the Break in Service is due to a termination of employment. If a Qualifying Full-time Employee terminates employment during the Stability Period and then resumes employment as a Continuous Employee during the same Stability Period, the employee will again be a Qualifying Full-time Employee, even if not hired as a full-time employee, as of the first day the employee is credited with an Hour of Service or as soon as reasonably possible thereafter (no later than the first day of the month following rehire as a Continuous Employee). If, however, the Qualifying Full-time Employee was previously offered affordable minimum value coverage during the same Stability Period and that employee elected to forgo such coverage, the employee is not required to be offer coverage again for the remainder of the Stability Period. If the employee terminates employment and resumes employment after a Break in Service, then the employee will not be a Qualifying Full-time Employee for the remainder of the Stability Period. See Appendix C for an example that applies the Break in Service rules to a Qualifying Full-time Employee during the Stability Period.
- *Duration of Stability Period for Qualifying Full-Time Employees.* The Stability Period following the Initial Measurement Period for such employees must be at least six months in duration, no shorter in duration than the Standard Measurement Period and it must begin immediately following the Standard Measurement Period and any applicable Administrative Period. See "Additional Considerations" below for a more detailed discussion on the duration of the Stability Period.
- Establish a Stability Period for employees determined to NOT be full-time during the Initial Measurement Period. The Stability Period for employees who are determined not to be full-time during the Initial Measurement Period is subject to the following fundamental requirements:
 - *Status during Stability Period.* If an employee does not have the requisite Hours of Service over the Initial Measurement Period, then he or she is not a Qualifying Full-Time Employee during any months of the Stability Period that follows the Initial Measurement Period (and Administrative Period).

- *Duration of Stability Period for employees who are NOT Qualifying Full-time Employees.* The Stability Period for such an employee cannot be more than one month longer in duration than the Initial Measurement Period.
- *Transition from variable/seasonal/part-time to ongoing employee.* If there is a gap between the end of the Stability Period following the Initial Measurement Period and the date the Stability Period following the Standard Measurement Period begins, the treatment afforded to the employee during the Stability Period following the Initial Measurement Period is continued until the start of the next Stability Period. See Appendix C for an example that illustrates this rule.
- Establish an administrative period. The Administrative Period is the period during which employees are identified as Qualifying Full-time Employees (or not) based on their Hours of Service during the Initial Measurement Period and, if identified as a Qualifying Full-time Employee, offered the opportunity to enroll for the Stability Period. The Administrative Period following the Initial Measurement Period may not exceed 90 calendar days. However the duration of the Initial Measurement Period and the following administrative period cannot extend beyond the last day of the month that begins on or after the employee's anniversary date.
- Additional Considerations: In light of the above mentioned fundamental rules, employers should consider the following factors in establishing their Initial Measurement and following Stability Periods:
 - *Preferred Measurement Period duration.* ALE Members should consider establishing an Initial Measurement Period that is no less than 11 months. Since the Stability Period for employees who are Qualifying Full-time Employees must be the same as the Stability Period for Ongoing Employees who are Qualifying Full-time Employees, and the Stability Period for employees who do not average the requisite Hours of Service during the Initial Measurement Period must be no more than 1 month longer in duration than the Initial Measurement Period, an employer who implements an Initial Measurement Period that is shorter than 11 months will have to implement two sets of rules—one for employees who are considered to be full-time and another for employees who are not considered to be full-time.

See Appendix C for an illustration of the Look Back Measurement Period Method for new employees.

The Monthly Measurement Period Method

If the ALE Member does not use the Look Back Measurement Period Method, then the ALE Member may use the Monthly Measurement Period Method. The Monthly Measurement Period Method is subject to the following fundamental requirements:

- All employees who have 130 Hours of Service (unless using the Weeks Approach defined below) in a month will be a Qualifying Full-time Employee for such month unless that month is part of a Limited Non-Assessment Period.
- Continuous employees are subject to a one-time Limited Non-Assessment Period. The following Limited Non-Assessment Periods apply to an employee under the Monthly Measurement Period Method: (i) the first partial month of employment; (ii) any of the first three full-calendar months beginning with the month that the employee first has the requisite Hours of Service provided that (A) the employee is otherwise eligible for coverage under a plan and is not offered coverage during any such month due solely to a waiting period (ii) coverage providing minimum value is offered to the Qualifying Full-time Employee (if still employed) by no later than the 1st day of the 4th full calendar month beginning with the first full-calendar month that the employee first had the requisite Hours of Service.

Practice Pointer: Coverage for such an employee under the statute would be effective on the first day of the month following the date they are first full-time. Thus, the only Limited Non-Assessment Period applicable to such an employee is the first partial month of employment.

- The Limited Non-Assessment Period only applies once to any Continuous Employee. If the employee has a period of less than 13 weeks with no Hours of Service (26 weeks if the entity is an Educational Organization), and then resumes service, the Limited Non-Assessment Period does not apply again and the ALE Member will be subject to excise taxes for any month that the Qualifying Full-time Employee is not offered qualifying coverage by the ALE Member and also receives a Premium Subsidy in the Marketplace.

See Appendix C for examples that illustrate the Monthly Measurement Period Method and the application of the Limited Non-Assessment Period.

- ALE Members may use a “weeks” approach. The ALE Member may determine full-time status for a calendar month based on Hours of Service over a period that (i) begins on the first day of the week that includes the first day of the calendar month so long as the period does not include the week in which falls the last day of the calendar month (unless that week ends with the last day of the month) or (ii) begins on the first day of the week immediately subsequent to the week that includes the first day of the calendar month so long as it includes the week in which the last day of the month falls. Under this method, the Full-Time Employee Hours of Service limit for months with 4 weeks is 120 hours and 150 for months with 5 weeks.
- Special rules apply when an employee changes positions to which different methods apply. The following rules apply when an employee changes status from a position to which one method applies to a position to which another method applies.
 - From look back to monthly: If an employee changes positions during a Stability Period, the employer will continue to treat the employee according to the status (full-time or not)

the employee maintained prior to the change in employment status for the remainder of that Stability Period even though the employee is now in a position to which the Monthly Measurement Period applies. For the Stability Period that follows the Measurement Period in which the change in status occurred, the employee must be treated as full-time throughout the Stability Period following that Measurement Period in which the change in status occurred if the employee averaged 30 Hours of Service or more per week during that Measurement Period both before and after the change. Otherwise, if the employee did not average the requisite Hours of Service during that Measurement Period that the change in status occurred, the employee would only qualify as a Full-time Employee for each calendar month that the employee averaged the requisite Hours of Service.

- From monthly to look back: If an employee changes positions during the Stability Period for the new position, then the ALE Member would continue to apply the Monthly Measurement Period to that employee, even though the employee is now in a position to which the look back Measurement Period applies, unless the employee's Hours of Service prior to the change would have resulted in the employee being treated as a Full-Time Employee during that Stability Period in which the change occurred; in that case, the employee must be treated as a full-time for the remainder of that Stability Period. For the Stability Period that follows the Measurement Period in which the change in status occurred, the employee will continue to qualify as a Full-Time Employee throughout the Stability Period following that Measurement Period in which the change in status occurred if the employee averaged 30 Hours of Service or more per week during that Measurement Period both before and after the change. Otherwise, if the employee did not average the requisite Hours of Service during that Measurement Period that the change in status occurred, the employee would only qualify as a Full-time Employee for each calendar month that the employee had the requisite Hours of Service.

Appendix A: Hours of Service Rules

Hours of Service Rules

The following is a summary of the fundamental concepts regarding Hours of Service calculations

- Hours of service means each hour for which the employee is paid or entitled to payment for performance of services AND hours for which the employee is paid or entitled to payment by the employer for a period of time, without limitation, during which no duties are performed due to any of the following (i.e., paid leave):
 - Vacation
 - Holiday
 - Illness or incapacity (i.e., disability)
 - Layoff
 - Jury duty
 - Military duty or leave of absence

The Hours of Service rules for periods during which no services are performed are based on the rules set forth in 29 C.F.R. 2530.200b-2(a). These are the rules under ERISA that are generally applicable to retirement and pension plans.

Practice Pointer: Are Hours of Service required to be credited during periods in which the employee is receiving payments made under a workers' compensation plan? No, Hours of Service are apparently NOT required to be credited for periods during which the employee receives payments from a plan maintained solely to comply with applicable workers' compensation laws; however, the regulations are not entirely clear on this point

- Employers must determine Hours of Service for hourly employees based on actual Hours of Service from records of hours worked and Hours of Service for which payment is due, even if no services were performed.
- Employers must determine Hours of Service for non-hourly employees based on one of the following three methods and only these three methods:
 - actual Hours of Service worked or hours for which payment is due based on the records,
 - a day's equivalency test based on labor rules set forth in 29 C.F.R. 2530.200b-2(a) (an employee is credited with eight Hours of Service for each day that the employee would be required to be credited with one hour of service), or
 - a week's equivalency test based on labor rules set forth in 29 C.F.R. 2530.200b-2(a) (an employee is credited with 40 Hours of Service for each week in which the employee would be required to be credited with one hour of service).

Practice Pointer: The equivalency methods do not require the employee to have actually worked an hour of service in a day or a week in order to be credited with eight or 40 hours in a week under the equivalency methods; if they are paid for an hour (e.g. paid leave) then they would be credited with

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| Hours of Service for that day or week as applicable. |
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- The equivalency tests are subject to an anti-abuse rule. According to the anti-abuse rule, the equivalency tests may not be used if use of the tests substantially understates an employee's Hours of Service in a manner that would cause that employee to not be treated as full-time. The anti-abuse rule also applies where equivalency test would understate the hours for a substantial number of employees. This could affect the full-time equivalency determination. For example, an employer who had 100 non-hourly employees who average 10 Hours of Service two days a week could not use the day's equivalency test because they would substantially understate the Hours of Service each week by 400 Hours of Service.
- The employer is NOT required to use the same Hours of Service calculation method for all categories of non-hourly employees as long as the categories are reasonable and consistently applied.

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| Practice Pointer: The employer may change the Hours of Service method for one or more categories of non-hourly employees each calendar year. |
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- The final regulations identify the following types of employees whose Hours of Service performed in the below mentioned positions are not considered "Hours of Service" for purposes of 4980H:

| <i>Category</i> | <i>Description</i> |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <u>Bona fide volunteer</u> NOTE: Although the definition of bona fide volunteer for 4980H purposes is based on the Code Section 457(e)(11)(B)(i) definition of bona fide volunteer for qualified plan purposes, the definition of bona fide volunteer for 4980H purposes is NOT limited to volunteer firefighters and emergency medical providers. | ANY volunteer who is an employee of a government entity or an organization described in Section 501(c) (i.e. non-profit organization) whose only compensation is in the form of the following: <ul style="list-style-type: none"> (i) Reimbursement for or reasonable allowance for reasonable expenses incurred in the performance of services by volunteers or (ii) Reasonable benefits (including length of service awards) and (iii) Nominal fees customarily paid by similar entities in connection with the performance of services by volunteers. |
| <u>Student Employees in a Work Study Program</u> NOTE: The regulations do NOT provide a general exemption for student employees or interns/externs who are otherwise compensated for Hours of Service (such as graduate research assistants) they perform or are entitled to payment for periods during which they provide no services. | Students in positions subsidized through the federal work study program or a substantially similar program of a State or political subdivision thereof. |
| <u>Members of a religious order</u> | Individuals subject to a vow of poverty as a |

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| | member of that order when the work is in the performance of tasks usually required of an active member of the order. |
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- Until further guidance is issued, any reasonable method for calculating Hours of Service may be used for the following types of employees:
 - Adjunct faculty
 - On-call employees
 - Employees in similar positions for whom tracking Hours of Service will prove challenging

Practice Pointer: A method of crediting hours is not reasonable if it takes into account only a portion of employee's Hours of Service with the effect of characterizing as non-full time an employee in a position that traditionally involves 30 or more Hours of Service per week.

The final regulations provide additional clarification regarding what is considered reasonable for the following categories of employees:

| <i>Category</i> | <i>Clarification</i> |
|-------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Adjunct Faculty | <p>A reasonable method (but not the only method) would include crediting an adjunct professor with (i) 2.25 Hours of Service per week for each hour of teaching or classroom time PLUS (ii) an hour of service per week for each additional hour outside of the classroom the adjunct faculty member spends performing duties he or she is required to perform.</p> <p>NOTE: This method may be relied on at least through 2015.</p> |
| On Call Employees | <p>Employers must credit Hours of Service for each hour that the employee is paid to remain on call on the employer's premises or which the employee's activities while remaining on call are subject to substantial restrictions that prevent the employee from using the time effectively for the employee's own purposes (the "Shoot your Weekend" rule).</p> |

- An employee's Hours of Service must be counted across all ALE Members of the same controlled group. If an employee performs Hours of Service for two or more ALE Members of the same controlled group during a month, then the ALE Member for whom the employee performed the most Hours of Service during the month is considered the employee's employer. If the employee performs the same number of Hours of Service each ALE Member, then ALE Members may choose which

ALE Member will be considered the employer (and that ALE Member will report the employee on its Code Section 6056 return if the employee is full-time).

Appendix B: Common Law Employee Factors

The IRS has issued a 20 factor common law employee test that employers should use to determine if an employee is a common law employee. The following is an overview of those factors:

1. **Instructions:** If the person for whom the services are performed has the right to require compliance with instructions, this indicates employee status.
2. **Training:** Worker training (e.g., by requiring attendance at training sessions) indicates that the person for whom services are performed wants the services performed in a particular manner (which indicates employee status).
3. **Integration:** Integration of the worker's services into the business operations of the person for whom services are performed is an indication of employee status.
4. **Services rendered personally:** If the services are required to be performed personally, this is an indication that the person for whom services are performed is interested in the methods used to accomplish the work (which indicates employee status).
5. **Hiring, supervision, and paying assistants:** If the person for whom services are performed hires, supervises or pays assistants, this generally indicates employee status. However, if the worker hires and supervises others under a contract pursuant to which the worker agrees to provide material and labor and is only responsible for the result, this indicates independent contractor status.
6. **Continuing relationship:** A continuing relationship between the worker and the person for whom the services are performed indicates employee status.
7. **Set hours of work:** The establishment of set hours for the worker indicates employee status.
8. **Full time required:** If the worker must devote substantially full time to the business of the person for whom services are performed, this indicates employee status. An independent contractor is free to work when and for whom he or she chooses.
9. **Doing work on employer's premises:** If the work is performed on the premises of the person for whom the services are performed, this indicates employee status, especially if the work could be done elsewhere.
10. **Order or sequence test:** If a worker must perform services in the order or sequence set by the person for whom services are performed, that shows the worker is not free to follow his or her own pattern of work, and indicates employee status.
11. **Oral or written reports:** A requirement that the worker submit regular reports indicates employee status.
12. **Payment by the hour, week, or month:** Payment by the hour, week, or month generally points to employment status; payment by the job or a commission indicates independent contractor status.

13. **Payment of business and/or traveling expenses.** If the person for whom the services are performed pays expenses, this indicates employee status. An employer, to control expenses, generally retains the right to direct the worker.
14. **Furnishing tools and materials:** The provision of significant tools and materials to the worker indicates employee status.
15. **Significant investment:** Investment in facilities used by the worker indicates independent contractor status.
16. **Realization of profit or loss:** A worker who can realize a profit or suffer a loss as a result of the services (in addition to profit or loss ordinarily realized by employees) is generally an independent contractor.
17. **Working for more than one firm at a time:** If a worker performs more than de minimis services for multiple firms at the same time, that generally indicates independent contractor status.
18. **Making service available to the general public:** If a worker makes his or her services available to the public on a regular and consistent basis, that indicates independent contractor status.
19. **Right to discharge:** The right to discharge a worker is a factor indicating that the worker is an employee.
20. **Right to terminate:** If a worker has the right to terminate the relationship with the person for whom services are performed at any time he or she wishes without incurring liability, that indicates employee status.

Appendix C: Look Back Measurement Period and Monthly Measurement Period Methods

The following general assumptions apply to examples 1-7 below.

ABC becomes subject to the 4980H rules on January 1, 2015. ABC, which is an Educational Organization, participates in the State Health Plan (the “Plan”), which operates on a calendar year basis. ABC has adopted the Look Back Measurement Period Method for identifying Qualifying Full-Time Employees in accordance with the following requirements:

New Employees

- *Initial Measurement Period-11 month Initial Measurement Period that begins on the first day of the month following the month in which the employee is hired.*
- *Administrative period-60 days*
- *Stability Period-12 months for both employees that qualify as Full-Time Employees and employees that do not qualify as Full-time employees.*

Ongoing Employees:

- *Standard Measurement Period that begins on October 4 each year and ends the following October 3.*
- *Administrative period—begins October 4 each year and ends the following December 31*
- *Stability Period-12 months for both employees that qualify as Full-Time Employees and employees that do not qualify as Full-time employees.*

Notwithstanding the above, the first Standard Measurement Period is a 6 month period that begins April 5, 2014 and ends October 4, 2014. The first administrative period ends December 31, 2014 and the first Stability Period is January 1, 2015 through December 31, 2015.

Example #1: Bob is a Non-Variable Employee:

- Bob is hired on June 15, 2015. Bob is a non-variable employee because ABC can make a determination on Bob’s start date that Bob is reasonably expected to be employed 30 or more Hours of Service per week, on average, during his employment with ABC.
- Under the terms of the Plan, Bob is eligible for coverage that is effective the first day of the month following the date of hire. Bob is offered coverage that becomes effective on July 1, 2015.
- Bob’s first Standard Measurement Period begins October 4, 2015 and ends October 3, 2016. Even though Bob was Non-Variable during the Initial Measurement Period and corresponding Stability Period, Bob is employed throughout the first standard measurement and, as a result, he is an Ongoing Employee subject to the first Standard Measurement Period.
- Bob was credited with 1750 Hours of Service during the first Standard Measurement Period ending October 3, 2016; therefore, Bob is a Qualifying Full-time Employee during each month of the Stability Period beginning January 1, 2016 and ending December 31, 2016 (to the extent he remains employed).

Example #2: Bob takes an unpaid leave of absence during the 2016 Stability Period:

- Same facts as example #1 except that Bob takes an unpaid leave of absence (other than a special unpaid leave of absence) beginning August 1, 2016 and ending December 31, 2016. Bob resumes service on January 1, 2017.
- Bob remains a Qualifying Full-time Employee during the months August through December of 2016. Under the terms of the Plan, Bob will continue to be eligible for coverage as though Bob were active.
- In addition, Bob resumes service as a Continuous Employee on January 1, 2017 because he did not experience a Break in Service (a period of 26 weeks or more without any Hours of Service). Thus, ABC must determine Bob's Hours of Service over the Standard Measurement Period beginning October 4, 2015 and ending October 3, 2016. If Bob averaged 30 Hours of Service per week over this Standard Measurement Period, Bob will be a Qualifying Full-time Employee for each month of the Stability Period beginning January 1, 2017 and ending December 31, 2017.
- Since Bob is an employee of an Educational Organization and the unpaid leave between August 1, 2016 and December 31, 2016 is less than 26 full weeks and greater than 4 weeks, the leave constitutes an Employment Break. Consequently, ABC must either allocate Hours of Service to the weeks in the leave period that occurred during the Standard Measurement Period ending October 3, 2016 based on the average weekly Hours of Service during the weeks of that Standard Measurement Period or remove those weeks when calculating the Hours of Service for the Standard Measurement Period.
- Assume that ABC removes those weeks from the calculation. In that case, ABC would determine whether Bob averaged the requisite Hours of Service during the Standard Measurement Period ending October 3, 2014 by dividing his total Hours of Service by 41 weeks (52 weeks minus 9 full weeks of Employment Break that occurred during the Standard Measurement Period ending October 3, 2016).
- ABC would use a similar formula for the weeks of the Employment Break that occurred during the Standard Measurement Period beginning October 4, 2016.

Example #3: Bob transitions from full-time to part-time during the 2016 Stability Period.

- Same facts as Example #2 except that instead of taking an unpaid leave of absence on August 1, 2016, Bob changes from a full-time position to a part-time position such that if Bob had been hired in that part-time position, ABC could have made a determination that Bob was NOT reasonably expected to be employed 30 or more Hours of Service each week.
- Bob does not have 130 Hours of Service in August, September or October 2016 (the three full calendar month period following the date the change in positions occurs).
- Since Bob was offered affordable, minimum value coverage at all times since the 1st day of the fourth calendar month following his date of hire (actually Bob was offered coverage sooner because his plan only imposed a 60 day waiting period) until the date that his change in position occurred, and he did not have 130 Hours of Service during any of the three full calendar months following the position change, ABC may apply the Monthly Measurement Period Method to Bob beginning November 1, 2016 (the 1st day of the fourth full calendar month following the date of his employment status change). Although Bob is a Qualifying Full-time Employee for months August through October 2016 (Bob was still in a Stability Period during which he was required to

be treated as full-time), Bob will not be a Qualifying Full-time Employee during November and December of 2016 under the monthly Measurement Period Method since Bob did not actually average 30 Hours of Service per week in those months.

Example #4; Marty is a Variable Hour employee and has full-time Hours of Service during Initial Measurement Period and Standard Measurement Period:

- Marty is hired by ABC on June 14, 2015. ABC is unable to make a determination on Marty's date of hire that Marty is reasonably expected to have 30 or more Hours of Service per week during the time that he is employed; therefore, Marty is a Variable Hour employee.
- Marty's Initial Measurement Period begins July 1, 2015 and ends May 30, 2016. Marty's Administrative Period ends July 31, 2015. Marty's 12-month Stability Period begins August 1, 2016.
- Marty averages 30 or more Hours of Service per week during the Initial Measurement Period ending May 30, 2016; therefore, Marty is a Qualifying Full-time Employee for each month of the Stability Period beginning August 1, 2016 and ending July 31, 2017. The Plan will permit Marty to make an initial election that begins August 1, 2016 and ending December 31, 2016 (i.e. the remainder of the Plan Year of the Plan). During the annual enrollment period for 2017 plan year, Marty will be permitted to make an election for the 2017 plan year. Whether Marty remains a Qualifying Full-time Employee for portion of portion of the 2017 plan year that occurs after the Stability Period ending July 31, 2017 depends on whether Marty averages full-time Hours of Service during the Standard Measurement Period ending October 3, 2016.
- Marty averages full-time Hours of Service during the Standard Measurement Period ending October 3, 2016; therefore, Marty is a Qualifying Full-time Employee to whom qualifying coverage must be offered during the Stability Period January 1, 2017 through December 31, 2017. Since Marty's election during the annual enrollment period for the 2017 plan year was effective for the entire 2017 plan year, no additional action is required.

Example #5; Marty is a Variable Hour employee and averages full-time Hours of Service during Initial Measurement Period but not the Standard Measurement Period.

- Same Facts as Example #4 except that Marty does not average full-time Hours of Service during the Standard Measurement Period ending October 3, 2016.
- Although Marty did not average full-time Hours of Service during the Standard Measurement Period ending October 3, 2016, he was a Qualifying Full-time Employee during each month of the Stability Period ending July 31, 2017. Consequently, Marty will remain eligible under the Plan through at least July 31, 2017.
- Even though Marty made an election for the entire 2017 plan year, Marty will cease to be eligible on July 31, 2017.

Example #6; Joe is a "Seasonal Employee":

- Each year, ABC hires employees to work during a period that is always 6 months or less in duration and begins the same time each year. Employees hired into such positions are "Seasonal Employees". One such season begins each year on October 1 and ends less than 6 months later.

- Joe is hired on October 1, 2015 into a Seasonal Employee position that is expected to last through December 31, 2015.
- When hired, ABC can make a determination that Joe is expected to be employed 30 Hours of Service per week each month that Joe works during the season. Even though Joe technically satisfies the definition of Non-Variable Employee, since Joe is a Seasonal Employee, ABC may treat Joe the same as it would any Variable or Part-time Employee.
- Since Joe is Variable Hour employee, Joe is subject to an Initial Measurement Period beginning November 1, 2015 and ending September 30, 2016 to the extent that he does not experience a Break In Service.
- Joe's employment is terminated on December 31, 2015. He is not hired back until October 1, 2016. Since Joe has no Hours of Service between February 28, 2016 and October 1, 2016, and this period is 26 weeks or longer, Joe experiences a Break in Service such that he may be treated by ABC as a new employee when resumes services on October 1, 2016.
- In this example, Joe never becomes a Qualifying Full-time Employee.

Example #7; Joe is *not* a Seasonal Employee:

- Same facts as Example #6 except that Joe is hired into a position that does not start at the same time each year. Consequently, even though Joe's position is expected to last less than 6 months, Joe is not a Seasonal Employee since the position into which he is hired is not expected to start at the same time each year.
- Joe is reasonably expected to be employed 30 or more Hours of Service each month that he is employed. Consequently, Joe is a Non-Variable Hour employee.
- Under the terms of the plan, all such Qualifying Full-time Employees are eligible on the first day of the month following the date of hire.

The following assumptions apply to Examples 8 and 9 below.

- *XYZ uses the monthly Measurement Period.*
- *XYZ maintains a plan that offers coverage on the 91st day after becoming a Full-Time Employee.*
- *XYZ also maintains a plan for union employees that impose a 1200 cumulative hour eligibility condition followed by 90-day waiting period.*

Example #8: Randy is hired as a part-time employee but has 130 Hours of Service in one or more months.

- On February 15, 2015, Randy is hired as a part-time employee who is not otherwise eligible for coverage under the statute.
- Although hired as a part-time employee, Randy has 130 Hours of Service in April, May and August of 2015. Under the Monthly Measurement Period Method, Randy will be a Qualifying Full-time Employee for each month that he has 130 Hours of Service unless such months are part of a Limited Non-Assessment Period.

Example #9; John is hired as full-time but transfers to a part-time position but is rehired without a Break In Service.

- John is hired as a full-time employee on August 5, 2015. John is eligible for coverage under the Plan that is effective on September 1, 2015.
- On May 25, 2016, John transfers to a part-time position and ceases to have 130 Hours of Service per month beginning with June 2016. John ceases to qualify as a Qualifying Full-time Employee in June 2016 and will not qualify again until the month that he has 130 Hours of Service again.

Appendix D: Special Unpaid Leave and Employment Break Rules

If the employee takes a “special unpaid leave”, and the employee resumes service as a “Continuous Employee” as described above, special treatment is required for purposes of the look back Measurement Periods described above if the employee is considered to be a Continuous Employee as described above. Special leaves are defined as unpaid FMLA leave, USERRA leave, and jury duty. Special leaves are subject to the following rules:

- An employer who uses the look back Measurement Period must treat the duration of the special leave in one of the following ways for purpose of calculating hours during a Measurement Period:
 - The ALE Member may disregard the period that such employee was on a special leave when calculating the Hours of Service of the employee during the applicable Measurement Period (i.e., the Measurement Period for such an employee will be reduced by the period the employee is on a special leave), or
 - The ALE Member may choose to treat the employee as credited with Hours of Service for any period of special unpaid leave at a rate equal to the average weekly rate at which the employee was credited with Hours of Service during the weeks in the Measurement Period that are not part of the special leave. Employers may use any reasonable method for calculating the average weekly rate.
- Likewise, “employment breaks” are afforded similar treatment as special leaves. Employment breaks are defined as a period of at least four consecutive weeks (disregarding unpaid special leave) during which an employee at an Educational Organization is not credited with Hours of Service, other than a special unpaid leave. Unlike special leaves, though, no more than a period of 501 Hours of Services are required to be excluded or credited (depending on the particular averaging method described above that is used by the ALE Member).

An Educational Organization is defined the same as “educational organization” in Treas. Reg. 1.170A-9(c)(1), without regard to whether the entity is described in Internal Revenue Code 501(c)(3) and tax exempt under Internal Revenue Code 501(a). Such an entity is described in Treas. Reg. 1.170A-9(c)(1) as follows:

An educational organization is described in section 170(b)(1)(A)(ii) if its primary function is the presentation of formal instruction and it normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on. The term includes institutions such as primary, secondary, preparatory, or high schools, and colleges and universities. It includes Federal, State, and other public-supported schools which otherwise come within the definition. It does not include organizations engaged in

both educational and noneducational activities unless the latter are merely incidental to the educational activities. A recognized university which incidentally operates a museum or sponsors concerts is an educational organization within the meaning of section 170(b)(1)(A)(ii). However, the operation of a school by a museum does not necessarily qualify the museum as an educational organization within the meaning of this subparagraph

