

# Paradigm

INTERNATIONAL SOCIETY OF PRIMERUS LAW FIRMS

WINTER 2014

*The Power of Primerus*

---

*How Does Primerus Help You?*

---

*Current Legal Topics:*

*North America • Europe, Middle East & Africa  
Latin America & Caribbean • Asia Pacific*





Bianca S. Watts

# Sharing Responsibility Under the Patient Protection and Affordable Care Act

Many employers are struggling to understand some of the more technical aspects of the Affordable Care Act (“ACA”) and its effect on employer budgets. Specifically, employers are looking for guidance on the complicated issue of how to determine whether workers qualify as full-time employees (“FTEs”) for purposes of the ACA’s employer shared responsibility provision and how to comply with the limitation on waiting periods before insurance coverage begins. Fortunately, the IRS has issued guidance that sheds light on the application of the employer shared responsibility rules and the 90-day waiting period limitation.

## The Basics of the Shared Responsibility Provision

Most employers are familiar with the individual mandate, which requires individuals to obtain health insurance either through their employer or through a covered Health Insurance

Exchange or face penalties. However, many employers remain confused about the employer mandate and basic requirements of the “shared responsibility” provision. The ACA’s employer shared responsibility provision applies to employers with 50 or more full-time employees or FTEs (employees working 30 or more hours per week). It requires such employers to provide FTEs “minimum essential coverage” or pay a penalty based on the number of FTEs that are not offered coverage. “Minimum essential coverage” means group health coverage under an eligible employer-sponsored group health plan, defined as a plan offered to employees of an employer that is a governmental plan or a plan or coverage available in the individual or group market.

Beginning in 2014, each covered employer will be assessed a penalty if any FTE is certified as eligible to receive a premium tax credit when buying insurance in a state-based

“health insurance exchange.” The annual penalty is \$2,000 per FTE in excess of 30 workers.

## New Safe Harbor Guidelines

The IRS’s guidance addresses “safe harbor” methods that employers may use to determine which employees are treated as FTEs for purposes of the employer shared responsibility provision. For ongoing employees, employers are generally permitted to apply a “look back” method that uses “standard measurement periods” and the “stability periods” that follow them. The “standard measurement period” is the period of time an employer chooses to apply to determine whether ongoing employees are FTEs. An “ongoing employee” is one that has been employed for at least one standard measurement period. The period must be at least three but not more than 12 consecutive months. The “stability period,” the period for which the employee’s status as an FTE or non-FTE is locked in regardless of hours worked, must run at least six calendar months and at least as long as the standard measurement period. An employee who does not average at least 30 hours per week during the standard measurement

**Bianca S. Watts** is an associate attorney at Wilke, Fleury, Hoffelt, Gould & Birney, LLP in Sacramento, California. Her practice includes employment litigation and general business litigation.

**Wilke, Fleury, Hoffelt, Gould & Birney, LLP**  
400 Capitol Mall, Twenty-Second Floor  
Sacramento, California 95814  
916.228.7755 Phone  
916.442.6664 Fax  
bwatts@wilkefleury.com  
www.wilkefleury.com

period can be treated as a non-FTE during the stability period that follows the standard measurement period.

Employers are also permitted to use an administrative period between the standard measurement period and the stability period to determine which ongoing employees are eligible for coverage and enroll these employees. This administrative period may last up to 90 days, but may neither increase nor decrease the measurement or stability period.

If a new employee is reasonably expected to work full time at the start date, no penalties will be assessed as long as the employer offers coverage to the employee before the end of the 90-day waiting period discussed in this article. There is also a special safe harbor for determining whether variable-hour and seasonal employees

are FTEs. Employers can determine whether these workers are FTEs using an initial measurement period of three to 12 months. The employer measures the hours of service completed during that period to determine whether an employee completed an *average* of 30 hours of service per week.

### The 90-Day Waiting Period Limitation

The ACA bars a group health plan from imposing a waiting period for enrollment in group health coverage of more than 90 days. “Waiting period” is defined as the period that must pass before coverage becomes effective for an employee or dependent who is otherwise eligible to enroll under a group health plan’s terms. The plan may impose other

substantive eligibility conditions as long as the condition is not designed to avoid the 90-day waiting period limitation.

### Notice of Liability

The IRS will inform employers of their potential liability for violation of the shared responsibility provision and provide them an opportunity to respond before any liability is assessed or notice and demand for payment is made.

### What This Means For You

To prepare for the employer mandate and avoid costly penalties, employers should have already taken a close look at the composition of their workforce to determine which employees qualify as FTEs. Employers with specific questions regarding their obligations under the ACA should consult an attorney. 

