

Summary of PPACA Play or Pay Final Regulations: [TD 9655 Long Copy]

1. Meaningful definitions include:
 - a. Applicable large employer (ALE) – An employer that employed an average of at least 50 full-time employees on business days during the last calendar year. (p 142)
 - b. Applicable large employer member (ALE-member) – Multiple related entities may together represent an applicable large employer; entities are known as applicable large employer members. Note: Special rules for government entities are reserved. Government agencies may rely on a reasonable, good-faith interpretation of IRC §414(b), (c), (m), and (o) in determining their status as an ALE. (pp 12, 17-18, 142)
 - c. Bona fide volunteer – An employee of a government entity...whose only compensation...is reimbursement for reasonable expenses..., or reasonable benefits...and nominal fees, customarily paid...in...the performance of services by volunteers. (pp 142-143)
 - d. Dependent – A child (as defined in section 152(f)(1), but excluding a stepchild or foster child, and excluding a child who is not a U.S. citizen or national, unless that child is a resident of a country contiguous to the United States (Canada or Mexico) or is adopted (as described in section 152(b)(3)(B)). A spouse is not a dependent. (pp 143-144, 95-97)
 - e. Educational organization - Institutions such as primary, secondary, preparatory, or high schools, and colleges and universities described in §1.170A-9(c)(1). Includes taxable, tax-exempt and government entities. (p 144)
 - f. Employee – An individual under the common-law standard of employee (see §31.3401(c)-1(b)). (p 144, 97)
 - g. Employer – The employer of an employee under the common-law standard (see §31.3121(d)-1(c)). (p 144)
 - h. Employment break period – At least four consecutive weeks (disregarding special unpaid leave) during which an employee of an educational organization is not credited with hours of service for an ALE. (p 145)
 - i. Federal poverty line – Any of the poverty guidelines in effect within six months before the first day of the plan year of the ALE-member’s health plan. (p 145)
 - j. Full-time employee – An employee employed an average of at least 30 hours of service per week. (p 146)
 - i. Monthly equivalency – 130 hours of service is the monthly equivalency of at least 30 hours of service per week. (p 146, 38)
 - ii. Weekly rule – An optional weekly rule allows full-time employee status based on hours of service based on calendar months established as either four or five weekly periods. 120 hours of service is full-time for a four-week month, and 150 hours of service is full-time for a five-week month (p 146)
 - k. Government entity – The government of...any state or political subdivision thereof...or any agency or instrumentality of any of the foregoing. (p 147)
 - l. Hour of service - each hour for which an employee is paid, or entitled to payment, for the performance of duties for the employer; and each hour for which an employee is paid, or entitled to payment by the employer for a period of time during which no duties are performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence. Hours of services across all ALE-members must be aggregated. (p 147-148, 40)

Excluded hours:

- i. Bona fide volunteers – See definition of bona fide volunteer.
- ii. Work study program – For student employees; Federal Work-Study Program hours or a substantially similar program of a state or political subdivision. Other student employee hours are not excluded from hours of service.
- iii. Services outside of the United States – Hours of service compensated by income from outside of the United States.

Services for other ALE-members:

- i. An hour of service for one ALE-member is treated as an hour of service for all other ALE-members for all periods.
- m. Initial measurement period – A period from 3 to 12 months selected by the ALE-member used for variable hour, seasonal, or part-time employees under the look-back measurement method. (p 148)
- n. Limited non-assessment periods for certain employees – Periods when an employer will not be subject to an assessable payment under 4980H(a) and in some cases 4980H(b): (p 148)
 - i. Three calendar months, beginning with the first full calendar month, when an employee is anticipated to average more than 130 hours of service per month, if the employee is otherwise eligible for an offer of coverage under a group health plan.
 - ii. During the initial measurement period for a variable-hour, seasonal or part-time employee determined to be “full-time” through the look-back measurement method.
 - iii. During the initial measurement period, if an employee experiences a change in employment status to a position expected to average more than 130 hours of service per month, months before the fourth full calendar month following the change in employment status are non-assessment months, as long as the employee is offered coverage by the first day of the fourth month, if the employee is still employed.
 - iv. The first month of employment, if the employee’s start date is a date other than the first day of the month.
- o. Minimum essential coverage – Includes “a plan...maintained for its employees by the...government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. (p 149) (by reference to IRC §5000A(f) and PHSA §2791(d)(8) and ERISA §3(32))
- p. Minimum value – Minimum essential coverage, when the plan’s share of the total allowed costs of benefits provided under the plan is at least 60 percent. (p 149) (by reference to IRC §36B(c)(2)(C)(ii))
- q. New employee – An employee employed by an ALE for less than one complete standard measurement period. (p 150)
- r. Ongoing employee – An employee employed by an ALE for at least one complete standard measurement period. (p 150)
- s. Part-time employee – An employee the ALE reasonably expects to average less than 130 hours of service per month during the initial measurement period, based on facts and circumstance at the employee’s start date. (p.150-151, 177-178)
 - i. An educational organization employer must disregard an educational break period when determining an expectation of future hours of service.
 - ii. No single factor determines an ALE’s expectation, but may include:
 1. Is the employee replacing an employee who averaged more or less than 130 hours;

2. Did ongoing employees in similar positions average more or less than 130 hours during recent measurement periods;
 3. Was the job advertised as averaging more or less than 130 hours;
 4. Was the job communicated to the new employee (or contracted) as averaging more or less than 130 hours.
- t. Period of employment – The period of time from the first day to the last day an employee is credited with an hour of services for an ALE. (p 151)
 - u. Qualified health plan (QHP) – A health plan certified by and offered through an Exchange that provides essential health benefits offered by a licensed health insurance issuer that offers at least one “silver” and at least one “gold” level QHP in the Exchange. (p 152)
 - v. Seasonal employee – An employee hired into a position where customary annual employment is six months or less. However, in certain unusual instances, the employee can still be considered a seasonal employee even if the seasonal employment is extended beyond its customary duration (even if it exceeds 6 months) (p 152, 57-58)
 - w. Section 1411 certification – Certification to employer that an employee enrolled for a calendar month in a QHP and received a premium tax credit or cost-sharing reduction. (p 152)
 - x. Section 4980H(a) applicable payment amount – For a calendar month, 1/12 of \$2,000, adjusted for inflation beginning in 2015. (Basis for LARGE penalty) (p 153)
 - y. Section 4980H(b) applicable payment amount – For a calendar month, 1/12 of \$3,000, adjusted for inflation beginning in 2015. (Basis for SMALL penalty) (p 153)
 - z. Self-only coverage – Health insurance provided to only one individual; generally the employee.
 - aa. Special unpaid leave – Unpaid leave subject to FMLA, USERRA, or for jury duty. (p 153)
 - bb. Stability period – Period selected by the ALE-member that follows and is associated with an initial or standard measurement period for the look-back measurement method. (p 153)
 - cc. Standard measurement period – A period from 3 to 12 months selected by the ALE-member for the look-back measurement method. (p154)
 - dd. Variable hour employee – An employee for whom the ALE reasonably can’t determine will average more or less than 130 hours of service per month during the initial measurement period because the employee’s hours are variable or uncertain, based on facts and circumstance at the employee’s start date. (p.154-155)
 - i. An ALE-member may not take into account the likelihood that the employee may terminate employment with the ALE before the end of the initial measurement period.
 - ii. An educational organization employer must disregard an educational break period when determining an expectation of future hours of service.
 - iii. No single factor determines an ALE’s expectation, but may include the same factors described in the definition of “part-time employees.”
2. Determining full-time employees:

An ALE may use either a “monthly measurement method” or a “look-back measurement method” to determine potential liability under §4980H(a) and (b) related to offers of coverage to “full-time” employees.

 - a. Under the “monthly measurement method,” the ALE-member determines each employee’s “full-time” status by counting hours of service for each calendar month. (pp 165-172)
 - i. No 4980H(a) penalty for first three full calendar months following employment, only if employee is otherwise eligible for coverage, and employee is offered coverage by fourth

month if the employee is still employed on that day. No 4980H(b) penalty if offered coverage provides “minimum value” [*rule does not specify affordability in this reference*].

- ii. A weekly equivalency method is provided (“Month” = 4 or 5 full weeks).
 - iii. Regardless of whether an employee was actually terminated, an employee can be treated as “terminated and rehired” after a 13-week break, except educational organization employees to whom a 26-week break applies. If break is less than 13 weeks, employee is credited with zero hours during the break. An employee is a “continuing employee” if returning or rehired within 13 weeks and must resume the status they left. If the employee resumes “full-time” status and coverage is indicated, enrollment is required no later than the first day of the following month.
 - iv. An employee can also be considered “terminated and rehired” as a new employee using a “rule of parity” method which allows a shorter (than 13-week or 26-week) period if the most recent period of employment is followed by a longer period of non-employment (of at least 4 consecutive weeks).
 1. Example 1: If an employee worked three weeks, then terminates employment and is rehired ten weeks later, upon return to work the employee could be treated as a new employee, and hours worked prior to the break would not have to be counted in determining whether the employee worked on average at least 30 hours per week (or 130 hours per month) during the Measurement Period.
 2. Example 2: If an employee worked six weeks, then terminates employment and is rehired five weeks later, upon return to work the employee must be treated as a continuing employee, and hours worked prior to the break would have to be counted in determining whether the employee worked on average at least 30 hours per week (or 130 hours per month) during the Measurement Period.
 - v. An employee who transfers to a position paid by other than U.S. income that is expected to continue at least 12 months can be treated as terminated. An employee in the reverse scenario transferring to employment with US source income may be treated as a new hire.
 - vi. Averaging methods for special unpaid leave and educational break period do not apply to monthly measurement method.
- b. Under the “look-back measurement method,” except as noted, the ALE determines each employee’s status by counting hours of service during an initial measurement period and/or a standard measurement period (3-12 months) to determine “full-time” status during a subsequent stability period (6-12 months; not less than preceding measurement period). An optional administrative period (90 days maximum in total) is available. (pp 172-203)
- i. If employee averages 130 hours per month during a measurement period, the employee is “full-time” during the subsequent stability period.
 - ii. Initial measurement periods must begin between the employees hire date and the first of the following month. A payroll period rule allows the initial measurement to sync with pay period dates for payroll periods that are one week, two weeks, or semi-monthly.
 - iii. An employer may use different measurement periods for employees in the following employee categories.
 1. Collectively bargained vs. non-collectively bargained
 2. Groups covered by separate collective bargaining agreements
 3. Salaried vs. hourly employees
 4. Employees whose primary employment is in different states

- iv. Employees fall into one of the following categories:
 - 1. Ongoing Employee (those employed at least one full standard measurement period)
 - a. Employer determines ongoing employee's full-time status by looking back at the standard measurement period (the employee must have been employed for the entire standard measurement period). An employee who averages 130 or more hours of service per month during the standard measurement period is "full-time" for the subsequent stability period (under 130 hours is "not full-time").
 - b. If an ongoing employee has a change in employment status before the end of a stability period, the change does not affect the employee's status for the remaining portion of the stability period.
 - 2. New Employees
 - a. New non-variable, new non-seasonal, or new non-part-time employee (defined)
 - i. An employee the employer reasonably expects to average 130 or more hours of service (during the initial measurement period) as of the start date, based on facts and circumstance at the employee's start date.
 - ii. An educational organization employer must disregard an educational break period when determining an expectation of future hours of service.
 - iii. No single factor determines an ALE's expectation, but may include:
 - 1. Is the employee replacing an employee who averaged more or less than 130 hours;
 - 2. Did ongoing employees in similar positions average more or less than 130 hours during recent measurement periods;
 - 3. Was the job advertised as averaging more or less than 130 hours;
 - 4. Was the job communicated to the new employee (or contracted) as averaging more or less than 130 hours.
 - iv. "Full-time" status is determined independently for each calendar month, until the employee becomes an ongoing employee.
 - v. No 4980H(a) penalty for first three full calendar months following employment, only if employee is otherwise eligible for coverage, and employee is offered coverage by fourth month if the employee is still employed on that day. No 4980H(b) penalty if offered coverage provides minimum value.
 - b. New variable, new seasonal, or new part-time employee (defined)
 - i. An employer is allowed to use an initial measurement period to determine whether the employee is a "full-time" employee.
 - ii. If the new employee averages 130 hours or more during the initial measurement period, the employee is "full-time" during the subsequent stability period (less than 130 hours is "not full-time").

- iii. The stability period must be the same length as the stability period for ongoing employees.
 - iv. No 4980H(a) penalty during the initial measurement period for an employee who does average 130 hours or more during any calendar month during the initial measurement period, only if employee is otherwise eligible for an offer of coverage, and employee is offered coverage by the first day of the associated stability period if the employee is still employed on that day. No 4980H(b) penalty if offered coverage provides minimum value. “An employee is otherwise eligible to be offered coverage under a group health plan for a month if, pursuant to the terms of the plan as in effect for that calendar month, the employee meets all conditions to be offered coverage under the plan for that month...”
 - v. If the employee experiences a change in employment status before the end of the initial measurement period (to a position in which the employee would have averaged 130 hours or more), the employee is treated as a “full-time” employee beginning the first day of the month following the change in employment status; unless eligible sooner through the look-back measurement method the employee is already under. No 4980H(a) penalty during the first three months following the change in employment status for an employee who does average 130 hours or more during any calendar month, only if employee is otherwise eligible for an offer of coverage, and employee is offered coverage by the first day of the fourth month following the change in employment status if the employee is still employed on that day. No 4980H(b) penalty if offered coverage provides minimum value. “An employee is otherwise eligible to be offered coverage under a group health plan for a month if, pursuant to the terms of the plan as in effect for that calendar month, the employee meets all conditions to be offered coverage under the plan for that month...”
 - vi. Once the employee has been employed for an entire standard measurement period, the ALE-member must test the employee for “full-time” status just like other ongoing employees.
 - vii. An employee who averages 130 hours or more during an initial measurement or standard measurement period must be treated as a “full-time” employee during the entire associated stability period; “full-time” for either period trumps “not full-time.”
- v. Non-educational organization employees rehired after termination or resuming service after other absence:
- 1. Regardless of whether an employee was actually terminated, an employee can be treated as “terminated and rehired” after a 13-week break. If break is less than 13 weeks, employee is credited with zero hours during the break. An employee is a “continuing employee” if returning or rehired within 13 weeks and must resume the status they left. If the employee resumes “full-time” status and coverage is indicated, enrollment is required no later than the first day of the following month.

2. An employer must exclude (or credit) hours of special unpaid leave when determining the average hours of service for a measurement period for a continuing employee. There is no limit to the amount of hours required to be excluded or credited.
- vi. Educational organization employees rehired after termination or resuming service after other absence:
 1. Regardless of whether an employee was actually terminated, an employee can be treated as “terminated and rehired” after a 26-week break.
 2. An employee can also be considered “terminated and rehired” as a new employee using a “rule of parity” method which allows a shorter (than 13-week) period if the most recent period of employment is followed by a longer period of non-employment (of at least 4 consecutive weeks).
 3. If break is at least 4 weeks and less than 26 weeks, the employee is considered a “continuing employee” and the employer must exclude (or credit) the employment break with average hours from the remainder of the measurement period. Break-period hours can be limited to total of 501 if the employer desires (if employer chooses to limit break period hours to 501, divide 501 by the total break period months to determine the break period monthly average).
 4. An employer must exclude (or credit) hours of special unpaid leave when determining the average hours of service for a measurement period for a continuing employee. There is no limit to the amount of hours required to be excluded or credited.
 - vii. Under the “look-back measurement” method, a continuing employee retains the stability status he or she had earlier earned upon resumption of services.
 1. If the employee resumes “full-time” employee status, coverage must be offered no later than the first day of the month following resumption of services.
 2. If an employer previously made an offer of coverage which the employee declined, the employer is considered to have offered coverage for the entire stability period to which the employee returned; the employer does not need to make a new offer of coverage for the remainder of the stability period.
 - viii. An employee can also be considered “terminated and rehired” as a new employee using a “rule of parity” method which allows a shorter (than 13-week or 26-week) period if the most recent period of employment is followed by a longer period of non-employment (of at least 4 consecutive weeks).
 - ix. For anti-abuse purposes, any hour of service is disregarded if it was credited for the purpose of avoiding or undermining employee rehire rules.
 - x. An employee who transfers to a position paid by other than U.S. income that is expected to continue at least 12 months can be treated as terminated. An employee in the reverse scenario transferring to employment with US source income may be treated as a new hire.
 - xi. An employer using the “look-back measurement method” is allowed to use the “monthly measurement” method in lieu of the otherwise applicable [initial or standard] stability period beginning with the fourth month following an employee’s change in employment status such that, if the employee had begun employment in the new position or status, the employee would have reasonably been expected not to be employed 130 hours or more per month on average. This rule is only available for employees who the ALE-member offered coverage to by the first day of the calendar month following the employee’s initial three

months of employment through the month the employment change occurs, and only if the employee averages less than 130 hours per month for each of the following three calendar months. The employer may continue to apply the “monthly measurement” method through the first full measurement period that would have applied under the “look-back measurement” method. (pp 79-81; 208-210)

- c. Hours of service for the “monthly measurement method” or “look-back measurement method” must be calculated using one of the following methods. Different methods may be used for different categories of employees if categories are reasonable and consistently applied. The method of counting non-hourly employee hours may be changed for each calendar year if desired.
 - i. Hourly Employee Rules
 1. Each paid hour of service or hour entitled to pay, and
 2. Each paid hour of service or hour entitled to pay for vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence
 - ii. Non-hourly Employee Rules – Equivalencies, if used, must not understate actual work hours.
 1. Actual hours of service as for hourly employee rules (above); or
 2. Days-worked equivalency: Assume the employee will work 8 hours of service for each day the employee would be credited at least 1 paid hour of service under hourly employee rules; or
 3. Weeks-worked equivalency: Assume the employee will work 40 hours of service for each week the employee would be credited at least 1 paid hour of service under hourly employee rules; or
 4. Adjunct Faculty: Until further federal guidance is issued, employers of adjunct faculty (and other positions that similarly require the employer to credit hours of service because compensation is not based primarily on hours of service) are required to use a reasonable method for crediting hours of service that accounts for hours outside of classroom or other instruction time, such as preparation time necessary to perform the employee’s duties. Regulations describe one reasonable method that credits 2.25 hours of service for each hour of teaching or classroom time (to account for class preparation and grading), and credits any hours required of the faculty member for other required duties (such as meetings or office hours). (pp 31-34)
 - iii. Special hour of service rules
 1. Educational Organization Employment Break Period: An educational organization employer cannot take into account the likelihood of an employment break period when determining its expectation of a new employee’s future hours of service. An employment break is a period of at least four consecutive weeks during which an employee is not credited with hours of service. (p 47)
 2. Student Employees: An employer can disregard anticipated hours of service of student employment in positions subsidized through the federal work study program or a substantially similar program of a state or local government. However, the employer must credit a student employee for hours of service in any other (non-work study) capacity. (pp 27-29)
 3. On-call Hours: An employer must credit an employee with an hour of service for any on-call hour for which payment is made or due by the employer, for which the employee is required to remain on-call on the employer’s premises, or when

remaining on-call prevents the employee from using the time effectively for the employee's own purposes. (p 36)

4. Volunteer Employees: An employer can disregard hours of service for bona fide volunteers, whose only compensation is for (i) reimbursement for reasonable expenses incurred in the performance of service by volunteers, or (ii) reasonable benefits (including length of service awards), and nominal fees, customarily paid by similar entities in connection with the performance of services by volunteers. (pp 26-27)
5. Members of Religious Orders: An employer can exclude hours of service for an individual who is subject to a vow of poverty and hours of service are in performance of tasks required of an active member of the order. (p 29-30)

d. Changes in employment status that change the "full-time" employee determination method: Specific rules apply when an employee's change in employment status causes the employee to change from the "monthly measurement" method to the "look-back measurement" method, or vice versa. The rules cause the employer to apply both methods, and apply the method that best benefits the employee to "full-time" status. (pp 204-208)

3. Termination for non-payment is allowed; removes liability for IRC 4980H penalties. (pp 210-211)
 - a. 30-day grace period required
 - b. No termination for non-payment allowed for insignificant shortfall

4. Assessable Penalties

No assessable penalties apply for 2014. Each ALE-member is liable for its section 4980H assessable payment, and is not liable for the payment of any other entity in the controlled group comprising the ALE. (p 92)

a. 4980H(a)

- i. If an ALE-member fails to offer (95%) of its "full-time" employees (and their dependents) minimum essential coverage for any calendar month, and the ALE-member receives a Section 1411 Certification for at least one "full-time" employee, a 4980H(a) assessable payment is imposed. For 2015 95% is instead changed to 70%. (pp 128-130)
- ii. $4980H(a) \text{ payment} = \$2,000 / 12 \times \text{Number of "full-time" employees for month}$
- iii. At least once per plan year, each "full-time" employee must be offered "an effective opportunity" to: (p 212-213)
 1. Accept coverage
 2. Decline coverage that is not minimum value or affordable. An effective opportunity to decline coverage is not required for an offer of coverage that provides minimum value and is offered...at a cost...of no more than 9.5 percent of a monthly amount determined as the federal poverty line for a single individual for the applicable calendar year, divided by 12.
 3. "Effective opportunity" is based on all facts and circumstances, including adequacy of the notice of availability of coverage, and the period of time to accept coverage. Evergreen elections are allowed.
 4. An offer of coverage for a calendar month by one ALE-member is treated as an offer of coverage for all ALE-members for that calendar month.

5. An offer of coverage for only a partial month is treated as no offer for the entire month, except in the case of an employee termination when coverage ends mid-month due solely to the termination.
 - iv. No 4980H(a) potential liability applies to the first calendar month of employment of a “full-time” employee, unless the start date is the first day of the month. (pp 213-214)
 - v. Liability for 4980H(a) penalty applies to the ALE-member with the greatest number of hours of service, when the employee has provided hours of service to more than one ALE-member. ALE-members can determine ties. (p 214, 93)
 - vi. With respect to each calendar month, and ALE-member’s 4980H(a) liability is reduced by that ALE-member’s allocable share of 30 “full-time” employees, rounded up to the next highest whole number. For 2015, 30 is increased to 80. (p 215)
- b. 4980H(b)
 - i. If an ALE-member fails to offer a “full-time” employee coverage that is affordable and provides minimum value, and the ALE-member receives a Section 1411 Certification for that employee, a 4980H(b) assessable payment is imposed.
 - ii. 4980H(b) payment = $\$3,000/12 \times \text{Number of “full-time” employees not offered affordable or minimum value coverage}$. A 4980H(b) payment cannot exceed the amount of a 4980H(a) penalty (whether incurred or not).
 - iii. Same “effective opportunity to accept or decline” and “partial month” coverage requirements as 4980H(a).
 - iv. Liability for 4980H(a) penalty applies to the ALE-member with the greatest number of hours of service, when the employee has provided hours of service to more than one ALE-member. ALE-members can determine ties. (p 214, 93)

5. Affordability

An employee offered coverage by an employer may be eligible for an applicable premium tax credit or cost-sharing reduction if the offer of coverage is not affordable. If used, Affordability Safe Harbors must be uniformly applied for all employees in a category. (pp 218-225)

- a. “W-2 Method”: 9.5% of the employee’s W-2 income from the employer for the calendar year.
- b. “Rate of Pay” method: 9.5% of the employee’s actual hourly rate for each month during the calendar year x 130 hours per month.

Example: Effective 1/1/13, Washington’s minimum wage is \$9.19. $\$9.19 \times 130 = \$1,195$. $\$1,195 \times 9.5\% = \114 . Coverage is affordable under safe harbor if PEBB’s lowest cost employee-only premium is equal to or less than \$114 per month. Currently, subscriber-only premiums range from \$21 to \$115 per month.
- c. “Federal Poverty Line” method: 9.5% of the federal poverty line for a single individual, using the most recent federal poverty guidelines available for the 6 months before the first day of plan year.

Example: The 2012 poverty line for a single individual is \$11,170, or a monthly amount of \$931. $\$931 \times 9.5\% = \88 . Coverage is affordable under safe harbor if PEBB’s lowest cost self-only premium is equal to or less than \$88 per month. Currently, subscriber-only premiums range from \$21 to \$115 per month.

6. ALE must comply with record-keeping requirements under Section 6001. (p 88, 135)
7. Employers intending to adopt a 12-month stability period may adopt a (one-time) transition measurement period that is less than 12 months in length (e.g. 6 months) due to time constraints. (pp 117-118)
 - a. Measurement period must be at least six months, and

- b. Begin no later than July 1, 2013, and
- c. End no earlier than 90 days before the first day of the first 2014 plan year.