

AFFORDABLE CARE ACT FREQUENTLY ASKED QUESTIONS

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1. Does the Employer Mandate apply to public agencies?

Yes. The term “employer” expressly includes government entities in the definition of employer for Section 4980H (Employer Shared Responsibility). (78 F.R. 217, 221.)

2. How do we know if our agency is required to comply with the Employer Mandate or pay a penalty (i.e. are we a small or large employer)?

The Employer Mandate provision of the Affordable Care Act (“ACA”) applies to large employers. Under the ACA large employers are those employers who employ at least 50 full-time employees, or a combination of full-time and part-time employees that equals at least 50, during the preceding calendar year. (78 F.R. 217, 221.) Among other things, in determining whether an agency meets the large employer threshold, the proposed regulations require employers to average their number of employees across the months in the preceding calendar year. Employers that do not meet the 50 employee threshold will not be considered a large employer, and as such will not be liable for a Section 4980H assessable payment. (78 F.R. 217, 221.)

3. If we do not meet the large employer threshold, does this mean we can ignore the Employer Mandate?

No. Even if an agency does not meet the applicable large employer threshold explained in FAQ 2, it still needs to closely monitor its workforce on an ongoing basis. Employers are required to make a determination each year, based on current number of employees, whether they will be a large employer for the next year.

4. Since the IRS delayed implementation of the reporting requirements, and effectively the penalties for the Employer Mandate, until 2015, does this mean we have a whole year to prepare?

No. Employers should take advantage of this one-year delay to identify which employees are considered full-time under the ACA. Further, employers who want to use a full 12-month measurement period, followed by an administrative period to calculate full-time status and enroll employees, must begin measuring in 2013. If there are identified impacts on mandatory subjects of bargaining, then you will need to plan additional time for that purpose.

5. Is the employer notice of coverage options still required for 2013?

Yes. Employers must act by October 1, 2013. Section 1512 of the ACA amended Section 18B of the Fair Labor Standards Act to require employers to provide a notice to current employees and to new hires regarding: (a) the existence of the Health Insurance Marketplace ("Marketplace"); (b) the potential for the employee to lose the employer's contribution if coverage is purchased through the Marketplace; and (c) whether the employer's plan meets the ACA's minimum value requirements.

The notice of Marketplace must be distributed to all full-time and part-time employees no later than October 1, 2013. From October 1, 2013 forward, employers must provide this notice to new employees within 14 days of their date of hire. (DOL Technical Release 2013-02.)

An employer may also consider modifying its COBRA election notice to include coverage options in the Marketplace.

6. Do we need to track all of our employees? What should we be tracking?

Yes. Because of the reporting requirements, an employer will need to be able to track all employees monthly. This is true unless the employer will offer coverage to all employees regardless of hours worked.

The ACA created reporting requirements under Internal Revenue Code Sections 6055 and 6056. Beginning in 2015, the return for all large employers (employing 50 or more full-time employees) must include the following information:

- The employer's name and EIN;
- Date the return is filed;
- Certification of whether the employer offers its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan;
- Number of full-time employees for each month during the calendar year;
- Name, address, and tax payer identification number (TIN) of each full-time employee and the months (if any) during which the employee and any dependents were covered under the eligible employer-sponsored plan during the calendar year;
- Duration of the waiting period;
- Month coverage was available;
- Monthly premium for the lowest cost option for each enrollment category;

- Employer's share of costs; and
- Any other information required by the IRS.

7. Is deciding the measurement period subject to meet & confer?

Probably yes, but it depends on the circumstances.

Health-related benefits are considered a wage. A decision to change a wage of represented employees is subject to the bargaining process.

If an agency's non-negotiable decision has an impact on mandatory subjects of bargaining, and that change involves an area of employer discretion, the agency must provide the union with notice and opportunity to bargain over the foreseeable effects of that decision before the change is made. (*County of Santa Clara* (2013) PERB Dec. No. 2321-M.) Further, the recent change in PERB's composition has resulted in decisions that place a much greater emphasis on the requirement to provide adequate notice and opportunity to bargain before making any change; this includes meeting with the union and clarifying any differences over scope of bargaining issues.

For example, the employer has discretion in choosing a measurement period (3 to 12 months) and whether the measurement period will differ by category of employees (78 F.R. 217, 226.) (See FAQ 8 below.) The length of the measurement period potentially impacts whether an employer will be required to offer an employee coverage because it is used to measure whether an employee is full-time under the ACA definition. However, if selection of the measurement period for a full-time employee does not have a direct and identifiable impact on employees in a bargaining unit, then there is no obligation to bargain.

8. Do we have to use the same measurement and stability period for all employees?

No. The ACA permits measurement and stability periods that differ either in length or start and end dates for the following categories of employees:

- Each group of collectively-bargained employees covered by a separate collective bargaining agreement;
- Collectively bargained and non collectively-bargained employees;
- Salaried employees and hourly employees; and
- Employees whose primary places of employment are in different states. (78 F.R. 217, 226.)

9. Do we have to offer coverage during the entire stability period, or is it enough that we just designate an employee as full-time?

Under the ACA, an agency is required to offer eligible full-time employees affordable coverage during the entire stability period. This means that an employee whom the employer determined to have worked for an average of 30 hours per week will have coverage by the start of the stability period and such coverage will continue through the entire stability period, provided the employee continues employment.

10. What is the definition of a full-time employee?

For applicable large employers, those employing at least 50 full-time employees or full-time equivalent employees, a full-time employee is defined as an employee who was employed on average at least 30 “hours of service” per week or 130 hours per month. (26 U.S.C. § 4980H(c)(4); 78 F.R. 217, 223.)

11. How are the hours of service per week calculated?

Hours of service include the actual hours an employee works and also any hour the employee was entitled to receive payment from the agency for non-worked hours (“Hours of Service” include: (1) each hour the employee is paid, or entitled to payment, for performance of duties for the employer; and (2) each hour the employee is entitled to receive payment for vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty, or leave of absence.) (29 C.F.R. § 2530.200b-2(a); 78 F.R. 217, 223.)

12. Do we need to offer coverage to just the individual employee or to their entire family? Is it true that spouses may be excluded?

Section 4980H of the ACA requires that employers offer employees and their dependents an opportunity to enroll in minimum essential coverage that is affordable and provides minimum value, or pay a penalty. However, whether or not coverage is affordable is based on the self-only coverage for the least cost plan, not dependent coverage. There is no requirement to offer contributions for coverage to an employee’s spouse. Also, it is important to note that under the ACA, a dependent is defined as an employee’s child who is under 26 years of age. (78 F.R. 217, 231-232.)

13. What happens if a full-time employee goes out on an unpaid leave or sabbatical during the stability period? Is the employer required to maintain affordable coverage for this employee?

The proposed regulations specifically provide that a change in employment status for an ongoing employee does not change the employee’s status as a full-time employee or non full-time employee during the stability period. (78 F.R. 217, 226 and 228.) Accordingly, as written, if an employer has deemed an employee as full-time during the measurement period, then it would be obligated to provide affordable health care

coverage during the stability period as long as the employee remains an employee of the agency. This would be true even if the employee was on an unpaid leave of absence.

However, regulations and guidance are unclear on how to handle the affordability aspect (*i.e.*, whether an agency is required to continue contributing to the employee's cost of coverage to ensure it remains affordable during the stability period).

14. When are we required to offer coverage to new employees under the ACA?
Is it true that California has adopted a stricter rule?

Under the ACA, an employee expected to be full-time must be offered coverage within 90 days of his or her start date. If an agency cannot reasonably determine whether the new employee is expected to work 30 hours or more per week, then the employer may take an initial measurement to assess whether the employee is full-time under the ACA.

In California, AB 1083 requires that new full-time employees, of employers offering insured plans, must be offered coverage within 60 days of his or her start date. Agencies may still impose other eligibility conditions unless those conditions are designed to avoid compliance with the ACA.

15. How do we measure new employees hired mid-year or the middle of our measurement and stability period?

Most new employees will have different measurement and stability periods than ongoing employees. This is the initial measurement period. Employers must begin measuring a new employee before the first day of the month following his or her hire date. (78 F.R. 217, 227.)

16. How do the measurement and stability periods work for new variable hour employees (when the employer cannot determine that the employee is reasonably expected to work on average at least 30 hours per week) and seasonal employees?

For the measurement period, employers will need to take the following basic steps:

First: Choose an initial measurement period between 3 and 12 months, that starts any time before the first day of the month following the hire date, to measure whether the employee worked an average of 30 hours per week or more (full-time).

Second: Determine the length of the administrative period. Note that the measurement period combined with the administrative period may not extend beyond the last day of the first calendar month beginning on or after the 1-year anniversary of the new employee's start date (totaling at most 13 months and fraction of a month).

Third: Measure the employee over the course of the measurement period.

For the stability period, employers should follow this procedure:

If the employee was measured to be full-time, then he or she will have a stability period that is the same length as ongoing employees. If he or she was not determined to be full-time, then he or she will have a stability period that is not longer than their measurement period plus 1 month and must not exceed the remaining stability period for ongoing employees. (78 F.R. 217, 227.)

17. What happens after a new variable hour or seasonal employee has been measured for an entire initial measurement period?

These employees will be rolled into the standard measurement period of ongoing employees. Once a new employee has been employed for an entire "standard measurement period," the employee must be tested for full-time status at the same time and under the same conditions as other ongoing employees. (78 F.R. 217, 227.)

18. What is an "ongoing employee" and a "new employee"?

An ongoing employee is defined as an employee who has been employed by an employer for at least one standard measurement period. (78 F.R. 217, 226.) A new employee is one who has not been employed at least one standard measurement period.

19. If an employee has other part-time jobs, could the employee be offered coverage by another employer, and if so, do we still have to offer them coverage?

Yes. It is possible that employees may be offered coverage by more than one employer. However, an employee's offer of coverage by another employer does not reduce any agency's obligations under the ACA. (78 F.R. 217.)

20. Under the ACA do we need to contribute towards the cost of coverage for an employee's entire family, or just the individual?

For purposes of complying with the ACA, affordability is calculated off of the cost of the employee's share of the premium for the least cost plan for self-only coverage offered to the employee. (IRC Sections 5000A(e)(1)(B) and 36B(c)(2)(C)(i); 78 F.R. 217, 233.)

21. If we want to change the duration and/or start and end dates of our measurement and stability periods, when can we do it?

You may change the duration and/or start and end dates of measurement and stability periods for subsequent years only. Remember that decisions regarding the start, end, and duration of the measurement and stability periods may be bargainable for

represented part-time employees, and require providing notice and opportunity to bargain to the union.

22. Can we limit the number of hours a part-time employee works to avoid the employee being considered full-time?

Yes. Under the ACA, there are no restrictions on limiting an employee's hours to ensure they do not meet the 30 hours per week threshold.

However, if the part-time employee is in a bargaining unit, then a change or reduction in hours may be a bargainable decision, unless practice or policy gives the employer discretion to limit hours. An agency needs to carefully analyze whether the limit on hours would require the agency to provide notice and an opportunity to bargain.

The material contained in these Frequently Asked Questions is for informational purposes only and drafted to provide a general framework for understanding and spotting issues related to provisions of the Affordable Care Act. Nothing herein is intended to constitute professional legal counsel or a legal opinion. For specific issues and questions, you should contact your personal legal counsel. Please feel free to contact any one of the following attorneys about this article or any other ACA issues:

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