



Affordable Care Act:

What Employers Need to Know to be in Compliance in 2014

October 2013

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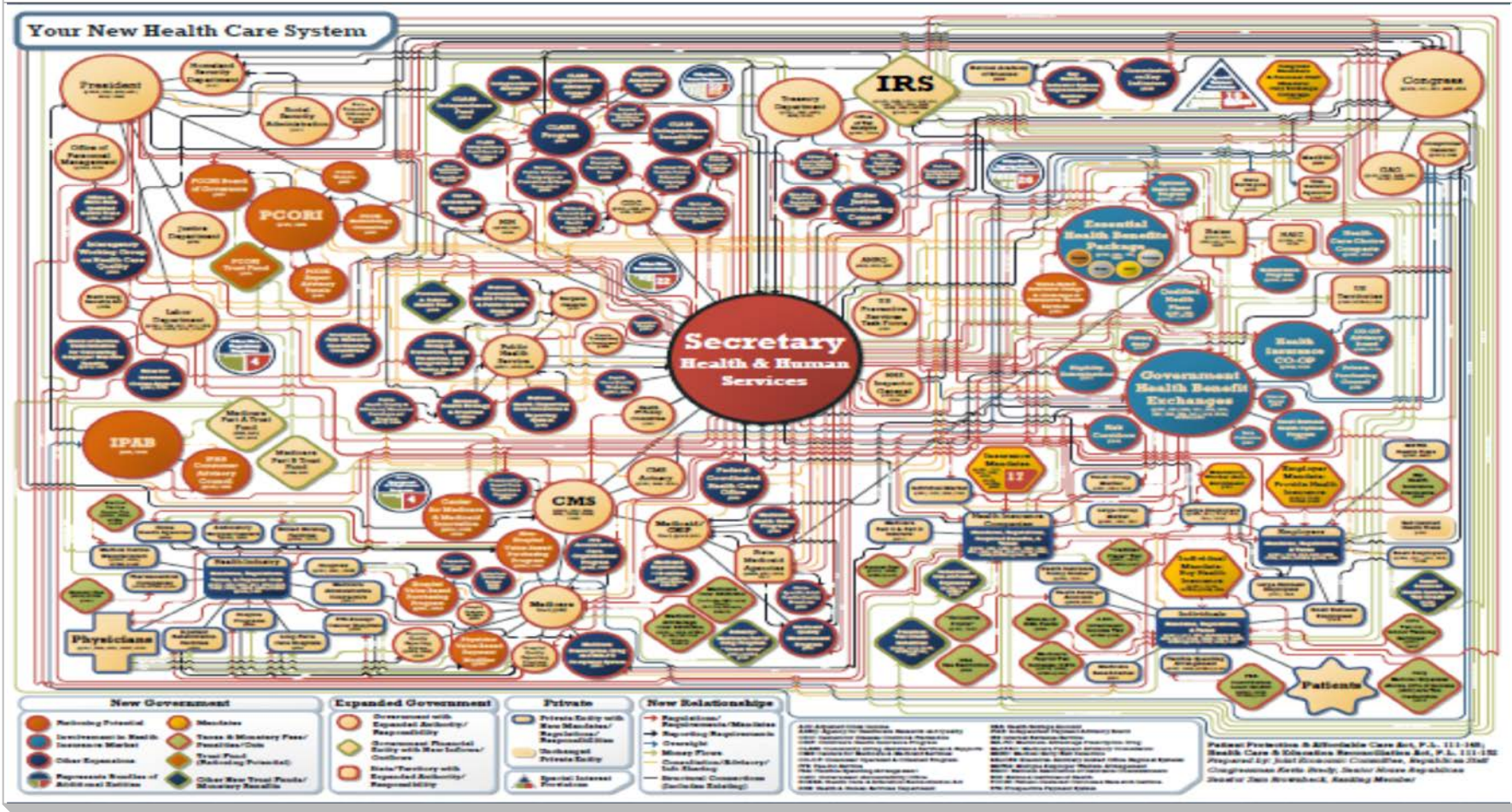
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Agenda

- Initial Observations
- Compliance Calendar Checklist: Important dates, past, present and future—Action Item Reminders
- Recent Developments in Health Care Reform
- Individual Mandates & Subsidies—What They Are and Why Employers Should Care
- Exchanges: What Are The States Doing & Not Doing
- The 90 Day Enrollment Rule
- Employer Shared Responsibility Requirements—A/K/A 2015's Play or Pay Mandates
- Taxes and Fees
- Q and A

Initial Observations about ACA



Compliance Calendar Checklist: Important dates, past, present and future—Action Item Reminders

2012

- Initial MLR Reporting (for CY2011) and Rebate issuance in August
- Women's Preventive Services expanded (plans renewing on or after 8/1/2012)*
- Summary of Benefits and Coverage (SBC) and 60-day advance notice of material modifications (plans renewing on or after 9/23/12)
- W-2 reporting of aggregate cost of employer-sponsored coverage on 2012 W-2

2013

- FSA contributions limited to \$2,500
- Medicare payroll tax rate increase for high income earners
- Notice to inform employees of Exchange provided by employer (by October 1, 2013)

2014

- | | |
|---|--|
| <input type="checkbox"/> Individual Mandate to purchase insurance or pay a penalty | <input type="checkbox"/> Coverage for clinical trials* |
| <input type="checkbox"/> Federal and State Insurance Exchanges, including Individual subsidies | <input type="checkbox"/> 90-day limit on Waiting Periods |
| <input type="checkbox"/> Guaranteed issue/availability* | <input type="checkbox"/> Employer annual reporting of employee coverage |
| <input type="checkbox"/> Pre-existing conditions prohibited | <input type="checkbox"/> Annual insurer industry fee for fully-insured plans |
| <input type="checkbox"/> Essential Health Benefits (EHB) Coverage standardized for small group plans* | <input type="checkbox"/> Reinsurer Fees through 2016 |
| <input type="checkbox"/> No Annual dollar limits on Essential Health Benefits (EHB) in any plan | <input type="checkbox"/> Wellness Incentives |
| | <input type="checkbox"/> Deductible caps of \$2k/\$4k for small group plans* |
| | <input type="checkbox"/> HDHP OOP Max for all non-GF plans* |

2015-18

- Employer Mandate in 2015**
- Exchanges may be open to all employers in 2017
- Individual Mandates Increased penalties start
- Cadillac Tax (2018)

* Certain exceptions may exist for grandfathered plans

Recent Developments in Health Care Reform

- On July 2 the IRS and the White House announced that:
 1. The annual reporting requirements for the employer “Play or Pay” mandate are delayed until January 1, 2015
 2. As a result of the delay of the annual reporting requirements, there will be no enforcement of the Play or Pay penalties for 2014
- Following the 4th of July, IRS Release Notice 2013-45 which formally confirmed the delay
 - This delay does not affect any other aspect of the ACA
- No guidance offered as to whether the 2014 transition relief will be available for 2015
 - Will non-calendar year plans have to comply by 1/1/15?

Recent Developments in Health Care Reform

- **New rule for plan years beginning on or after 1/1/14**
- **Out-of-Pocket Limits – Applicable to all non-grandfathered plans**
 - OOP limit on EHB's tied to the limit for HSA-qualified HDHPs
 - 2014 OOP limits for in-network care: \$6,350 single / \$12,700 family
 - Deductibles, coinsurance and copayments apply toward the limit
 - Additional regulatory guidance may be forthcoming; existing regulations apply only to Exchange plans
- **Transition Relief for Plans that use Multiple Service Providers**
 - Released as part of the DOL FAQ series in February 2013
 - Applies only to the first plan year beginning in 2014
 - Generally applicable to self-insured plans that use a PBM
 - Departments will consider a plan to have satisfied the OOP limits if:
 1. Plan complies with OOP limit for major medical coverage; and
 2. To the extent the plan includes an OOP limit on the other coverage (e.g., there is a separate OOP limit for Rx, it complies with the limit)



Recent Developments in Health Care Reform

- **New rules for plan years beginning on or after 1/1/14**
- Wellness Programs – **Applicable to all group health plans**
 - Premium differential increased to 30%
 - Tobacco differential increased to 50%
 - New Reasonable Alternative Standard notice
- Deductible Limits – **Applicable only to small group plans**
 - Deductibles cannot exceed \$2,000/\$4,000
 - Exception for plans that cannot meet stated actuarial value
- Premium Rating – **Applicable to individual and small group plans**
 - In 2014, carriers may vary premiums for non-grandfathered plans based only on age (3:1), tobacco use (1.5:1), family size, and geography
 - Should small employers consider renewing by December 2013?



Small Group Reminder

- **Small group health plans** are generally subject to all the same insurance mandates and market reforms as large group and self-insured group health plans, PLUS
 - Required to cover Essential Health Benefits
 - Deductibles cannot exceed \$2,000/\$4,000 single/family
 - Subject to Modified Community Rating (Fair Health Insurance Premiums)
- **“Small”** for Insurance/Exchange purposes: 100 or fewer employees on business days during preceding calendar year (states may reduce limit to 50 or fewer until 2016)
- **“Small”** for Play or Pay purposes: Less than 50 FTEs



Recent Developments in Health Care Reform

- Essential Health Benefits (EHB) Guidance Finalized
 - Starting in 2014, non-grandfathered individual and small group health plans must cover EHBs, satisfy cost-sharing limits and meet actuarial value limits
- Plans that do not have to cover EHB:
 - Grandfathered plans
 - Self-insured plans
 - Insured large group plans
 - If these plans cover EHBs, they cannot impose annual or lifetime limits on the dollar value of EHBs



Recent Developments in Health Care Reform

- Ten categories of Essential Health Benefits
 - Ambulatory patient services
 - Emergency services
 - Hospitalization
 - Maternity and newborn care
 - Mental health and substance use disorder services, including behavioral health treatment
 - Prescription drugs
 - Rehabilitative and habilitative services and devices
 - Laboratory services
 - Preventive and wellness services and chronic disease management
 - Pediatric services, including oral and vision care



Recent Developments in Health Care Reform

- Elimination of HIPAA creditable coverage notices
 - Proposed rules would eliminate the requirement to send notices of creditable coverage as of December 31, 2014

Recent Developments in Health Care Reform

- New Guidance on HRAs, FSAs from IRS and DOL
 - Also applies to arrangements that reimburse premiums for individual health insurance policies
- HRAs, FSAs, and “Employer Payment Plans” are generally group health plans for purposes of ACA
- Will qualify as “minimum essential coverage” for covered employees, unless they are “excepted benefits” under HIPAA
 - However, they also must comply with annual limit and preventive care requirements, unless they are integrated with a compliant group health plan (or are “excepted benefits”)
 - An HRA will not be considered “integrated” with an individual health insurance policy for purposes of satisfying the ACA’s annual limit rules or preventive care rules
 - “Defined contribution” model does not work if it reimburses premiums for individual health insurance policies



Recent Developments in Health Care Reform

- Employers can offer choice of taxable compensation or an after tax payment to be applied to health coverage
- Employers can forward premium payment to exchange, but arrangement generally must comply with the rules for “voluntary” plans under ERISA, with one such requirement being that the employees pay 100% of the cost of the coverage
- These rules generally eliminate tax preferences for employers that wish to reimburse employees for the cost of individual health insurance policies
- Does anything else work?



Reminder: Notice of Exchange Availability

- Two Model Notices: One for those offering insurance and one for those who don't
- Must be provided by October 1, 2013 to all employees—regardless of whether full- or part-time and regardless of whether eligible or not
- To new employee on the start date or within 14 days of the start date
- Delivery is by first-class mail or in accordance with the DOL's electronic disclosure requirements
 - Hand delivery should also be permissible



Reminder: Notice of Exchange Availability

- Notice of Exchange
 - Notice must inform employees that:
 - The employee may be eligible for a premium tax credit (subsidy) if he or she does not have access to affordable coverage and purchases qualified coverage through the Exchange
 - Purchase of health coverage through an Exchange will terminate eligibility for employer premium contributions (if any) to any health plan offered by the employer and that all or a portion of those employer contributions may be excludable from the employee's income for Federal income tax purposes



Reminder: Notice of Exchange Availability

- Model notice includes information employees will need to apply for coverage through an Exchange, including:
 - Employer name and Employer Identification Number
 - Employer address and phone number
 - The name, phone number and email address of an employer contact who can discuss employee health coverage with Exchange officials
 - Information about any health coverage offered by the employer, including whether health coverage is offered to some or all employees, eligibility criteria, and availability of dependent coverage
 - Whether the employer coverage meets the ACA’s 60% minimum value standard, and whether the cost of this coverage to the employee meets the “affordability test” under the ACA

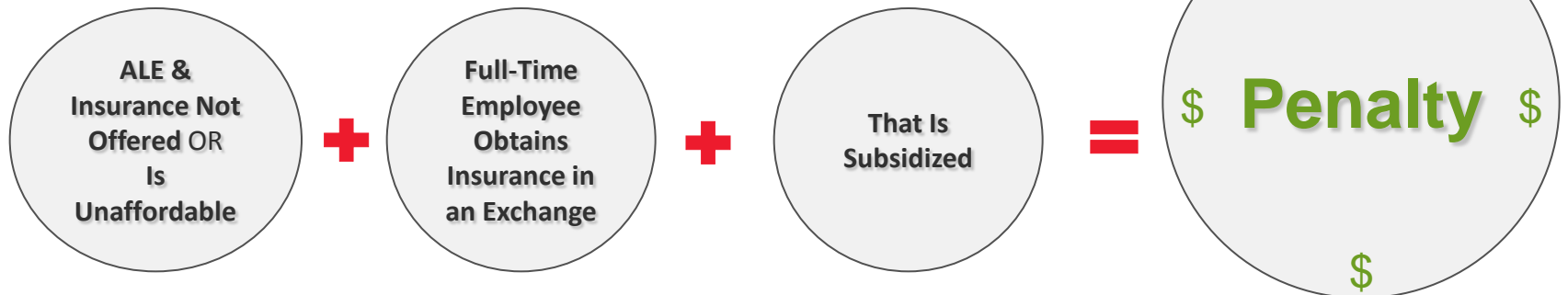


90 Day Limit on Waiting Periods

- Effective first day of plan year on or after January 1, 2014
- **Waiting period cannot exceed 90 days** from the first day of eligibility
 - E.g., coverage may be effective at midnight on the 91st day
- If employees can elect within 90 days but fail to do so, it is not a violation
- Employer may use a reasonable period to determine eligibility if (a) period is not designed to avoid the 90 day rule, (b) individual becomes eligible within 90 days of being assessed eligible or, if earlier, within 13 months of start date (plus the days to the first day of the next calendar month if the employee's start date is the middle of the month)

Play or Pay Requirement—Overview

- Play or Pay – **Delayed until 2015**
 - Applies to **Applicable Large Employers**
 - Employers with 50 or more **Full-Time Employees (Including Full-Time Equivalents (FTEs))**
 - Penalty if coverage is **not offered** or coverage is offered but it's not “**affordable**” or does not provide “**minimum value**” and a **Full-Time Employee** Receives A Subsidy in an Exchange



What Is An "Applicable Large Employer"

- An employer is an applicable large employer for a calendar year if: employed average of at least 50 full-time employees (including FTE's) during preceding calendar year
 - Full-time equivalent employees (e.g., part-time employees) are counted only for purposes of determining ALE status
 - Full-time equivalent employees are **NOT** counted for penalty purposes
- **To determine applicable large employer status**, count the employer's full-time employees (using a 30 hour per week standard) plus the result of dividing the hours of service (up to 120) of employees who are not full-time employees by **120 for each month**

What Is An "Applicable Large Employer"

- **Special Rule for Seasonal Employees:**

- Back out from calculation "seasonal employees" employed *no more than* 120 days (or 4 calendar months) during the preceding calendar year
- Until further guidance is issued, an employer may use a reasonable, good faith interpretation of existing Department of Labor guidance on the definition of seasonal employees
- **Note:** Applicable Large Employers are not held to the 4 month/120 day limit for seasonal employees when identifying full-time employees (i.e., an employee working in excess of 4 months may be considered "seasonal" for measurement/stability periods)



What Is An "Applicable Large Employer"

- **All counting done on a “controlled group” basis**
- **Separate Tax ID / EIN is irrelevant**
- **New Employers**
 - A new employer is an applicable large employer if it reasonably expects to employ an average of 50 or more full-time employees (including FTE’s) during the current calendar year and it actually employs an average of at least 50 full-time employees (including FTE’s) on business days during the calendar year

Play or Pay Requirements

Penalty for not offering minimum essential coverage

- Employers who do not offer health coverage to at least 95% of all full-time employees (and, starting in 2015, their children under age 26) are subject to a penalty
 - If at least one full-time employee (30+hrs/wk or 130+ hrs/mo) receives a subsidy to purchase Exchange coverage **for himself or herself**, the employer is subject to an annual penalty of \$2,000 × all full-time employees (reduced by 30)
 - Penalty is assessed monthly (\$167.67 per full-time employee per month)

Play or Pay Requirements

Penalty for employer that offers coverage, but it is not “affordable” or does not provide “minimum value”

- Coverage is "**affordable**" if the employee's cost for single coverage does not exceed 9.5% of household income (or Box 1 W-2 wages or another safe harbor)
- Coverage provides "**minimum value**" if it is expected to cover at least 60% of participants' covered expenses
- If 95% of FTEs offered coverage, 5% can trigger affordability penalty
- Annual penalty is \$3,000 for each full-time employee who receives a subsidy for Exchange coverage (not to exceed the "no coverage" penalty)
 - Penalty is assessed monthly (\$250 per subsidy-receiving full-time employee per month)



Play or Pay Requirements

Other Rules

- Determination *and* assessment of penalty is made with respect to each separate Applicable Large Employer Member (“ALE Member”)
 - Not across the controlled group
 - However, the “30 employee reduction” is allocated across the controlled group according to employer size
- If a full-time employee is employed by more than one ALE Member in a calendar month, the liability for any penalty is allocated among the different members based on the number of hours of service the employee had from each ALE Member that calendar month

Play or Pay Requirements

Other Rules

Affordability Safe Harbors

- **W-2 Safe Harbor**

- Affordable if required contribution for self-only coverage (excluding COBRA) does not exceed 9.5% of W-2 wages (Box 1)
- Determined after calendar year, on an employee-by-employee basis
- Contribution must remain consistent (amount or %) during the year
 - But employer may require a contribution that is based on a consistent percentage of W-2 wages and subject to a dollar limit specified by the employer (e.g., contribution may be set 9.5% of wages up to \$100)
 - Prorated for partial periods of coverage

Play or Pay Requirements

Other Rules

- **Rate of Pay Safe Harbor:**

- Affordable if required monthly contribution does not exceed 9.5% of an amount equal to 130 hours multiplied by the employee's hourly rate of pay
- For salaried employees, monthly salary is used instead of 130 multiplied by the hourly rate of pay
- Available as long as employer does not decrease an employee's rate of pay during the year

- **Federal Poverty Line Safe Harbor:**

- Affordable if required monthly contribution does not exceed 9.5% of a monthly amount determined as the Federal poverty line (FPL) for a single individual for the applicable calendar year, divided by 12
- FPL is the FPL for the state in which employee is employed



Play or Pay Requirements

- Wellness Program Incentives
- Wellness plan surcharges must be included in the premium calculation for affordability, EXCEPT for:
 - Surcharges based on smoking cessation that are part of a compliant wellness program; and
 - For the 2014 plan year, surcharges for any DOL-compliant wellness program can be excluded from the affordability calculation, but only to the extent of the terms of the wellness program in effect on May 3, 2013



Play or Pay Requirements

Annual Open Enrollment Requirement

- To avoid a potential penalty, an employer must provide employees with an effective opportunity to enroll (or decline coverage) at least once each plan year
- An employer cannot render an employee ineligible for a premium tax credit by requiring the employee to enroll in unaffordable coverage
- An employee's failure to make a timely premium payment may result in termination of coverage without the employer becoming liable for an affordability penalty

Play or Pay—Who Is A Full-Time Employee?

Hours of Service Rules

- Hours of service include **PAID**: vacation, holiday, illness, incapacity, layoff, jury duty, military duty or leave of absence
- Hours worked outside US disregarded if not US source income
- If not full-time and actual hours not tracked, employer must:
 - Use actual hours of service and hours for which payment is made or due, or
 - Use equivalency method
 - 8 hours of service per day if employee works at least one hour, or
 - 40 hours of service per week if employee works at least 1 hour per week
 - Method must generally reflect actual hours worked

Play or Pay—Who Is A Full-Time Employee?

Hours of Service Rules

- Employers with:
 - Adjunct faculty members
 - Employees paid on commission
 - Transportation employees (e.g., airline pilots)
 - Other analogous employment positions
- May use a “reasonable method” for crediting hours of service
 - Adjunct faculty: a reasonable method would account for hours necessary to perform the employee's duties, such as time spent preparing for class
 - Traveling salesperson paid on commission: a reasonable method would account for travel time to/from appointments

Play or Pay—Who Is A Full-Time Employee?

Employees Rehired or Returning From a Leave of Absence

- Break of 26 consecutive weeks may result in treatment as a new employee
- Parity Rule: If break is between 4 and 26 weeks and exceeds length of pre-break employment, may treat returning employee as new employee
- Employee treated as a continuing employee returns to the measurement and stability period that would have applied had the employee not been on leave
- Continuing employees must be reinstated as soon as possible upon resumption of services

Play or Pay—Who Is A Full-Time Employee?

Employees Returning from FMLA or USERRA

- For periods of unpaid FMLA or USERRA, and for unpaid leave for jury duty (“**special unpaid leave**”), average hours per week **exclude** the special unpaid leave period—employer must use average for paid hours as average for entire measurement period
 - Alternatively, employees may be credited with hours of service for special unpaid leave at same rate as for non-special unpaid leave



Play or Pay—Who Is A Full-Time Employee?

Teachers and Other Employees of Educational Institutions

- Traditional breaks in the academic year such as winter or spring breaks will often be periods of paid leave
 - During periods of paid leave, employees are required to be credited with hours of service
 - Rules for returning/rehired employees generally result in an employee who works full-time during the active portions of the academic year being treated as a full-time employee

Play or Pay—Who Is A Full-Time Employee?

Optional Look-Back Measurement Method

- Optional method for determining full-time status
- Key Terms:
 - “**Measurement Period**” (a/k/a “Look Back Period”)
 - “**Standard Measurement Period**” for *ongoing* employees
 - *Ongoing* employees have worked for the employer for at least one standard measurement period
 - “**Initial Measurement Period**”—for new employees
 - “**Administrative Period**”
 - “**Stability Period**”



Examples of Look-Back Periods (Ongoing EEs)

3 Month Look-Back (Ongoing Employees)

2013	2014 Calendar Year						2015 Calendar Year						2016 Calendar Year																								
N	D	J	F	M	A	M	J	J	A	S	O	N	D	J	F	M	A	M	J	J	A	S	O	N	D	J	F	M	A	M	J	J	A	S	O	N	D
Not Applicable							Look-Back	Admin	Std. Stability Period																												
							Look-Back	Admin	Std. Stability Period																												
								Look-Back	Admin	Std. Stability Period																											

6 Month Look-Back (Ongoing Employees)

2013	2014 Calendar Year						2015 Calendar Year						2016 Calendar Year																								
N	D	J	F	M	A	M	J	J	A	S	O	N	D	J	F	M	A	M	J	J	A	S	O	N	D	J	F	M	A	M	J	J	A	S	O	N	D
Not Applicable				Std. Look-Back				Admin	Std. Stability Period																												
								Std. Look-Back	Admin	Std. Stability Period																											

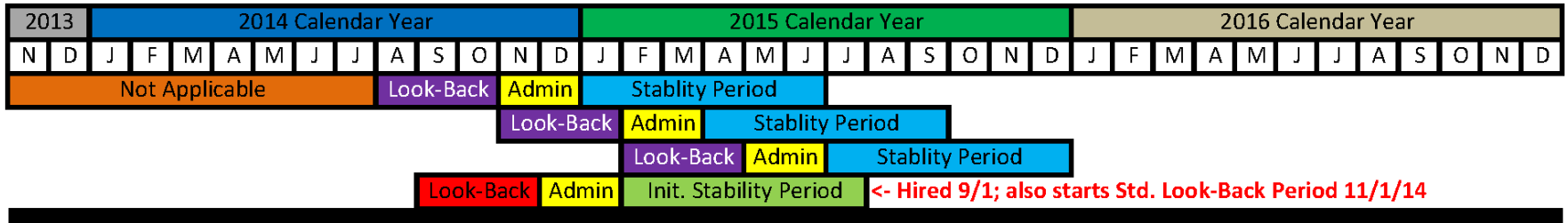
12 Month Look-Back (Ongoing Employees)

2013	2014 Calendar Year						2015 Calendar Year						2016 Calendar Year																								
N	D	J	F	M	A	M	J	J	A	S	O	N	D	J	F	M	A	M	J	J	A	S	O	N	D	J	F	M	A	M	J	J	A	S	O	N	D
Standard Look-Back Period											Admin	Standard Stability Period																									
											Standard Look-Back Period											Admin	Standard Stability Period														

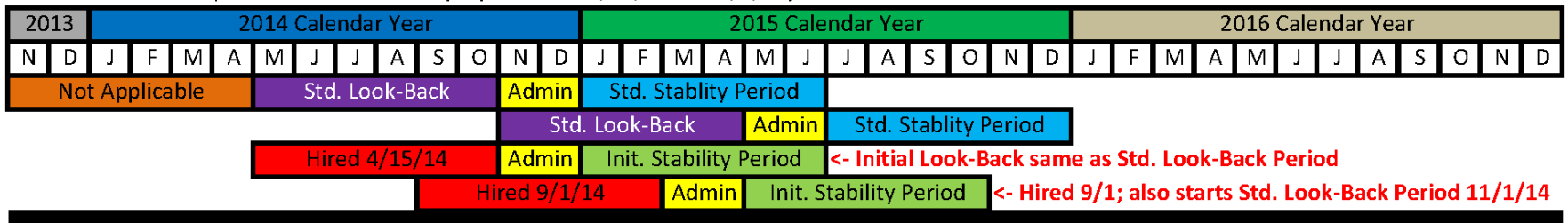


Examples of Look-Back Periods (New EEs)

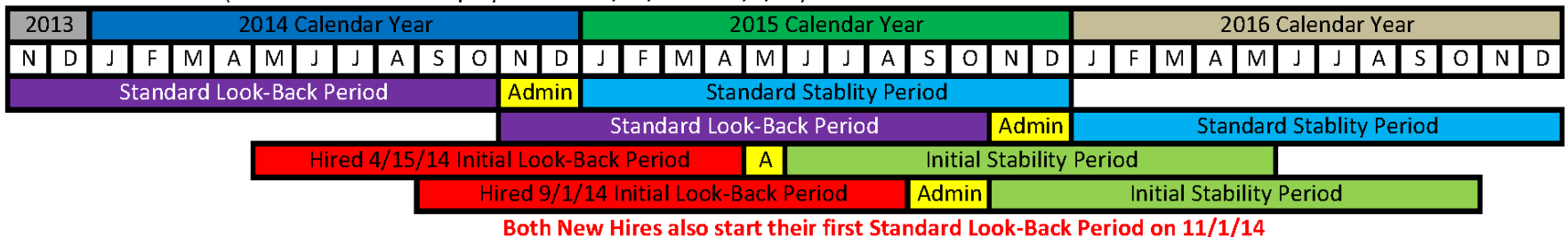
3 Month Look-Back (New Variable Hour Employee Hired 9/1/14)



6 Month Look-Back (New Variable Hour Employees Hired 4/15/14 and 9/1/14)



12 Month Look-Back (New Variable Hour Employees Hired 4/15/14 and 9/1/14)





Play or Pay—Who Is A Full-Time Employee?

- Employers can choose measurement, stability and administrative periods for ongoing employees—but determination must be uniform and consistent for all employees in same category
- Four permissible categories
 - Collectively bargained employees and non-collectively bargained employees
 - Each group of collectively bargained employees covered by a separate collective bargaining agreement
 - Salaried employees and hourly employees, and
 - Employees whose primary place of employment are in different states
- Employer may choose same periods for all ongoing employees
- Stability period for new hires must be same length as that for ongoing employees



Questions?

- **For Health Care Reform related resources visit:**
<http://www.proskauer.com/practices/health-reform-task-force/resources/>
- **Our new ERISA blog will also have health care reform developments. Join at:**
<http://www.erisapracticecenter.com/>

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