The Affordable Care Act and its Impact on IAAPA Members

March, 2013

The Affordable Care Act (ACA) is exceptionally complicated and comprehensive. It contains hundreds of provisions which will impact virtually every business, person, and health care entity in the nation. Some of the sections of the law require action by federal and state agencies before they can be put into effect. Others are subject to widely varying interpretations and must be clarified by administrative action. Accordingly, implementation of this massive statute requires the issuance of hundreds of regulations, guidances, policy statements, rulings, and other regulations from numerous federal agencies including the Department of Health and Human Services ("HHS"), the Centers for Medicare and Medicaid Services ("CMS"), the Department of Labor ("Labor"), the Treasury Department ("Treasury"), and the Internal Revenue Service ("IRS"). In addition, state governments will be required to promulgate far-ranging rules to implement portions of the law for which they are responsible.

Over the last several months, HHS, Labor, and Treasury have issued hundreds of pages of regulations and other materials to implement various parts of the ACA. Of perhaps greatest interest to IAAPA members is the proposed rule which was published in the Federal Register on Jan. 2, 2013 entitled "Shared Responsibility for Employers Regarding Health Coverage". Although issued as a proposed rule, it makes clear that "employers may rely on these proposed regulations for guidance pending the issuance of final regulations or other applicable guidance", but through 2014.

Set out below is a summary of the major employer responsibility provisions that are applicable to the attractions industry. This is by no means a summary of the entire law; just the provisions specific to the attractions industry that will go into effect Jan. 1, 2014 that IAAPA members should start planning for in 2013. Some of the concepts outlined in this summary are complicated. We have included several charts and examples to help you better understand their application. There are more examples in the proposed rule, linked above.

Two caveats: (1) With the exceptions noted below, the summary is based on the statutory language and regulations and guidances which the agencies have issued thus far. Additional guidance and information will be forthcoming from the agencies over the coming months. (2) Nothing in this document should be construed as legal advice or a legal opinion. IAAPA members are strongly encouraged to consult their attorneys and human resources professionals when interpreting the law or determining compliance strategies. The regulations implementing the ACA are lengthy and complex and in many cases are cross-referenced to, and correlate with, other regulations issued by HHS, Treasury, and Labor. **Members are advised to seek expert assistance in assessing their duties under the ACA.**

Part 1: Determining Applicable Large Employer Status

Only a "large employer" may be liable for a penalty for failing to offer its full-time employees (and their dependents) an opportunity to enroll in minimum essential coverage. For purposes of determining employer responsibility, an "applicable large employer" for a calendar year is an employer that employed an average of at least 50 full-time employees (taking into account Full Time Equivalents, discussed below) on business days during the preceding calendar year. For purposes of the ACA, a full-time employee is one who works 30 hours or more per week. Employers can also use a threshold of up to 130 hours per month to determine full-time status.

Seasonal workers for purposes of determining applicable large employer status
An employer is not considered to employ more than 50 full-time employees (i.e., is not a "large employer") if (1) the employer's workforce exceeds 50 full-time employees for 120 days or less during the calendar year **AND** (2) the employees in excess of 50 employed during the 120-day period were seasonal workers.

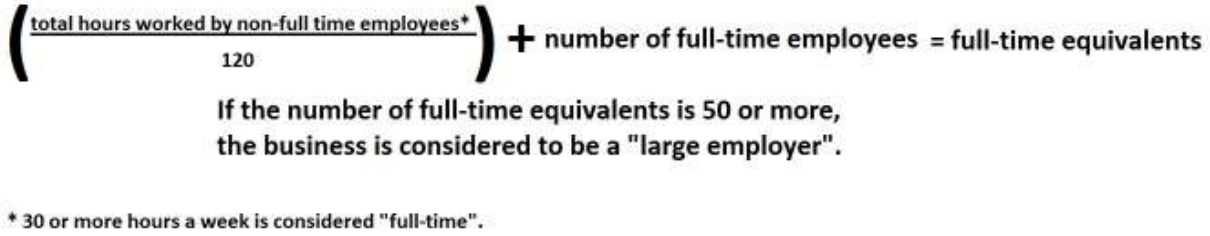
For this purpose, a seasonal worker means a worker who performs labor or services on a seasonal basis as defined by the Secretary of Labor and retail workers employed exclusively during holiday seasons. However, the proposed rule further provides that:

> "the term seasonal worker…is not limited to agricultural or retail workers. Until further guidance is issued, employers may apply a reasonable, good faith interpretation of the statutory definition of seasonal worker, including a reasonable good faith interpretation of the standard set forth in the DOL [Department of Labor] regulations at 29 CFR 500.20(s)(1)…applied by analogy to workers and employment positions not otherwise covered under those DOL regulations."

Some IAAPA members may be excluded from being an "applicable large employer", either because they are below 50 full-time employees and equivalents, or because of seasonal workers, but it is important to note this is not a blanket exemption for seasonal businesses. IAAPA members should consult their own attorneys when determining if they are an applicable large employer.

Determining full-time equivalents

Figure 1: Calculating Full-Time Equivalents



Solely for the purpose of determining whether an employer is an "applicable large employer" for the current calendar year, the employer must calculate the number of full-time equivalent employees (FTE) it employed during the preceding calendar year and count each FTE as one full-time employee for that year. All employees (including seasonal workers) who were not full-time employees for any month in the preceding calendar year are included in calculating the

employer's FTE for that month by calculating the aggregate number of hours of service (but not more than 120 hours of service for any employee) for all employees who were not employed on average at least 30 hours per week for that month and dividing the total hours of service by 120. This calculation provides the number of FTEs for the calendar month. If the number is greater than or equal to 50, a business is considered to be an "applicable large employer."

Employers will determine each year, based on their current number of employees, whether they will be considered a large employer for the next year. For example, if an employer has at least 50 full-time employees, (including full-time equivalents) for 2013, it will be considered a large employer for 2014.

> **Example 1 (Calculating Full Time Equivalents):** A business employs 20 full-time employees (those working more than 30 hours per week) and 200 part-time employees who each work 25 hours per week (or 100 hours). To determine if it is a large employer, the business owner would multiply 200 employees by 100 monthly hours each for a product of 20,000 aggregate hours, then divide 20,000 by 120 to get 167. Then the business owner would add the 20 full-time employees to 167 to get 187 full-time equivalents. The business would thus be considered a large employer.

It should be noted that the calculation above is intended to be used by year-round businesses where employees' hours are fairly consistent. For seasonal businesses or other businesses where employees have fluctuating hours, please see "Seasonal and Variable-Hour Employees", below.

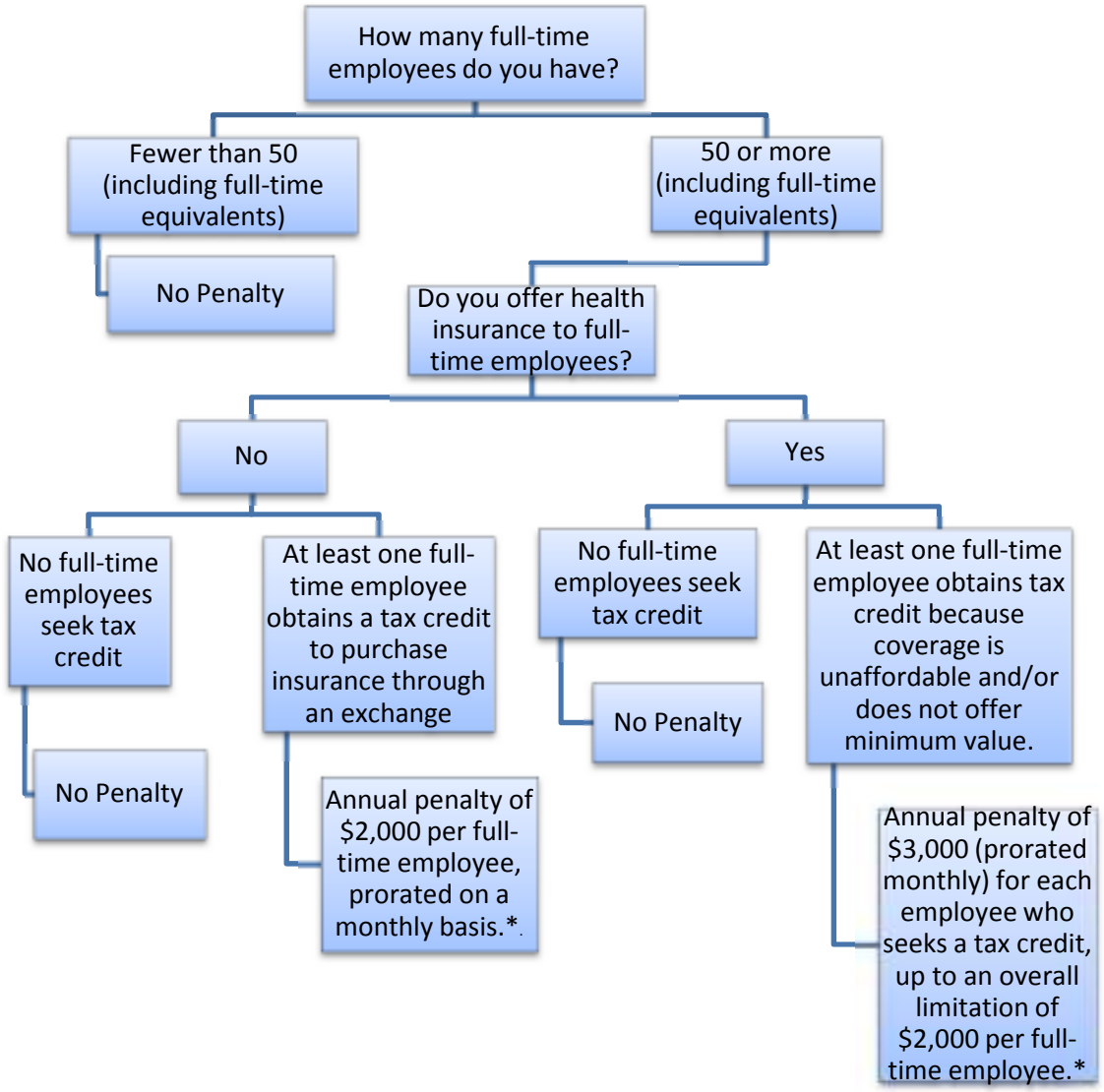
Auto-enrollment
Employers with more than 200 full-time employees which offer employees enrollment in one or more health benefit plans must automatically enroll all new full-time employees in one of the insurance plans and must continue the enrollment of current employees in a health benefits plan offered through the employer. Any automatic enrollment program must include adequate notice to each employee and an opportunity for an employee to opt out of any coverage in which the individual employee was automatically enrolled. Full-time employees are defined as employees who work on average 30 or more hours per week.

Controlled groups
For purposes of determining whether an employer is a large employer, and for the purposes of determination any assessment of penalties, the ACA requires employers to count employees on a "controlled group" or an "affiliated service group" basis. In general, this means that employees of businesses with common owners will need to be combined for purposes of determining the number of full-time employees. The new proposed regulations clarify that for a calendar year during which an employer is an applicable large employer, the employer responsibility standards are generally applied separately to each person who is a member of the controlled group in determining liability for penalties and the amount thereof. For example, according to the proposed rule, "if an applicable large employer is comprised of a parent corporation and 10 wholly owned subsidiary corporations, each of the 11 corporations, regardless of the number of employees, is an applicable large employer member."

Part 2: Employer Penalties

The ACA requires applicable large employers to offer minimum essential coverage or pay a monthly, non-deductible tax penalty if any one of their full-time employees obtains coverage in a public exchange and receives a federal subsidy, in the form of a tax credit. Generally, a premium tax credit will be available only to individuals whose household income for a taxable year is between 100 percent and 400 percent of the federal poverty line for the taxpayer's family size, AND who are not eligible for other "minimum essential coverage". Penalties are assessed on a monthly basis. Some employers may decide to pay applicable penalties instead of offering health insurance. That is a decision a business that qualifies as a large employer can make, working in conjunction with counsel and/or Human Resources consultants.

Figure 2: Determining Penalties under the Employer Responsibility Provisions



*Reduced by 30 employees.

Penalty for not offering coverage
The annual penalty for large employers who do not offer a group health plan that provides "minimum essential coverage" is $2,000 multiplied by every one of the employer's full-time employees (reduced by the first 30). This penalty is triggered by one employee receiving a federal subsidy to purchase health insurance in an exchange, and is assessed on a monthly basis.

"Affordability" penalty
For those employers who offer coverage that is not considered to be affordable or to provide minimum value, the annual, non-deductible penalty is the lesser of $3,000 multiplied by the number of full-time employees who receive subsidized coverage on an exchange or $2,000 multiplied by the total number full-time employee (reduced by 30 employees). This penalty is triggered by one employee receiving a federal subsidy, and is assessed on a monthly basis.

Coverage is considered "unaffordable" if the required employee contribution towards the cost of self-only coverage exceeds 9.5 percent of the employee's household income. The proposed rule incorporates three affordability safe harbors which may be used by employers: a Form W-2 safe harbor; a rate of pay safe harbor; and a Federal poverty line safe harbor. The proposed rule describes these optional safe harbors in detail. Coverage "fails to provide minimum value" if it fails to pay at least 60 percent of the total allowed cost of benefits provided under the plan.

Part 3: Seasonal and Variable Hour Employees

The proposed rule provides that employers may use a look-back measurement method to determine if a seasonal or variable hour employee is consistently working 30 hours per week or more and is thus eligible for health insurance coverage.

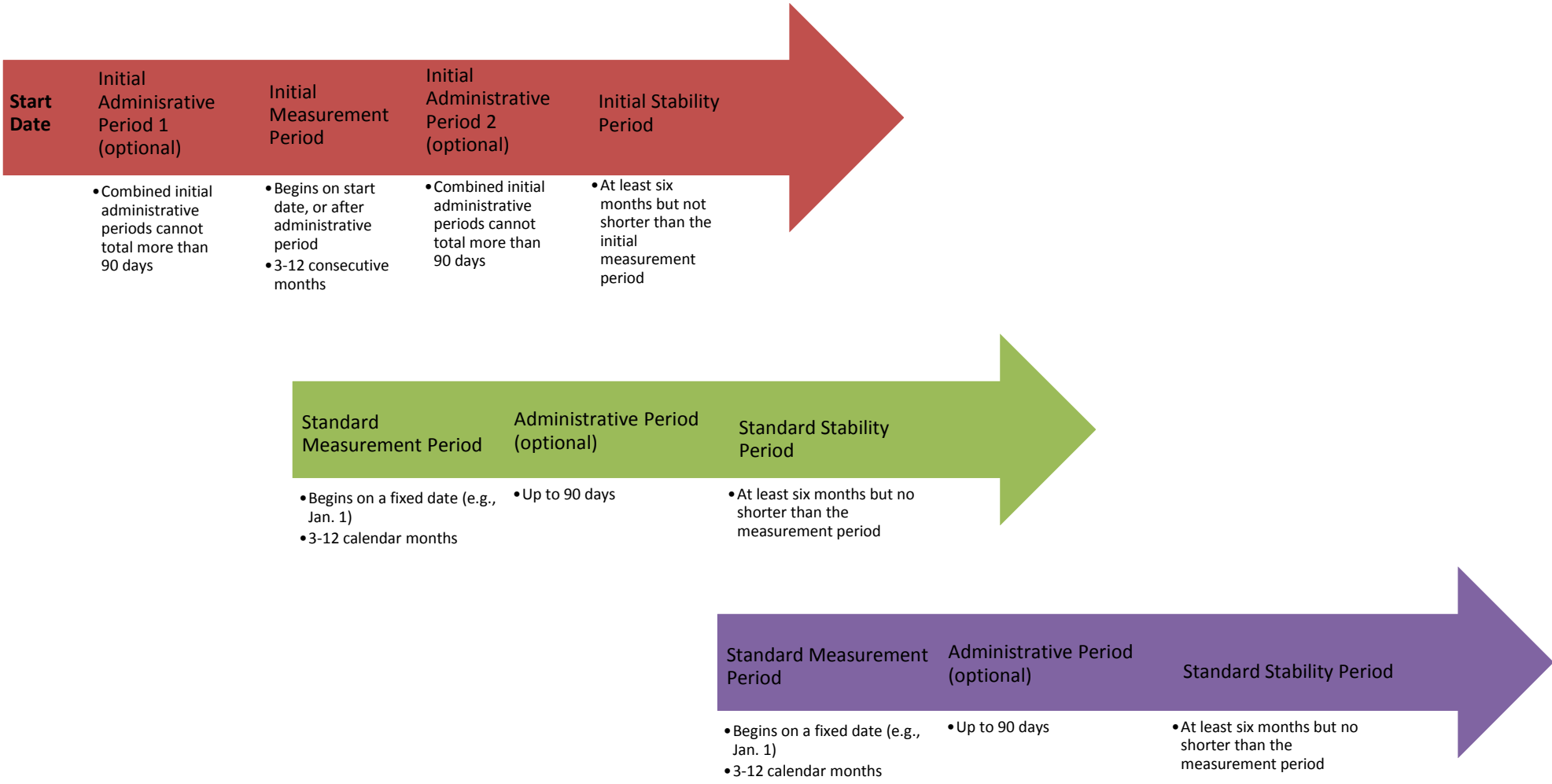
An employee is considered to be a "variable hour employee" if, based on the facts and circumstances at his or her start date, it cannot be determined that the employee is reasonably expected to be employed on average at least 30 hours per week.

The general concept of the look-back measurement method is an employer can take up to one year to average a variable-hour employee's hours to see if he or she is consistently working 30 hours per week or more. This measurement period is then followed by a stability period or equal or longer length, during which, if determined to be full-time, an employee will be able to enroll in the company's health insurance program, and remain for the duration of the stability period, regardless of hours worked. The second measurement period will run concurrent to the first stability period, and so on, to complete the cycle.

In most cases, new variable hour employees will undergo initial measurement and stability periods while they catch up to the standard periods that existing employees follow. After they have "caught up", they will transition to the standard measurement and stability period.

There are nuances to the proposed rules on measurement/stability that IAAPA members should play attention to. There is also special guidance for employers of variable hour employees to follow in 2013. A more thorough explanation of the concepts follows, after the chart.

Figure 3: Using Measurement/Stability to Determine Status of Seasonal or Variable-hour Employees



Initial measurement period
In most circumstances, an employee will begin with an initial measurement period while he or she "catches up" to the standard measurement period that existing variable-hour employees follow.

An employer may use both an "initial measurement period" of between three and 12 months, plus an "administrative period" of up to 90 days for new variable hour and seasonal employees. If the employer complies with these provisions, it will not be liable for a penalty with respect to variable hour or seasonal employees during the initial measurement period or the administrative period.

During the initial measurement period, an employer measures the hours of service for the new employee or seasonal employee and determines whether that employee worked an average of 30 hours or more per week.

Initial stability period
The initial measurement period is followed by an "initial stability period" for that employee which must be the same length as the stability period for ongoing employees. If an employee is determined to be a full-time employee during the initial measurement period, the stability period must be a period of at least six consecutive calendar months that is no shorter in duration than the initial measurement period and that begins immediately after the initial measurement period (a brief administrative period is permitted, see below). During this period, eligible employees and their dependents will be able to participate in the employer's health insurance plan, regardless of the hours worked during the stability period.

If during the measurement period an employee is determined not to be a full-time employee, the employee does not have to be offered health coverage by the employer during the stability period, but his or her hours should continue to be tallied and averaged during the next measurement period.

> **Example 2 (Initial Measurement Period):** Fun Park is open from Easter until Halloween, but only open seven days a week between Memorial Day and Labor Day. Stephanie begins her job as a ride attendant at Fun Park on May 15, 2014. For simplicity's sake, Human Resources starts all initial measurement periods on the first of the month, so in Stephanie's case, there is a 16-day initial administrative period before her initial measurement period begins on June 1, 2014.
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> Fun Park uses an initial measurement period of six months. Stephanie's last shift is on Halloween, at which point she terminates her employment at Fun Park. She plans to move to Washington after she graduates from college, so she will not return to Fun Park in the summer of 2015.
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> Because Stephanie did not work until the end of her initial measurement period, Fun Park is not obligated to provide her with health insurance.

Standard measurement period
Unlike the initial measurement period, standard measurement periods begin on fixed dates (such as Jan. 1, the first day of the plan year, etc). Generally, the standard measurement period and stability period must be uniform for all employees; however, the employer may apply different measurement periods, stability periods, and administrative periods for the following categories of employees: (1) each group of collectively bargained employees covered by a

separate collective bargaining agreement, (2) collectively bargained and non-collectively bargained employees, (3) salaried employees and hourly employees, and (4) employees whose primary places of employment are in different states.

There will typically be overlap between an employee's initial measurement period and the start of the business's standard measurement period. An employer will need to track hours in both periods during this time.

Standard stability period

Just like with the initial stability period, during the standard stability period the employer must treat the employee as either full- or part-time, depending on the calculation made during the standard measurement period. The standard stability period must last at least six calendar months, regardless of the length of the standard measurement period, but it cannot be shorter than the standard measurement period. During the standard stability period full-time employees and their dependents should be offered health insurance, or the employer may have to pay the appropriate penalty.

Standard stability periods will overlap the next standard measurement period to repeat the cycle.

Administrative periods

Employers are allowed to use brief administrative periods on either side of the initial measurement period. These can be used to permit the initial measurement period to begin on the first of the next month, or the first day of the next payroll period on the front end, or allow time to tally and average hours, and collect and process paperwork on the back end. Combined, these administrative periods cannot total more than 90 days, nor can they extend beyond the last day of the first month that begins on or after the first anniversary of the employee's start date. For example, if an employee begins June 2, 2014, his combined initial measurement and administrative periods must be complete by July 31, 2015.

Employers are also permitted up to 90 days following each standard measurement period to tally and average hours and collect and process paperwork before the standard stability period begins.

> **Example 3 (Transitioning to Standard Measurement Periods):** Family Fun Center is a year-round family entertainment center. Paul begins work at Family Fun Center on June 10, 2013. Family Fun Center begins all initial measurement periods on the first of the month, so Paul's initial, year-long measurement period begins July 1, 2013 and runs through June 30, 2014.
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> Family Fun Center uses a second initial administrative period of one month to average Paul's hours and have him complete enrollment paperwork. Paul enters his initial stability period on Aug. 1, 2014. Technically this will run through July 31, 2015, but Paul will transition to the standard stability period before this.
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> Family Fun Center's year-long standard measurement period begins on Nov. 1 for all employees. Paul enters his first standard measurement period on Nov. 1, 2013, even though he is still undergoing his initial measurement period. Paul's first standard measurement period ends Oct. 31, 2014 (subsequently, his second standard measurement period begins the next day). Family Fun Center takes two months for a standard administrative period (Nov. 1 – Dec. 31, 2014), and begins its standard stability

period on Jan. 1, 2015. At this point, Paul enters the standard stability period and is now on the same schedule as existing variable-hour employees.

Returning employees
Seasonal employees often return to a business for several consecutive seasons. The proposed regulations establish a break-in-service rule to determine when a rehired or resuming service employee may be treated as a new employee. Under the proposed regulations, if the period during which an employee does not work is at least 26 weeks, an employer may treat the rehired or resuming service employee as a new employee.

For breaks of less than 26 weeks, an employer may choose to apply a "rule of parity", where a returning employee can be treated as a new employee if the period with no credited hours of service is at least four weeks long **and** is longer than the employee's period of employment immediately preceding that period with no credited hours of service.

This proposal applies solely for the purposes of determining full-time status of variable-hour employees through the measurement/stability process.

For continuing employees (those who are returning before 26 weeks or do not meet the rule of parity), the measurement and stability periods that would have applied had the employee not separated will apply upon the employee's resumption of service. For example, if the continuing employee returns during a stability period in which the employee is treated as full-time, the employee is treated as a full-time employee and offered health insurance upon return and through the end of that stability period.

> **Example 4 (Rule of Parity):** On Oct. 1, 2013, Randy begins his seasonal job and 12 month measurement period at Amusement Land. He works the Halloween and Christmas events, and his last day at Amusement Land is Jan. 1, 2014.
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> Randy enjoys his job so much that he decides to return the following spring. His first day is April 15, 2014. Under the rule of parity, Randy was employed by Amusement Land for 13 weeks, and separated for 15 weeks, so Randy is considered a "new employee", and will begin Amusement Land's 12-month measurement period again.
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> **Example 5 (Continuing Employees):** Susan begins her job and year-long initial measurement period at the Alexandria Zoo on Feb. 17, 2014. Since Susan is the first employee in a new position, the Alexandria Zoo management cannot predict if she will consistently work 30 hours per week or not. It turns out Susan works about 40 hours per week.
>
> Susan decides to return to graduate school, and her last day at the Alexandria Zoo is Dec. 31, 2014. At this point, she has worked 46 weeks. Had Susan continued working until Feb. 16, 2015 (the end of the initial measurement period), she would have been considered a full-time employee because even with six weeks of no service factored in, she still averaged about 35 hours per week.
>
> Susan decides she does not like her graduate program, and returns to her job at the Alexandria Zoo on May 18, 2015. While Susan was at graduate school, her boss hired another employee, so there are now two employees doing the work Susan used to do alone, which means management still cannot predict whether or not Susan will consistently work 30 hours per week or not.

Susan's break in service was a) less than 26 weeks, and b) shorter than the 46 weeks she was initially employed by the zoo (so she does not meet the rule of parity), so she is considered a continuing employee. Since her return date falls within the time frame that would have been her initial stability period, Susan is entitled to enroll in the zoo's health insurance program for the duration of her initial stability period.

The Alexandria Zoo's standard measurement period runs from Jan. 1 until Dec. 1, with a 30-day administrative period in the month of December. Since Susan is a continuing employee, she will also enter the standard measurement period when she returns but she will not receive credit for hours worked from Jan. 1, 2015 until May 18, 2015. This gap in service may mean she cannot average more than 30 hours per week for 2015, and thus may not be eligible for health insurance in 2016, after the initial stability period runs out.

Modified measurement periods for 2013
Employers who intend to utilize the measurement/stability method for 2014 will need to begin their measurement periods for existing employees in 2013. Solely for the purposes of stability periods beginning in 2014, employers may adopt a transition measurement period that:

- Is shorter than 12 months, but no fewer than six months long; **and**
- Begins no later than July 1, 2013, and ends no earlier than 90 days before the first day of the plan year beginning on or after Jan. 1, 2014.

This transition measurement period is only used for existing variable-hour employees. Variable-hour employees beginning work after July 1, 2013 will begin an initial measurement period, as discussed above.

Part 4: Steps for Success

What should IAAPA members be doing in 2013?

- If your business does not qualify as a "large employer", you do not need to do anything. If you are close to the threshold of becoming a "large employer", you should consider tracking and recording your variable-hour employees' hours, in case your business expands.
- If your business qualifies as a "large employer" and all of your employees are full-time, you do not need to do anything in 2013. Beginning in 2014, you will need to offer your employees and their dependents health insurance coverage, or you may be assessed a penalty.
- If your business employs seasonal or variable-hour employees, you should designate a measurement period in 2013 that is no less than six months long and begins no later than July 1, 2013. On Jan. 1, 2014, or at the start of the next plan year, you will need to know which of these employees are consistently working 30 hours per week or more, so you can offer them (and their dependents) health insurance coverage or be assessed penalties.
- If your business qualifies as a "large employer" and you have part-time employees, you may still be required to show the hours of service to prove an employee is working fewer than 30 hours per week, if you are not offering health insurance coverage to him or her.
- If your business intends to pay a penalty instead of offering health insurance, you still must track hours so that you can determine the penalty amount.

Anticipated future regulatory activity
The implementation of the employer responsibility provisions is ongoing; therefore, IAAPA anticipates that aspects of the provisions will be refined and/or clarified in the upcoming months. As new regulations and guidances are released, IAAPA will inform members; however it is always best to check with legal counsel and/or your benefit consultants before making adjustments.

Additional resources
For more information and updates on the ACA please visit IAAPA's health care reform page.

To view correspondence between IAAPA and the federal government on health care reform and other issues, please visit the GR Archive.