

Welcome

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with ongoing expert compliance resources.



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Please remember, employment and benefits law compliance depends on multiple factors – particularly those unique to each employer’s circumstances. Numerous laws, regulations, interpretations, administrative rulings, court decisions, and other authorities must be specifically evaluated in applying the topics covered by this webinar. The webinar is intended for general-information purposes only. It is not a comprehensive or all-inclusive explanation of the topics or concepts covered by the webinar.



What the IRS' New ACA Penalty Process Means For Applicable Large Employers



Agenda

Learn how the IRS' renewed enforcement efforts will impact employer reporting and associated penalty exposure.

Gain insights into:

- Determining applicable large employer (ALE) status
- IRC Section 4980H offer of coverage requirements
- Common errors and oversights

Be able to answer these questions:

- Why have enforcement efforts increased?
- What is the process of responding?
- What are the penalties for non-compliant employers?



Employer Shared Responsibility Rules



Background

“Play or Pay”

“A” Penalty

An “applicable large employer” (ALE) that fails to offer minimum essential coverage (“MEC”) to full-time (FT) employees and their dependents (children) may be subject to a penalty under Internal Revenue Code (IRC) section 4980H(a) if a FT employee enrolls in Marketplace coverage and receives a premium tax credit (aka PTC or subsidy) for the coverage.

Background (continued)

“Play or Pay”

“B” Penalty

An ALE that offers MEC to its FT employees (and dependents) may be subject to a penalty under IRC section 4980H(b) if a FT employee receives a premium tax credit (aka PTC or subsidy) for Marketplace coverage where the employer’s offer of MEC is either unaffordable or fails to provide minimum value.

An employer may choose to comply (“play”) with the employer shared responsibility provisions in order to avoid the possibility of having to “pay” a penalty, which can be substantial – this choice is known as “play or pay.”



What is affordable coverage?

- Employee's premium contribution may not exceed 9.12%* of household income (* adjusted annually)
- Applies to lowest tier employee-only coverage

What is minimum value?

- Plan pays at least 60% of total allowable costs
- No more than 40% paid by participants: co-pays, deductibles, co-insurance
- Carrier's Summary of Coverage and Benefits (SBC) states whether plan provides minimum value

Note:

A “minimum value plan” must include hospital and physician Services (IRS Notice 2014-69). Generally, employer may not reimburse or pay for individual policy premiums. Limited transition relief for some plans.

Safe Harbor – Affordability

- 9.12% of annual earnings in following year's W-2 (Box 1) divided by 12 months; or
- If salaried, 9.12% of employee's monthly salary. If hourly, 9.12% of 130 hours x rate of pay; or
- 9.12% of individual federal poverty level (FPL) (\$13,590 in 2023) divided by 12 months = (employee contribution cannot exceed \$103.28 per month) (calendar year plan)

Defining ALE Status

Who is an ALE?

- ALE is employer with 50 or more full-time (FT) and full-time equivalent (FTE) employees.
- A FT employee for any calendar month is an employee who has on average at least 30 hours of service per week during the calendar month, or at least 130 hours of service during the calendar month.
- To determine the number of FTEs:
 - Combine the number of hours of service of all non-FT employees for the month but do not include more than 120 hours of service per employee.
 - Divide the total by 120.
- If ALE has 50 or more FT and FTE employees combined, employer is an ALE and is subject to shared responsibility rules and reporting obligations.

Who is an ALE? (Cont'd)

- ALE determination made on a controlled group basis and based on prior calendar year employee count.
 - Liability for, and the amount of, the excise tax is computed and assessed separately for each ALE member.
 - Each ALE member is responsible for health coverage reporting.

Example:

- Company A has 40 full-time employees and is part of a controlled group that includes Company B, which has 20 full-time employees.
- Both Companies A and B are ALEs (ALE members), and both must “play or pay” and complete required health coverage reporting.

Counting Hours of Service

- IRS defines hour of service as
 - Each hour an employee is paid, or entitled to payment,
 - for the performance of duties for the employer, and
 - for vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty, or leave of absence
- Hourly employees
 - Employer must calculate actual hours of service from records of hours worked and for non-worked hours for which payment is made or due (e.g., vacation, holiday, illness, incapacity, etc.)



Non-Hourly Employees

- Calculate hours of service using one of the following methods:
 - Implement an hour tracking system
 - Count actual hours worked & non-worked hours for which payment is due using a reasonable method of counting hours
- Equivalency methods
 - Days-worked equivalency – count eight hours of service for each day for which the employee is entitled to pay
 - Weeks-worked equivalency – count 40 hours of service for each week for which the employee is entitled to pay

Two Methods for Identifying Full-time Employees



Monthly
Measurement

Look-back
Measurement

Look-back Measurement Method

- Optional method employer may use for employees in same category (instead of monthly measurement method)
- If employer is using look-back measurement method, new hires are not considered “ongoing employees” until they complete a full standard measurement period
- Look-back method requires complicated administration for measuring employees



Measurement Definitions

Standard Measurement Period

- A period for which the employer looks back at hours worked by variable hour employees to determine if they are full-time or part-time
- Minimum of 3 months; maximum of 12 months

Initial Measurement Period

- An individualized time period beginning on each employee's start date (or first of the month thereafter) that is used to determine the FT status of new variable hour employee
- Minimum of 3 months; maximum of 12 months



Administrative Period

- A period employer can use to determine eligibility and to enroll employees
- Generally, starts after end of measurement period and ends just before start of stability period
- Cannot exceed 90 days
- Includes period between employee's start date and beginning of initial measurement period, if initial measurement period does not start on employee's start date
- Initial measurement period and administrative period combined cannot exceed 13 months plus a fraction of a month

Initial Stability Period

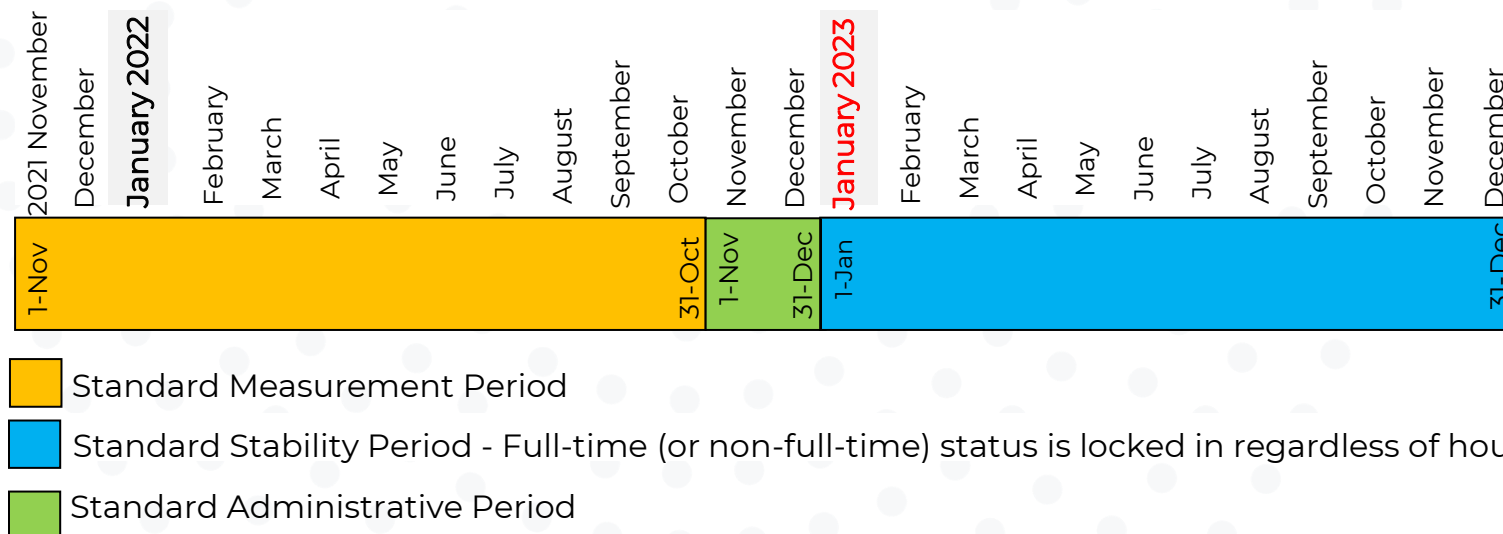
- A period associated with an initial measurement period during which a new employee's status (either full-time or not) is locked in (based on hours of service during an initial measurement period)
- An employee who is determined to be full-time (or non-full-time) during an initial measurement period retains that status during the subsequent initial stability period regardless of actual hours worked
- Must be the same length as stability period for ongoing employees
- If initial measurement period is less than six months and EE is deemed not FT, initial stability period cannot be greater than initial measurement period plus one month

Standard Stability Period

- A period associated with standard measurement period during which ongoing employee's status (either full-time or not) is locked in (based on hours of service during standard measurement period)
- An employee who is determined to be full-time (or non-full-time) during a standard measurement period retains that status during subsequent stability period regardless of actual hours worked
- Must be at least six months and no shorter than standard measurement period

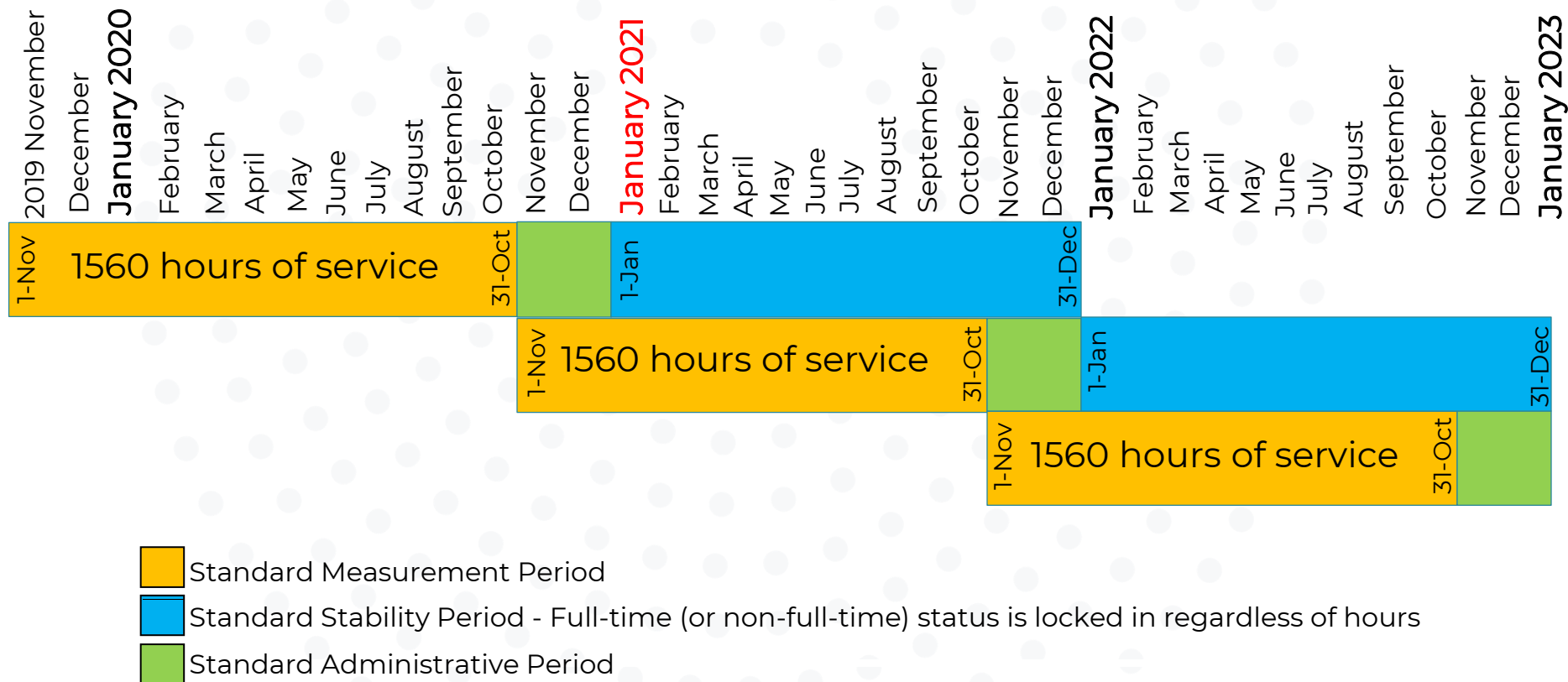
Determining full-time status for ongoing employees using look-back measurement method for calendar plan year

- Standard Measurement Period November 1 – October 31
- Standard Administration Period = November and December
- Plan Year and Standard Stability Period = January 1 – December 31



Standard Administrative Period Full-time (or non-full-time) status is locked in regardless of hours

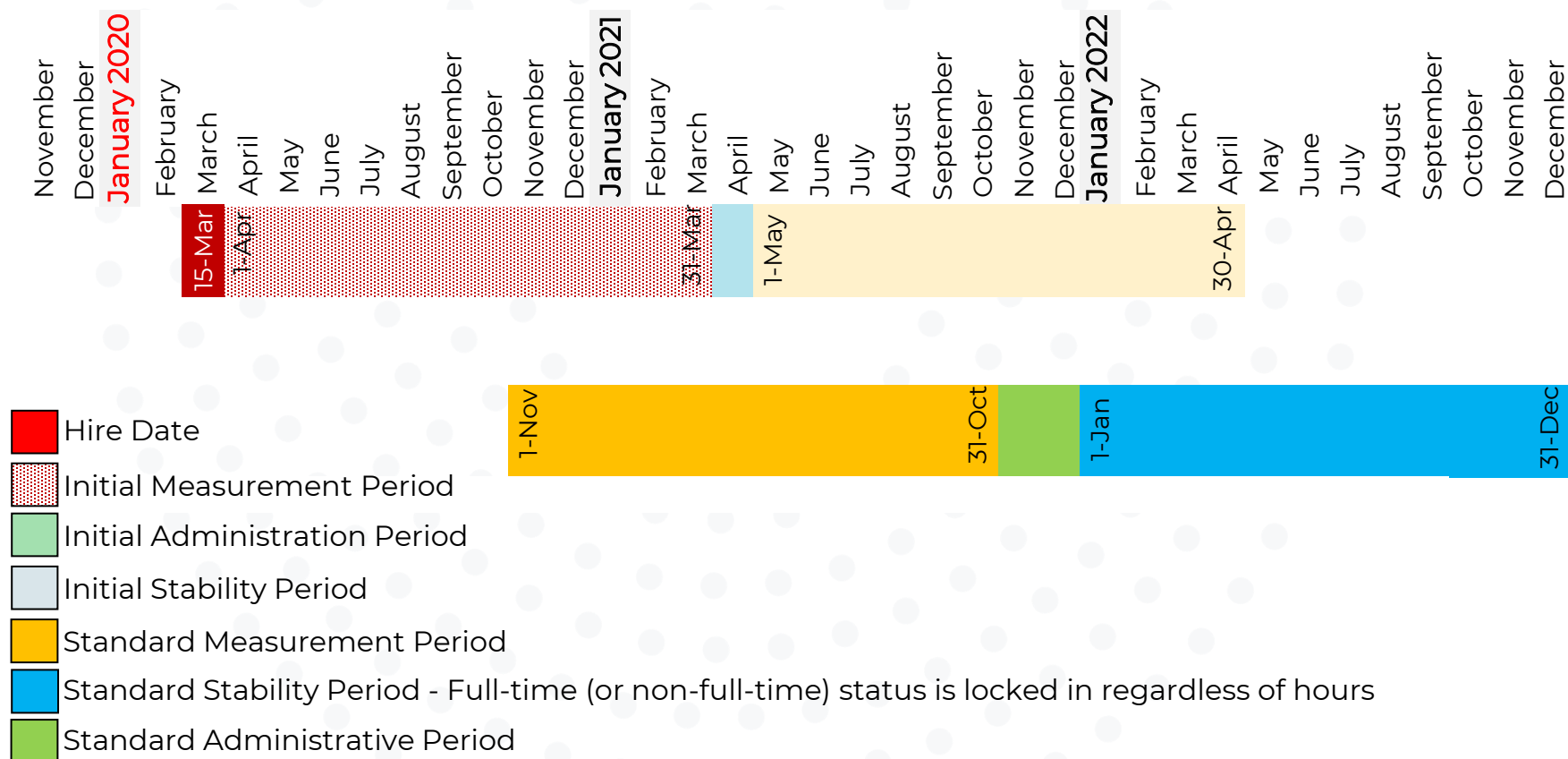
Determining full-time status for ongoing employees using look-back measurement method for *calendar plan year*



Look-back measurement method (continued)

New Hire initial measurement period transitioning into standard measurement period

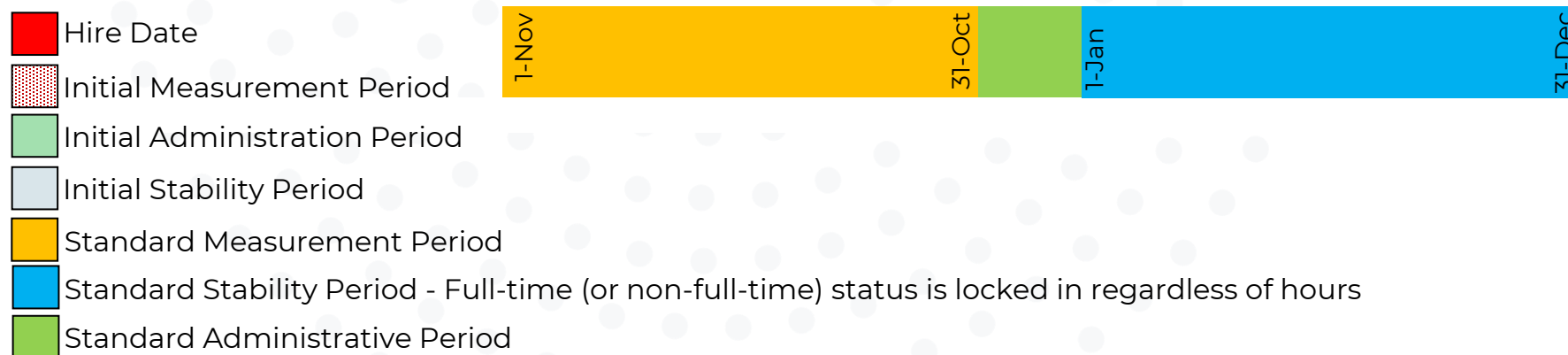
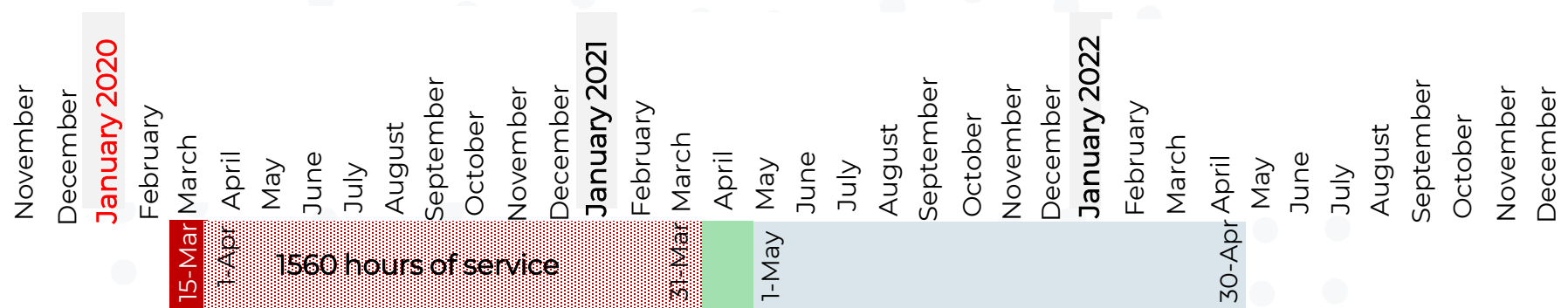
Non-full-time (e.g., variable hour) employee hired March 15, 2020



Look-back measurement method (continued)

New Hire initial measurement period transitioning into standard measurement period

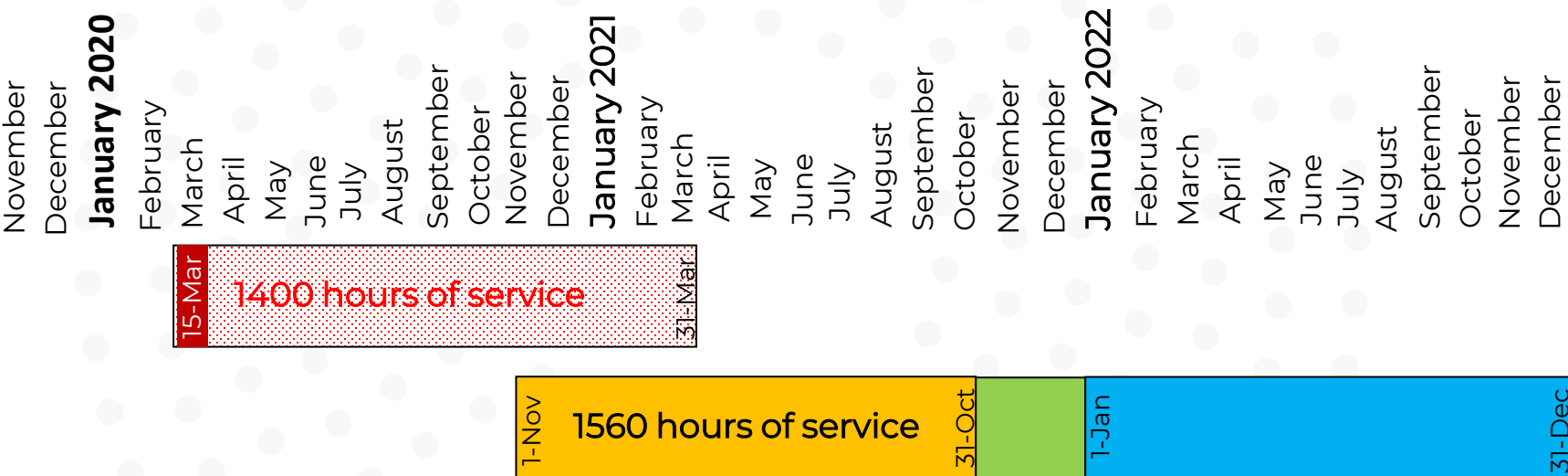
Variable hour employee hired March 15, 2020; *full-time* at end of IMP



Look-back measurement method (continued)

New Hire initial measurement period transitioning into standard measurement period

Variable hour employee hired March 15, 2020; *not* full-time at end of IMP



- Hire Date
- Initial Measurement Period
- Standard Measurement Period
- Standard Stability Period - Full-time (or non-full-time) status is locked in regardless of hours
- Standard Administrative Period

Establishing Measurement and Stability Periods

- Employers can have different periods for the following categories of employees:
 - Salaried employees versus hourly employees
 - Each group of collectively bargained employees
 - Collectively bargained versus non-collectively bargained employees
 - Employees in different states

Other considerations for measurement periods

- Change in status
- Break in service
- Leave of absence

Filing with the IRS

How and When to File

- Returns must be filed with IRS the year immediately following the year being reported
 - February 28, if filing by paper
 - March 31, if filing electronically
- Employers filing fewer than 250 Forms 1095 may file by paper.
- Employers filing 250 or more Forms 1095 must file electronically; proposed regs could lower threshold to 10
 - Employers can request electronic filing waiver by submitting IRS Form 8508 at least 45 days before the due date of the returns.
 - Must use IRS e-filing system - ACA Information Return system (“AIR”).
 - [IRS AIR Portal](#)

Filing and Furnishing Extensions

- Filing with IRS
 - Automatic 30-day extension by submitting IRS Form 8809 on or before due date for IRS filing.
[Form 8809](#)
 - After automatic extension, additional 30-day extension possible under certain hardship conditions.
- Providing to individuals
 - IRS recently formalized permanent 30-day extension.
 - New due date March 2 (March 1 in leap year; next business day if falls on weekend or holiday).



Employer Shared Responsibility Penalties



Employer Shared Responsibility Assessments and Appeals

- The IRS penalizes employers that fail to comply with their employer shared responsibility (ESR) obligations under the ACA.
- IRS issues Letter 226J to propose and assess ESR penalties and will be addressing 2021 calendar year filings in its latest round of letters.
- Letter 226J explains how the IRS calculated the proposed penalty and how employers can dispute any or all of the assessment.

Key takeaways

- Do not ignore Letter 226J; penalties are real, and appeals become more complicated at next stage.
- Respond to IRS by date shown on Letter 226J; Can request extension from IRS.
- Review Forms 1094-C and 1095-C for applicable year; coordinate with vendor.
- Consider engaging legal counsel.

Employer Shared Responsibility Assessments and Appeals

- Dispute IRS calculations using Form 14764 (included with Letter 226J).
- Must attach signed statement explaining disagreement.
- Describe any desired changes to original Forms-1094-C; DO NOT RE-FILE.
- Make changes on Employee PTC Listing included with Letter 226J.
- Use same codes as on Form 1094-C and 1095-C; DO NOT FILE CORRECTED FORMS 1095-C.

Employer Shared Responsibility Assessments and Appeals (continued)

- Use only one code even if more than one applies.
- Include additional supporting documentation.
- Include tax year and EIN on top right corner of signed statement and all submitted documentation.
- IRS will review submission.

Penalties for ACA Reporting Failures



Reporting Failure Penalties

- Failure to file information return with IRS:
 - \$280 per return; \$3,426,000 maximum per calendar year.
- Failure to provide correct individual statement:
 - \$280 for each statement; \$3,426,000 maximum per calendar year.
- Penalties can increase for intentional disregard of filing requirement.
- IRS can reduce penalties in certain circumstances.



Reporting Failure Penalties

- Failure to file information return with IRS:
 - Tiered penalties with \$50 for each return if filed within 31 days; \$110 for each return after 31 days but before August 1 .
- Failure to provide correct individual statement:
 - Tiered penalties with \$50 for each statement if filed within 31 days; \$110 for each statement after 31 days but before August 1.
- Penalties can increase for intentional disregard of filing requirement.
- IRS can reduce penalties in certain circumstances.



IRS Issues Notices to ALEs for ACA Reporting Failures

- ALEs have started receiving Notice 972CG (“Notice of Proposed Civil Penalty”) from the IRS.
- Notice 972CG proposes civil penalties on ALEs that fail to file Forms 1094 and 1095, file late, use incorrect media or filing format, or file with missing or incorrect Tax Identification Numbers (TINs).
- Employers who receive Notice 972CG from the IRS must respond within 45 days indicating agreement or disagreement with the proposed penalty; presumably can seek extension.

IRS Issues Notices to ALEs for ACA Reporting Failures (continued)

- ALEs that respond to Notice 972CG should expect to receive:
 - Letter 1948C (which will request additional information or confirm the penalty was waived due to reasonable cause), or
 - Letter 845C (a denial due failure to establish reasonable cause, a demand for payment, and the employer's appeal rights).

Key takeaways:

- For the first time since ACA reporting started, IRS is targeting ACA reporting errors.
- Employers should redouble ACA reporting efforts to ensure that the forms they file with IRS are accurate.
- Employers should make sure they are following regulations regarding soliciting employee TINs.
- Employers who receive a Notice 972CG should consider engaging tax counsel with experience in responding to these notices, which long have been used to address other IRS information reporting errors and deficiencies.

Common Mistakes and Pitfalls

- Uncertain of 2023 ALE status
 - Review 2022 employee counts to determine ALE status for 2023.
 - Review or engage resources to assist with ACA reporting obligations.
- Failure to adopt ACA measurement method for variable hour employees
 - Identify full-time employees under ACA measurement method and prepare associated Forms 1095-C.
 - Understand implications if ACA Measurement Method switched from prior years.
- Failure to timely prepare, distribute, and file Form 1095-C



- HR technology
 - Inventory and transfer ACA reporting data when converting platforms.
 - Download and maintain copies of prior years' Forms 1094-C and 1095-C.
- Mergers & Acquisitions issues
 - Transaction may cause employer to become ALE or lose ALE status and impact ESR compliance obligations.
 - Nature of transaction may impact ACA reporting obligations.
 - Plan ahead - understand ACA reporting obligations and obtain necessary data.

Case Study 1

Errors on IRS Form 1094-C

- For all of 2020, ABC Co., an ALE, offered minimum essential coverage (MEC) that met ACA affordability and minimum value requirements. ABC Co. made an offer of coverage to all full-time employees and their spouses and dependents.

Errors on IRS Form 1094-C (continued)

- Ten employees declined ABC Co.'s offer of coverage for 2020 and qualified for premium tax credits when they enrolled in Marketplace coverage.
- In its 2022 IRS Form 1094-C, ABC Co. failed to identify on IRS Form 1094-C, Part III, Column (a) that it offered MEC to at least 95% of its full-time employees in 2020.
- ABC Co. received IRS Letter 226J regarding the coverage offered in 2020; IRS proposed penalties in excess of \$1 million based on the failure to offer MEC to at least 95% of its full-time employees.

Errors on IRS Form 1094-C (continued)

- ABC Co. discovered that it incorrectly completed IRS Form 1094-C. ABC Co. responded timely to Letter 226J and provided a signed statement requesting correction to the information provided in the 1094-C – it did indeed offer MEC to at least 95% of its full-time employees in 2020.
- ABC Co. also updated and corrected the applicable codes used on IRS Form 1095-C for each of the 10 employees who received premium tax credits (PTCs).
- IRS accepted the information provided by ABC Co. and determined that ABC Co. owed no penalty for 2020.

Case Study 2

Failure to include affordability safe harbor codes on IRS Form 1095-C

- XYZ Co., an ALE, offered minimum essential coverage that met ACA affordability standards (determined using the W-2 safe harbor) and minimum value requirements. XYZ Co. offered coverage to all full-time employees and their spouses and dependents.
- Five employees declined XYZ Co.'s offer of coverage for 2019 and qualified for premium tax credits (PTC) when they enrolled in Marketplace coverage.

Failure to include affordability safe harbor codes on IRS Form 1095-C (continued)

- XYZ Co. prepared Forms 1095-C for all employees, including the five employees who declined coverage, but did not include the W-2 safe harbor code (2F) on the 1095-C, Part II, Line 16. The missing codes triggered a penalty assessment for the five employees that received a PTC.
- IRS sent Letter 226J regarding the coverage offered in 2019. The five employees were identified in the Letter as having received PTCs, and a proposed a penalty assessment based on XYZ Co.'s failure to offer affordable coverage to the five employees.

Failure to include affordability safe harbor codes on IRS Form 1095-C (continued)

- XYZ Co. timely responded to Letter 226J, indicating that it disagreed with the proposed penalty assessment and provided safe harbor code 2F for the five employees.
- IRS informed XYZ Co. that the information provided was accepted and determined that XYZ Co. owed no penalty for 2017.

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Feb. 14

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