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It's the Season for Seasonal Employees

Summer is just around the corner! That means that many businesses are gearing up for their busy times and hiring employees to meet the summer's demands. **This issue of *Reflections* reviews the various intricacies that employers need to consider when complying with the Affordable Care Act (ACA) if they have seasonal employees.**

Who is a seasonal employee?

There remains some ambiguity regarding who is – or isn't – a seasonal employee for ACA purposes. And, to some degree the definition or treatment

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A letter from Karen Knippen

I love having to worry about seasonal employees. After this past winter and slow start to spring, I'm happy to think about anything that relates to summer!

Seriously though, questions on how an employer must address seasonal employees are among the most frequent that we are asked. This issue of *Reflections* will be one to keep handy!

Sincerely yours,

Karen Knippen, RHU, REBC, CLTC
Senior Vice President

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of a worker as seasonal for ACA purposes may change depending on the size of the employer.

The rules which have been issued to date rely on long existing Department of Labor (DOL) regulation regarding seasonal workers. **The key aspect in these rules is: Labor is performed on a seasonal basis where, ordinarily, the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year.**

Examples of workers one would generally recognize as seasonal are retail workers employed during holiday seasons, agricultural workers employed during growing seasons or workers in seasonally related outdoor jobs such as ski instructors or pool lifeguards.

How do employers need to account for seasonal workers?

Employers need to consider how to address seasonal workers to first determine the size of the employer for ACA purposes.

If an employer is assessing whether SHOP coverage is available, seasonal employees may be excluded from the calculation.

To calculate full-time equivalent employees when applying for SHOP, the employer is instructed to:

- Use the most recent year.
- Exclude seasonal employees (those working fewer than 120 days a year) from all calculations.
- Count the number of people who worked an average of 30 or more hours a week.
- Add to this amount the number of hours worked per week by non-full time employees divided by 30.

[Healthcare.gov](https://www.healthcare.gov) has a SHOP full-time equivalent employee calculator to help employers that can be found at:

<https://www.healthcare.gov/shop-calculators-fte/>

Employers may also benefit from the “seasonal worker exception” when assessing whether the employer exceeds the threshold requiring compliance with the employer responsibility requirements. **The IRS FAQs specifically note:**

Seasonal workers are taken into account in determining the number of full-time employees. However, if an employer's workforce exceeds 50 full-time employees (including full-time equivalents) for 120 days or fewer during a calendar year, and the employees in excess of 50 who were employed during that period of no more than 120 days were seasonal workers, the employer is not considered an applicable large employer for the current calendar year.

The final rules on employer responsibility also allow that 120 days is equivalent to four (4) calendar months. The rules also note that the four (4) calendar months or the 120 days do not have to be consecutive.

The final rules also allow a new employer to utilize the seasonal worker exception. An employer who was not in existence “on any business day during the preceding calendar year” will not be treated as an ALE if it expects its workforce to exceed 50 full-time equivalent employees for 120 days or fewer during the current calendar year solely due to seasonal workers.

It's also important to remember that there is a difference between a seasonal worker and a temporary employee or short term employee. A seasonal worker is one that performs labor or services on a seasonal basis.

Must an employer subject to the employer responsibility requirements offer coverage to seasonal employees?

Notice 2012-58 described a safe harbor for employers to use to determine which employees should be offered coverage. Section III of the notice outlines how an employer can determine the full-time status of employees, both newly hired and ongoing. This section discusses the use of the look-back and measurement period approach to determining eligibility for coverage.

The final employer responsibility rules provide more definition on how to treat seasonal employees for coverage purposes using the look-back method. The regulations note:

"...a seasonal employee means an employee in a position for which the customary annual employment is six (6) months or less, and that period should begin each calendar year in approximately the same part of the year, such as summer or winter."

The regulations recognize that there may be instances where an employee is seasonal despite working longer than six (6) months. An example included in the rules addresses a ski instructor at a resort that has a longer snow season than usual.

The rules specifically address how to treat an employee in a seasonal position who is transferred or promoted to a permanent position. If the change in status from seasonal to permanent occurs during the initial measurement period, an employer must treat the employee as if they were hired originally in their new position. As such, if the employee would have been expected to be employed 30 hours of service per week, the employer has until the first day of the fourth (4) month following the change in status, or, if earlier, the first day of the first month following the end of the initial measurement period plus any applicable

administrative period, to treat the employee as a full-time employee.

Despite the numerous efforts to provide guidance regarding seasonal employees, questions undoubtedly remain. Employers are expressly advised that they can use a "reasonable, good faith interpretation" of the term "seasonal employee." That being said, employers should have a solid factual basis to support any interpretations.

A Seasonal Strategy?

Employers with seasonal employees that are on the cusp of having to comply with the employer responsibility requirements of the ACA may wish to develop a seasonal strategy. This could include limiting the length of time that seasonal workers are employed to less than 120 days so that they can be excluded from the full-time equivalent count.

Some employers may find that being subject to the requirements of an ALE has advantages. As such, policing seasonal employee hours of service may be less of a concern.

Employers should review the hours of service of seasonal employees when establishing their measurement periods. **Since seasonal employees will generally not average 30 hours per week over 12 months, a measurement period of 12 months may be a wiser course than opting for a shorter measurement period.** Each month for which the seasonal employee has few or no hours of service will ensure that truly seasonal employees are not considered full-time for health coverage purposes.

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Inside: It's the Season for Seasonal Employees

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