

# HIPAA and Health Care Reform: New Obligations, New Risks

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# Topics for Today

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- HIPAA's new regulations
- Health care reform
  - Political / regulatory forecast
  - Highlights from recent guidance
  - Seven steps to Pay or Play Rule
- Questions

# Who is Subject to HIPAA?

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- HIPAA applies to “covered entities” and, now “business associates”
- “Covered entities” usually:
  - Health care providers who conduct a “Standard Transaction”
  - Health plans
- Health plans include employer-sponsored group health plans
  - Major medical; dental; vision; health FSA; HRA; EAP; wellness
  - More of an impact if self-funded (rather than fully-insured)



# HIPAA and Health Care Reform

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- Health care reform (Affordable Care Act) made some changes to HIPAA
- New Standard Transactions
  - Electronic funds transfer (regulations 1/2012; effective 1/2013)
- Follow Operating Rules
  - Staggered effective dates
  - Eligibility for health plan and health care claim status regulations issued in 2011
    - Effective January 2013
  - Others take effect in 2014 and 2016

# Overview – Health Care Reform

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- Unique health plan identifier
  - 9/2012 HHS issued final regulations
  - Health plans apply for a unique number for Standard Transaction purposes
  - Large health plans need one by 11/2014
  - Small receive extra year; use by 11/2016
- New “employer certification” requirement by end of 2015 / 2016
  - Certify compliance with certain Transactions and Operating Rules
  - No regulations yet (so details unknown)
  - Penalty range as low as \$1 per covered life per day
- Action step: Update business associate agreements for these terms
  - Note: HHS model BAA does not include these items

# New Regulations

- Very long but maintain many prior proposed changes
- Generally, follow by September 23, 2013
  - E.g., updates to notices of privacy practices and policies and procedures (discussed later)
  - General “catch-all” provision would not be sufficient
- Changes to business associate agreements (“BAAs”):
  - Complicated determination of whether to update by 9/23/2013 or 9/23/2014
  - Action Step: Finalize soon if not already done

# Applying Rules to Business Associates

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- Some Privacy Rules and all Security Rules now apply directly to business associates
- “Subcontractors” (a “business associate” of a “business associate”) also must comply
  - And subcontractors of subcontractors, etc.
- Action Step: Identify whether you are a BA
  - If so, identify your subcontractors
  - Prepare your own policies and procedures

# New Breach Notification Rules

- If: (1) covered entity or business associate accesses, maintains, retains, modifies, records, stores, destroys or otherwise holds, uses or discloses “unsecured protected health information” and (2) there is a “breach” of such information; and (3) the breach is “discovered”; then (4) notification rules apply
- Covered entities and business associates follow rule
  - New regs: For this (and other obligations) plan can require BA to conduct on behalf of plan
  - If so, must include in business associate agreement
  - Plan still liable

# Defining “Breach”

- (1) Nature and extent of PHI involved
  - Including types of identifiers and likelihood of re-identification
- (2) Unauthorized person who used / received PHI
- (3) Whether PHI was actually acquired or viewed
- (4) Extent to which the risk to the PHI has been mitigated

# Defining “Breach”

- All should be documented
  - Plan may want BA to do assessment and provide it to plan
  - New regs: Burden of proof on plan / BA to prove no breach occurred
  - Make notification without "unreasonable delay", no later than 60 calendar days of breach discovery
  - New regs: Can send one notice addressed to participant and spouse / dependent as long as all reside at single address AND notice “clearly identifies” individuals to which notice applies
- Action Step: Update your policies and procedures, related forms, possibly plan amendment and notice of privacy practices

# Access to PHI

- Individuals have right to access and obtain copy of PHI in designated record set
- Previously had 60 days to respond – now usually 30
- New regs: Plan must, if requested by individual, send PHI directly to another designated person
  - Request to do so “must” be in writing, signed by individual and must clearly identify recipient
- Can still charge reasonable, cost-based fees
  - New regs: No standard “retrieval fee”
  - New regs: Can include cost of CD (if that is what individual requests)
- Action Steps: Update policies and procedures, forms, BAAs

# Restriction Request Rules

- Individual can make restriction request under 164.522
  - and covered entity usually can deny it
- Under HITECH, covered entity must comply with request if:
  - Disclosure is to a health plan for purposes of carrying out payment or health care operations (but not treatment) and
  - PHI pertains solely to a health care item or service for which the health care provider has been paid out of pocket in full
- New Regs: Rule only applies to providers (not health plans)
  - But, only in preamble, not regs themselves
- Action Step: Update policies and procedures, forms, BAAs

# New Accounting Rules

- New Regs: If individual requests electronic copy of PHI and if PHI maintained electronically, plan must provide access to it in electronic form and format requested
- If not possible, provide “machine readable” copy
  - Includes Word, Excel, text, HTML, PDF
- Consider risks of allowing direct download on individuals’ portable devices
- Action Steps: Update policies and procedures, forms, BAAs

# Other Changes

- Generally no “sale” of PHI
- Decedent’s PHI not protected after 50 years (and easier to disclose to family members)
- GINA change: State specifically that genetic information is PHI
- Action Steps: Update notice of privacy practices, policies and procedures, forms

# Other Action Steps

- Update notice of privacy practices
- Also must state authorization usually needed for:
  - Most uses and disclosures of psychotherapy notes
  - Uses and disclosures for marketing
  - Sale of PHI
  - Other uses and disclosures not described in notice made only with authorization from individual
- Some new distribution rules
  - If have web site, post by effective date
  - If not, provide it within 60 days of material revision

# Health Care Reform: Regulatory Forecast

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- Large number of “open” issues
- Automatic enrollment (likely 2015)
- Nondiscrimination rules
- Employer interaction with Exchanges
  - E.g., will employers “dump” sick employees to Exchange? HIPAA / nondiscrimination issues?
  - Can hospitals pay for Exchange coverage?
- More Pay or Play guidance
- Mental Health Parity Act guidance (now out – comply in 2014 / 2015)

# New Fees

- New PCORI and reinsurance fee
- Recently released: Form 720 (to report PCORI)
  - Generally file by July 31, 2013 if plan year ended on or after October 1, 2012 (but before January 1, 2013)
- \$1 per covered life for PCORI
- Generally applies to major medical plans
- In distance, “Cadillac” tax looms (2018)

# Reinsurance Fee

- \$63 per “belly button” fee
- First payable in December 2014 / January 2015
- Evaluate how to determine number of covered participants
- New regulations require 10-year (!) records retention rules
  - Require TPAs to hold records for that long?
  - New guidance indicates that self-funded, “self-administered” plans will avoid 2015, 2016 fees

# Future Reporting

- Pay or Play Rule delayed because IRS failed to issue reporting requirements for employers
  - Now first report due early 2016
- Minimum essential coverage reporting
  - Needed because IRS needs to know if employer offered employee and family affordable, minimum value MEC
  - Generally for major medical (and HRAs during spend-down)
  - Goes to employee and IRS
  - Large amount of information to report, but key is Social Security number of covered individuals

# Future Reporting

- Applicable large employer reporting
  - Needed to determine if large employer offered affordable, minimum value MEC to full-time employees and family
  - Does not appear to apply to retiree coverage
  - Information to report includes which employees were “full-time” and whether they were offered affordable, minimum value MEC
  - Also, months covered or if not covered, why (e.g., waiting period)

# Seven Steps to Understanding Pay or Play

- Understand general Pay or Play Rule concepts
- Is the employer a “large employer”?
- Will any employees receive federally-subsidized Exchange coverage?
- Does the employer offer minimum essential coverage under an employer plan?
- Does the plan provide minimum value?
- Is the plan’s coverage affordable and offered to all full-time employees?
- If applicable, calculate and pay the penalty

# Step 1: Understand General Rules

- Today: Employer can refuse to offer coverage without any federal penalty
- January 1, 2014: Employers are not required to provide health insurance to employees, but tax applies if full-time employee receives federally-subsidized Exchange coverage
  - No exclusion for governmental, church or non-profit employers
  - New: July guidance delays rule until 2015
    - Presumably January 1, 2015
  - Employers likely must measure in 2013 / 2014 to know who is full-time as of January 1, 2015

# Possible Penalties

- **No Offer Penalty:** If employer does not offer minimum essential coverage:
  - \$2,000 (annual, but calculated on monthly basis) tax per full-time employee, if at least one full-time employee obtains federally-subsidized Exchange coverage
  - Calculated after first 30 employees; 5% de minimis
- **Unaffordable Coverage Penalty:** If employer does offer minimum essential coverage but at least one full-time employee obtains federally-subsidized Exchange coverage:
  - Tax is lesser of \$3,000 per subsidized full-time employee, or \$2,000 per all full-time employees (annual, but calculated on monthly basis)

# Step 2: Is the Employer a Large Employer?

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- Check if employer has at least 50 full-time (including full-time equivalent (FTE)) employees during preceding calendar year
  - 6-month transitional rule for 2013
- Includes common law employees, FTE part-time, FTE seasonal, controlled group
- IRS guidance defines “employee” as: “a worker who is an employee under the common-law test” (apparently excludes independent contractors)
- For purposes of determining whether the rule applies, a “full-time” employee is an individual with 30+ “hours of service” per week
  - IRS: 130 hours of service in a calendar month = 30 hours of service per week

# Step 2: Is the Employer a Large Employer?

- Steps 2(a - c): Special rules for counting full-time employees (controlled group, predecessor and new employers)
- Controlled group rules similar to those for retirement plan purposes (use Code Section 414 definition)
  - So, 100% owner usually cannot divide a 200-employee company into five 40-employee companies to avoid the Pay or Play Rule
  - Penalty \*not\* applied on controlled group basis
- Other “anti-abuse” rules also apply
  - E.g., XYZ Co. and Staffing Co. “divide” employee so employee works 20 hours / week for each

# Step 3: Will Employees Receive Subsidized Exchange Coverage?

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- Always possible for an employer (with help from insurer / TPA) to design health plan so employer never faces Pay or Play Rule penalty
  - But may require plan design changes and employer must follow three requirements
  - (a) Offer “Minimum Essential Coverage” under an “eligible employer-sponsored plan” to all its full-time employees (and, perhaps, dependents) who are eligible for subsidized Exchange coverage
  - (b) Ensure employer’s plan provides “Minimum Value”
  - (c) Ensure employee’s share of premium for self-only coverage for employer’s lowest-cost, Minimum Value plan is “Affordable”
- Steps 4 – 6 discuss each point

# Step 4: Offer Minimum Essential Coverage?

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- Easy test – generally, if offer major medical coverage
- What does it mean for employer to “offer” coverage?
  - IRS regulation: Must have opportunity to enroll (or not enroll) once per year
  - Appears PEO could offer on behalf of client

# Step 5: Does Plan Provide Minimum Value?

- “Minimum value” definition under ACA: “plan’s share of the total allowed cost of benefits provided under the plan is less than 60 percent of such costs”
- IRS will examine typical benefits provided by other employers and use that as standard
- IRS and HHS have discussed “calculators” and “checklists” to simplify determination
  - Minimum value calculator released
  - Available at [cciio.cms.gov/resources/files/mv-calculator-final-2-20-2013.xlsm](http://cciio.cms.gov/resources/files/mv-calculator-final-2-20-2013.xlsm)
  - May 3 regulation clarifies whether wellness discounts for deductibles and other cost-sharing are considered
    - Yes, if discount is tobacco-related
  - Preamble to May 3 regulation discusses certain design-based safe harbors
  - Previously, IRS indicated that 98% of employees in US covered by plan that was expected to pass this test

# Step 6: Is Plan Coverage Affordable?

- Employee can obtain subsidized Exchange coverage if income at least 100% of federal poverty level (“FPL”) and not more than 400% FPL (about \$92,000 today for a family of four) and either:
  - Poor Plan (No “Minimum Value”): Plan pays less than 60% of total benefits allowed under plan; or
  - Costs Too Much: Employee’s share of premium for employee portion of “self-only” coverage for employer’s lowest-cost coverage that provides minimum value > 9.5% of employee’s “household income”
- IRS: Employers allowed to use W-2 wages or two other “safe harbors”
  - Rate of pay
  - Federal poverty line

# Step 7: Determine “Full-Time” Employees and Calculate the Penalty

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- Must employer determine who is a “full-time” employee?
  - Theoretically “no” – but employer would need to promptly offer coverage to all employees
  - Could determine on month-by-month basis (but administratively difficult)
- Who is a “full-time” employee?
  - New guidance (IRS Notice 2012-58 and January 2, 2013 regulation) more complicated than prior guidance
    - Does provide helpful clarifications and certainties
    - Can rely on through 12/31/2014

# Step 7: Determine Who is a “Full-Time” Employee?

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- Generally divide employees into different categories
  - Ongoing Employee
  - New Employees
    - New, Full-Time Employee
    - New, Variable Hour Employee
    - New, Seasonal Employee
  - Part-Time Employees

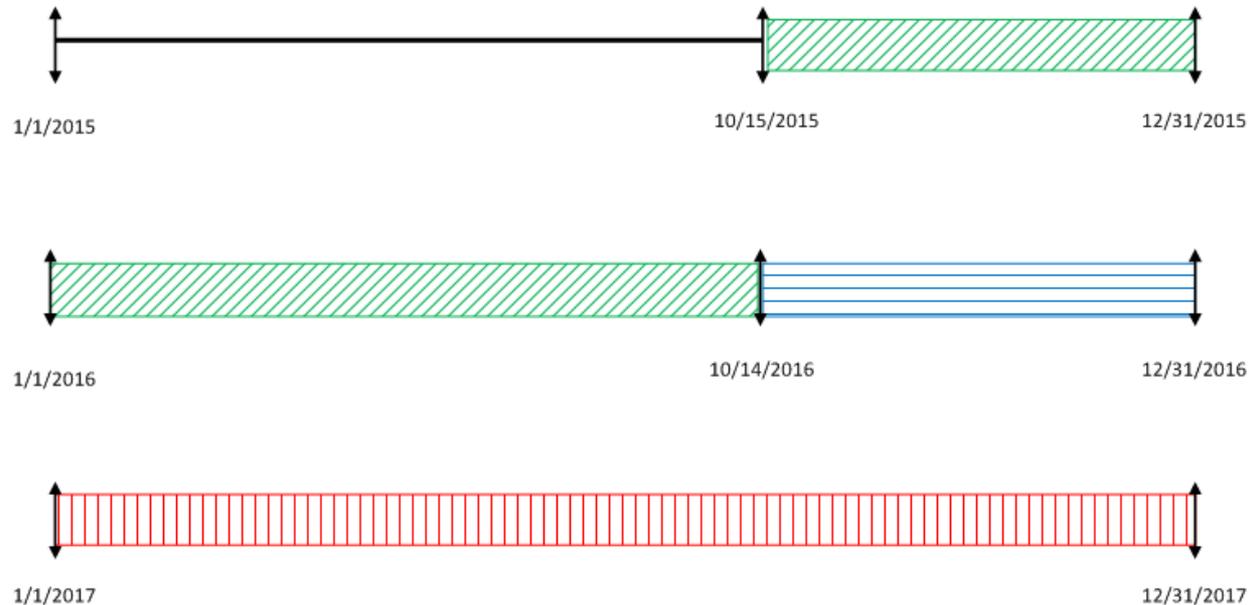
# Step 7: Ongoing Employees

- Employer selects Standard Measurement Period
  - 3-12 month period in which employer will determine whether employee has worked on average 30 hours per week
  - Employer chooses when it starts and ends
- If Ongoing Employee is a full-time employee, he is “protected” and remains full-time employee during subsequent Stability Period
  - Stability Period must be at least 6 consecutive calendar months
    - Leads to awkward results if 3-month Measurement Period selected
  - Stability Period generally cannot be shorter than Standard Measurement Period
- Start of Stability Period can be delayed for up-to-90-day Administrative Period
  - Allows employer to calculate employee’s hours, answer questions from employees, collect materials from employee, etc.

# Step 7: Ongoing Employees

## Illustration of Full-Time Employee Time Periods

In this example, assume Employer uses a 12-Month, October 15-based Standard Measurement Period. Employer also uses a 12-Month Stability Period and 2½ month Administrative Period. Assume Employer hired Alex the Employee as a full-time employee in 2007 and Alex has worked continuously since then as a full-time employee of Employer.



Standard Measurement Period – Alex’s hours during this time are measured



Administrative Period – Employer checks to see if Alex is still full-time. If so, Employer offers coverage to Alex



Stability Period – If Alex enrolls for coverage, Alex continues to be covered during this time

# Step 7: New Employees Expected to be Full-Time

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- No Pay or Play Rule penalty if employer offers health plan coverage at or before conclusion of employee's initial three full calendar months of employment
- E.g., Goodco hires Frank on 6/15/2015. Is first month of June “ignored” because it is not a “full” month? Or does period from 6/15 – 7/14 count as first “full” month?
  - Best answer seems to be enroll by October 1
  - New “orientation period” rules also allow brief delay

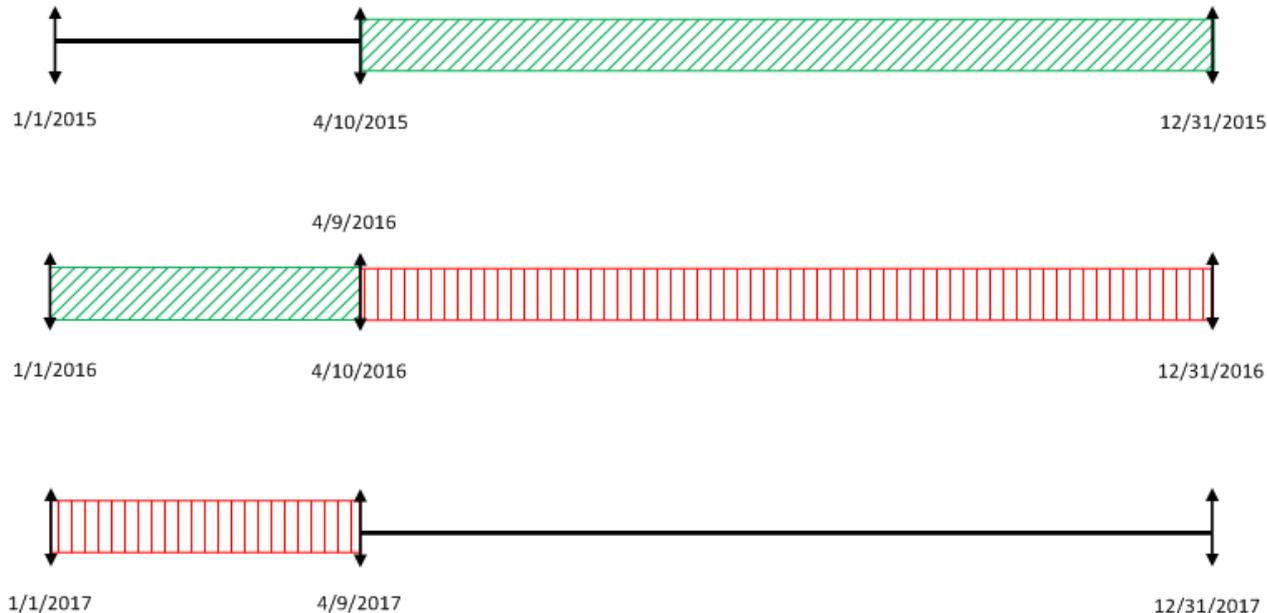
# Step 7: New, Variable Hour Employee

- Usually Variable Hour and Seasonal Employees treated the same
- Technically, Variable Hour Employee involves New Employee with uncertain future hours (not known if will average 30 hours / week)
  - Employment status change requires health plan coverage by 1st day of 4th month after change
  - Effective 1/1/2015, employer must assume that although employee's hours of service may vary, employee will continue to be employed for entire "Initial" Measurement Period
- Employer measures full-time status using "Initial" Measurement Period (not a "Standard" Measurement Period)
  - Also a period between 3 – 12 months
  - Employers may want shorter period (e.g., 11 months) due to special rule (discussed later)

# Step 7: New, Variable Hour Employee

## Illustration of New, Variable Hour Employee (No Administrative Period)

For New Employees, the Employer uses an initial Measurement Period which begins on the first day of employment and ends 12 months later. Employer also uses a 12-Month Stability Period and no Administrative Period. Assume Employer hired Betty the Employee as a Variable Hour Employee on April 10, 2015.



Betty's Initial Measurement Period – Employer checks to see if Betty is full-time



Betty's Stability Period – If Betty enrolls for coverage effective 4/10/2016, Betty is covered during this time, until her Stability Period ends after 12 months (here, 4/9/2017)

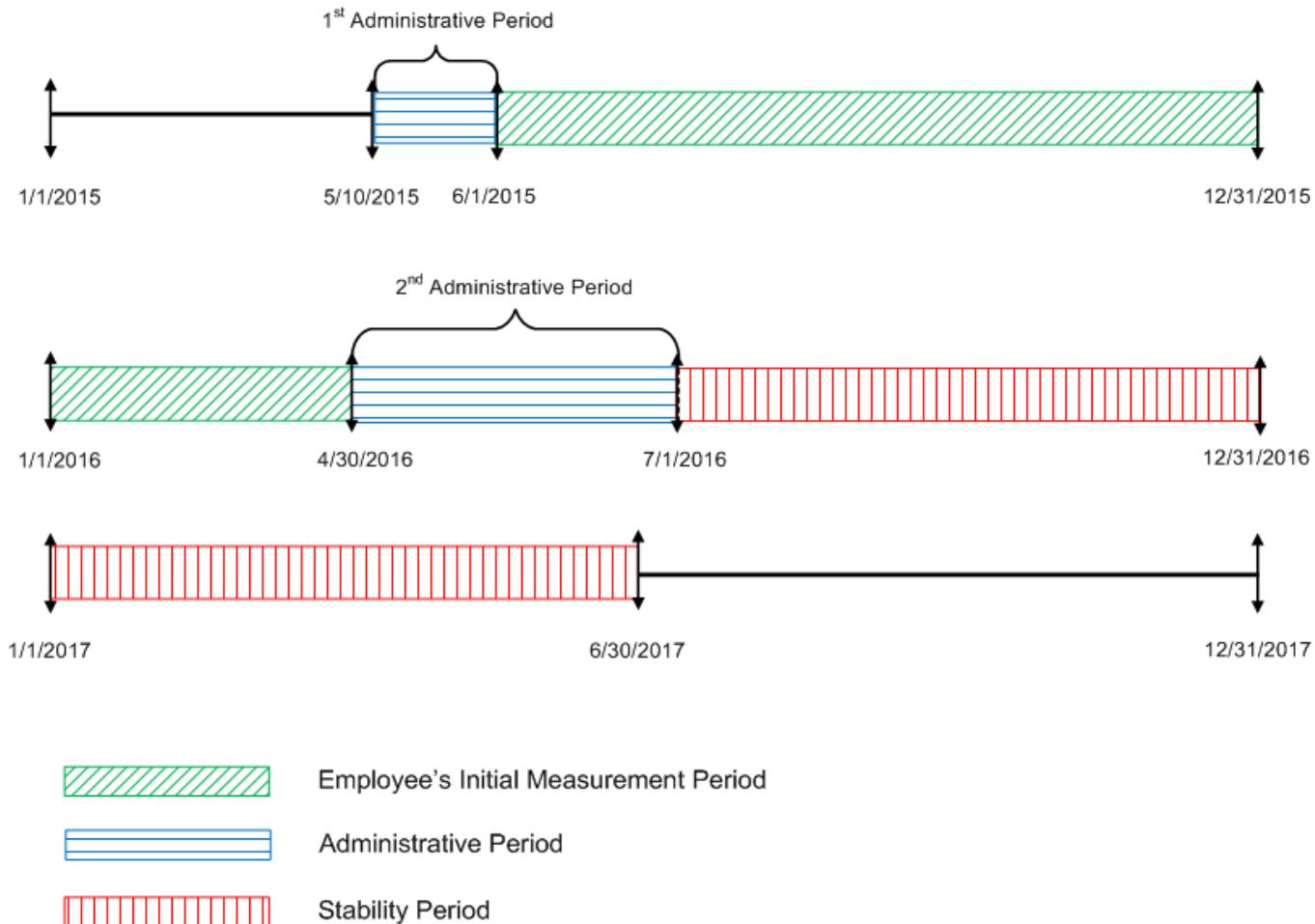
# Step 7: New, Variable Hour Employee

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- For Variable Hour Employee, employer can “split” Administrative Period
- Helpful to make dates “easier” (e.g., start counting as of first of month)
- However, special rule: combined Initial Measurement Period and Administrative Period may not extend beyond last day of first calendar month beginning on or after one-year anniversary of employee’s start date
  - Totals, at most, 13 months and a fraction of a month
  - Prevents employer from having 12-month Measurement Period and 90-day Administrative Period

# Step 7: New, Variable Hour Employee

## Acceptable Split Administrative Period (11-Month Measurement Period)



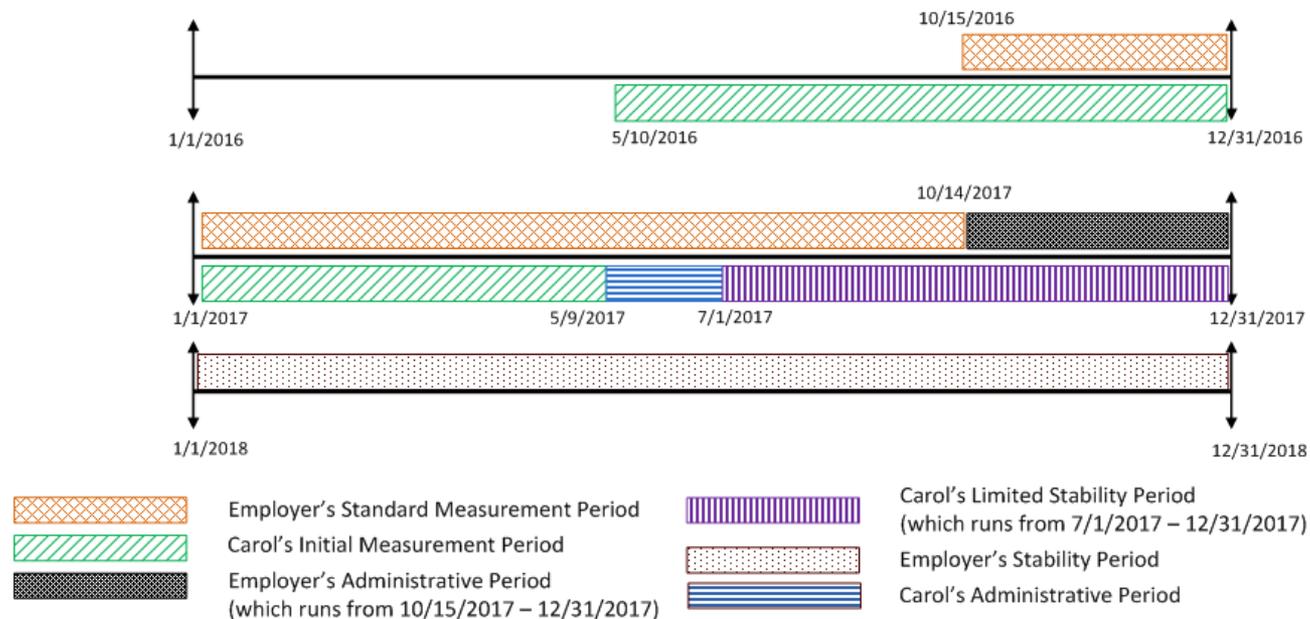
# Step 7: New, Variable Hour Employee

- If Variable Hour Employee not treated as full-time during Initial Measurement Period, employer can treat employee as not “full-time” for a “Limited” Stability Period
- Limited Stability Period:
  - Must not be longer than one month longer than the Initial Measurement Period
  - Must not exceed remainder of Standard Measurement Period (and any associated Administrative Period) in which Initial Measurement Period ends
  - Appears to be designed to allow employee to “re-qualify” quickly for full-time status

# Step 7: New, Variable Hour Employee

## Illustration of New, Variable Hour Employee (Limited Stability Period)

In this example, assume Employer uses a 12-Month, October 15-based Standard Measurement Period for Ongoing Employees. For New Employees, the Initial Measurement Period begins on the first day of employment and ends 12 months later. An Administrative Period is used for these New, Variable Hour Employees, where the Period runs until the end of the month after the Initial Measurement Period ends. For Ongoing Employees, Employer uses a 12-Month Stability Period which begins on January 1 and a 2½ - month Administrative Period. Assume Employer hired Carol the Employee as a Variable Hour Employee on May 10, 2016. Assume Carol only averages 28 hours during the Initial Measurement Period of May 10, 2016 – May 9, 2017, but 30.0 hours during the 10/15/2016 – 10/14/2017 Standard Measurement Period.



Thus, the net effect is that:

- Carol is not offered coverage from the start date (May 10, 2016) through all of 2017
- Because Carol was not deemed full-time during her unique Initial Measurement Period, Carol receives another chance to qualify for full-time status. Employer must count the hours Carol worked from October 15, 2016 – October 14, 2017 (the Standard Measurement Period which applies to Ongoing Employees – even though Carol is not an Ongoing Employee as of the start of that Standard Measurement Period).
- Although Employer may want to “lock in” Carol as a Part-Time Employee who is not eligible for plan coverage from July 1, 2017 – June 30, 2018 (the typical 12 months) Employer cannot do this. Carol's average of 30 hours during the overlapping Standard Measurement Period of October 15, 2016 – October 14, 2017 “controls.” Carol becomes a Full-Time Employee on January 1, 2018 and receives plan coverage.

# Step 7: Seasonal Employees

- Under prior IRS guidance (Notice 2012-17) appeared Seasonal Employees could never be deemed “full-time” (even if working 30+ hours)
- Now, key seems to be length of Initial Measurement Period (and Administrative Period) selected by employer
  - Long periods will prevent Seasonal Employees from being “full-time”
- E.g., Little Ski Hill has a 3-month Initial Measurement Period from 11/15/2015 – 2/14/2016. Administrative Period lasts until first of month following end of Initial Measurement Period.
  - Little Ski Hill hires Ted on 11/15, who works 60 hours per week entire time
  - Ted’s Initial Measurement Period ends 2/14/2016
  - Ted’s Administrative Period ends 2/28/2016
  - Ted seems to be “full-time” as of 3/1/2016 (before he terminates employment on 3/15)

# Examples of Penalties (Pay AND Play)

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- Generous Co. has 1,000 full-time employees. Generous Co. offers excellent health plan to 940 employees. However, a group of 60 employees in remote locations have never received coverage. All employees are full-time. Could Generous Co. face a penalty? If so, how much?
- Penalty is possible. 5% de minimis rule likely does not apply
- 60 full-time employees may be eligible for Exchange subsidy
- If penalty applies, Generous Co.'s annual penalty would be:
  - $((1,000 - 30) = 970) \times \$2,000 = \$1,940,000$
  - Large penalty considering Generous Co. is providing rich health plan coverage to 94% of workforce
  - Worst of all worlds for employer – want to avoid this through plan design (or hope to be lucky!)

# Practical Considerations

- Will almost certainly require insurers / TPAs / employers to make some plan changes
  - E.g., if employer sets eligibility using “expected to work 30+ hours per week”, have Pay or Play Rule risk
  - Thus, many employers may choose to “sync up” eligibility provisions with Pay or Play Rule
    - Not legally required, but only way to “guarantee” no Pay or Play Rule risk
    - Perhaps could rely on 5% de minimis exception
  - Even employers with “generous” eligibility provisions may have risk
    - E.g., Acme Co. allows employees into plan if “scheduled” to work 20 hours per week (prospective standard)
    - Standard would not catch those who work, e.g., 15 hours currently but who are “full-time” due to prior high hours
    - Acme also may not take into account unpaid leave (e.g., FMLA, USERRA, jury duty) in way provided by Pay or Play Rule

# Employer Strategic Considerations

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- Examine collective bargaining issues
- If “managing down” hours, consider:
  - ERISA Section 510
  - “Whistleblower” provisions – riskier in 2014?
  - State law
- Offer “skinny” plan?
  - Provide free, bare-bones coverage. If employee elects it, no Pay or Play Rule penalty.
    - If employee declines it, \$3,000 penalty possible (plan fails “minimum value” test)

# Questions?

## Thank you for attending!

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