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Thank you for joining us.



# The ACA's Employer Mandate and Look-Back Measurement Method

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**Presented By:**  
Nick Karls and Cindy Niesen

*Presented by the Regulatory and  
Legislative Strategy Group*

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# Employer Mandate

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## WHAT IS AN ALE?

### Applicable Large Employer (ALE)

- 50 or more full-time and full-time equivalent employees (FTEs)
- Based on the previous year's average
- All employees of a “controlled group” of entities are considered
  - » Each controlled group member must then comply with the mandate on its own

### What Employees Should be Considered?

- For purposes of the employer mandate, if the employee is the employer's common-law employee, the employee must be analyzed for compliance with the employer mandate

### Difficult types of employees to determine common-law status:

- Temporary employees hired from a staffing agency
- Union employees
- Employees that work for multiple, related entities

# Why Do We Care?

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## THE PENALTIES ARE REAL

### Subsection (a) penalty 2022: \$2,750 (projected)\*

- \$229.17 per month per full-time employee (projected), minus 30 employees
- This is the penalty if coverage is not offered to substantially all (95%) full-time employees and one full-time employee not offered coverage goes to the Exchange and gets a subsidy

### Subsection (b) penalty 2022: \$4,120 (projected)\*

- This is the penalty if the coverage is not affordable (9.61% in 2022), does not constitute Minimum Value (MV) or a full-time employee is not offered coverage, but the employer meets the 95% requirement
- \$343.33 per month, per full-time employee

*\*The projected employer shared responsibility payment for 2022 is based on the Premium Adjustment Percentage, as stated in the Notice of Benefit and Payment Parameters published in The Federal Register for 2022.*

# Employer Shared Responsibility Payments

## PENALTIES - ESRP

### An ESRP applies when employers fail to offer MV, affordable coverage:

- To new full-time employees by 91st day following date of hire
  - » A three-month limited non-assessment period applies if coverage is offered by the start of the fourth month following date of hire
- Variable-hour (non-full-time) employees
  - » If they have worked the required hours to qualify for full-time status based on employer's measurement policy
- A limited non-assessment period applies if coverage is offered upon completion of the measurement period
  - » And one or more employees not offered coverage goes to the Marketplace (Exchange) and qualifies for the Advanced Premium Tax Credit



# Full-Time Under the Mandate

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## What Is a Full-Time Employee?

- A full-time employee is an employee who, based on the facts and circumstances surrounding the employee's position and expected work schedule, is expected to work 130 hours per month (30 hours/week) during their employment
  - » This is true even if the employee is only expected to work for a short period of time (with the possible exception of seasonal employees)
  - » *All other employees are measurable for full-time designation [Variable, Seasonal, Part-time]*



# Non-Full-Time Employees

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## Part-Time Employees

- Employees expected to work fewer than 130 hours per month on average
- May be in regular part-time or seasonal positions

## Variable-Hour Employees

- Employees in positions that cannot be determined to be full-time at time of hire
- Includes seasonal employees

Hours can be measured to determine full-time status under the mandate



# Seasonal Employees

## WHAT IS A SEASONAL EMPLOYEE?

- A seasonal employee is an employee who is hired into a position for which the customary annual employment is six months or less and their employment occurs at about the same time each year
- Measurable even if they are expected to work 130 hours or more during their period of employment
- Summer interns usually fall within this bucket, but measuring just for interns does not always make sense
- Likely to be under age 26
- Year-round interns may be full-time, part-time or variable hour depending on positions



# Why Use the Look-Back

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## HOW ARE PENALTIES AVOIDED?



- If there are enough non-full-time employees: Measure non-full-time employees in an optional look-back measurement period to determine full-time status
- If coverage is already offered to enough full-time employees to mitigate exposure to penalties to an acceptable level, no further action may be needed
- Alternatively, an employer may use the “monthly” method

# Measuring Hours

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## WHAT MEASUREMENT METHODS ARE PERMITTED?

- Applies to employees the employer cannot reasonably determine are full-time at time hired
  - » Optional look-back measurement method
    - Standard (on-going) measurement
      - 3-month to 6-month and 12-month measurement periods, followed by:
      - Administrative period (no more than 90 days) and
        - Corresponding stability period
        - No less than 6 months for 3-month to 6-month measurement periods
        - 12 months for 12-month measurement period
  - Initial measurement (new hires)
    - Length of measurement, administrative and stability periods equal to standard (on-going) measurement
    - Commences date of hire (or first of month following date of hire)
  - Monthly measurement method
    - Default method when there is no look-back
  - Employee is full-time in each month employee is credited with 130 hours of service

# Tracking Hours

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## WHAT HOURS COUNT TOWARDS FULL-TIME STATUS?

### An hour of service is credited for:

- » each hour for which an employee is paid or entitled to payment, for the performance of duties for the employer; and
- » each hour for which an employee is paid or entitled to payment by the employer for a period of time during which no duties are performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence.



# Tracking Hours

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## CAN ANY HOURS THE EMPLOYEE IS RECEIVING PAY BE EXCLUDED?

- Hours during unprotected leave in which no services are provided are excluded for periods of disability during which either:
  - » Employee receives workers' compensation benefits or statutory disability/paid family medical leave benefits required by law
  - » Employee collects LTD or STD benefits under a completely voluntary plan with no employer contributions



# Look-Back Basics

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## If You Are Using the Look-Back Measurement Method, Include It in Your Plan Documents

### Especially the SPD

- ERISA specifically requires SPDs to describe the plan's eligibility requirements
- A separate policy may be incorporated by reference, and becomes part of the SPD
- Why is this important?
  - » The terms of the plan are difficult to enforce if key eligibility provisions are not in the SPD
  - » Difficult to take the position that an employee cannot trigger a penalty because they were in a limited non-assessment period when plan documents do not include look-back eligibility language

# Look-Back Basics

## WHAT IS THE LOOK-BACK METHOD?

**3 – 12  
Months**

### Measurement Period (MP)

A prior period to determine whether employees have met the hours-of-service threshold of 130 hours per month (30 hours per week)

- Initial measurement period for new variable hour employees
- Standard measurement period for on-going employees

**Up to 90  
calendar days**

### Admin. Period (AP)

The period immediately after the measurement period and before the stability period (up to 90 calendar days)

**3 – 12  
Months**

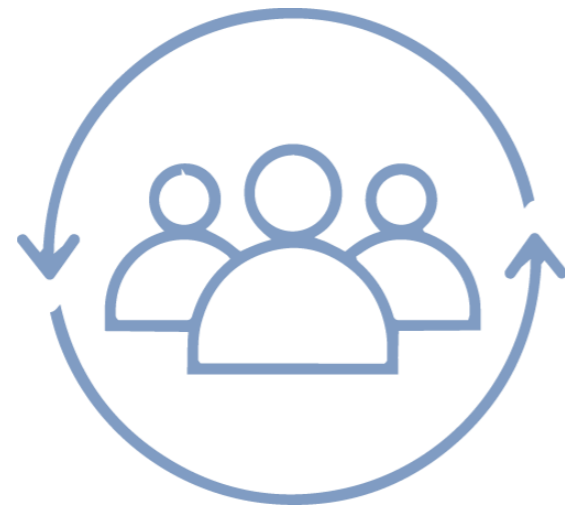
### Stability Period (SP)

The period for which the employee's status is set with regard to eligibility

If the individual qualifies during the MP, the SP must be a minimum of 6-months.

# Initial and On-going Measurement

TWO DIFFERENT MEASUREMENT PERIODS FOR NEW HIRES AND ON-GOING EMPLOYEES



## Standard measurement period for on-going employees

An on-going employee is an employee who has been employed for at least one standard measurement period



## Initial measurement period for new employees

This includes employees that have not had an hour of service for 13 weeks or more



# On-going Variable-Hour Employees

STANDARD METHOD/COMMON STRUCTURE FOR CALENDAR YEAR PLANS

12 Months

2 Months

12 Months

Measurement Period (MP)

Admin. Period (AP)

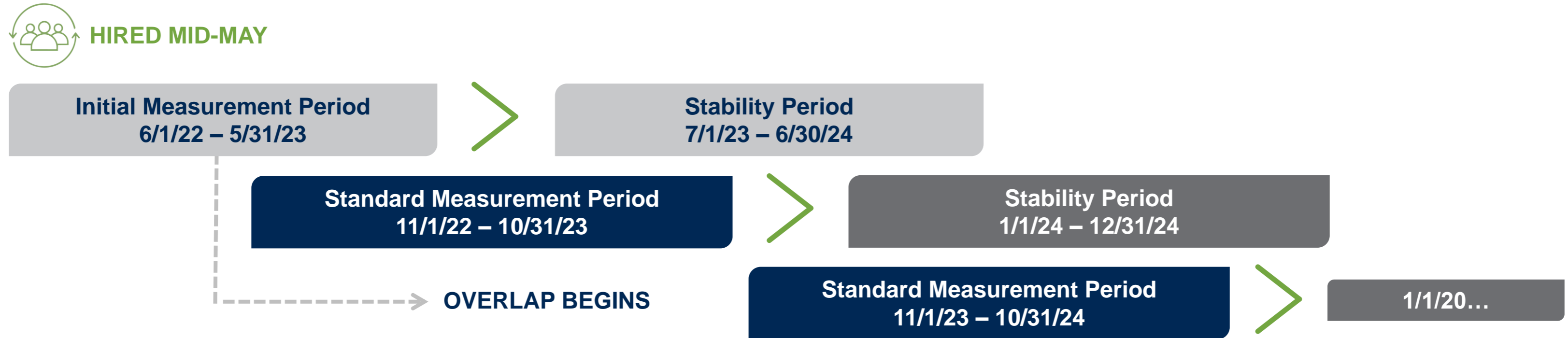
Stability Period (SP)

Nov. 1, 2021 – Oct. 31, 2022

Nov. 1, 2022 – Dec. 31, 2022

Jan. 1, 2023 – Dec. 31, 2023

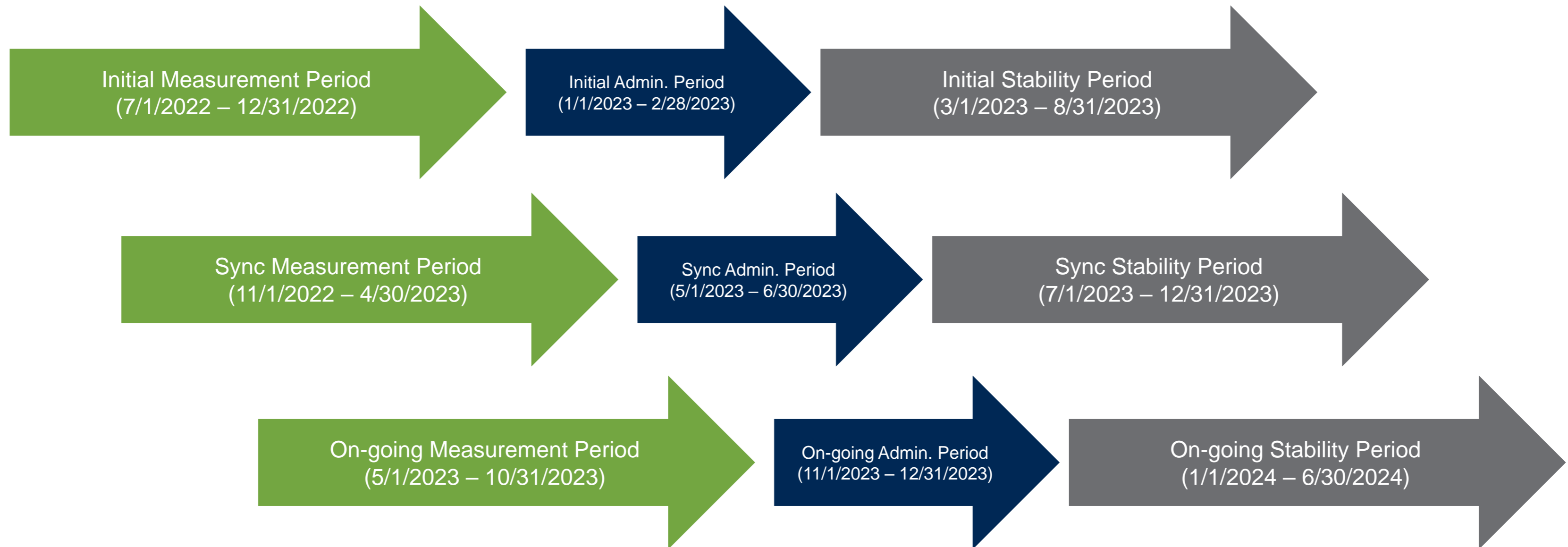
# New Variable-Hour Employees



1. Initial measurement period (IMP) of 12 months starts first of the month following date of hire
2. Measure new employee's hours of service during the IMP
3. Employee averages at least 130 hours of service per month during the measurement period
  - » Offer coverage for the following stability period
4. Employee does not average at least 130 hours of service per month during the measurement period
  - » Not required to offer coverage for the following stability period
  - » However, employee may qualify for coverage during the ensuing on-going measurement period

# 6-Month Measurement Period

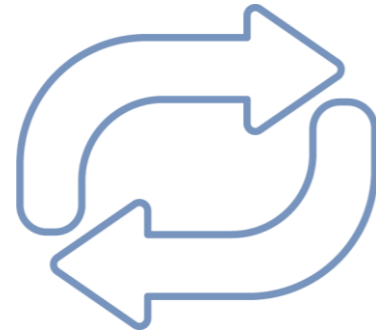
CALENDAR YEAR PLAN YEAR



# 6-Month Measurement Period

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CALENDAR YEAR PLAN YEAR



## On-going Measurement Assumptions

1. Plan Year January 1 - December 31
2. On-going Stability Periods
  - January 1 - June 30
  - July 1 - December 31
3. Two-Month Administrative Period
4. Measurement Periods
  - November 1 - April 30
  - May 1 - October 31

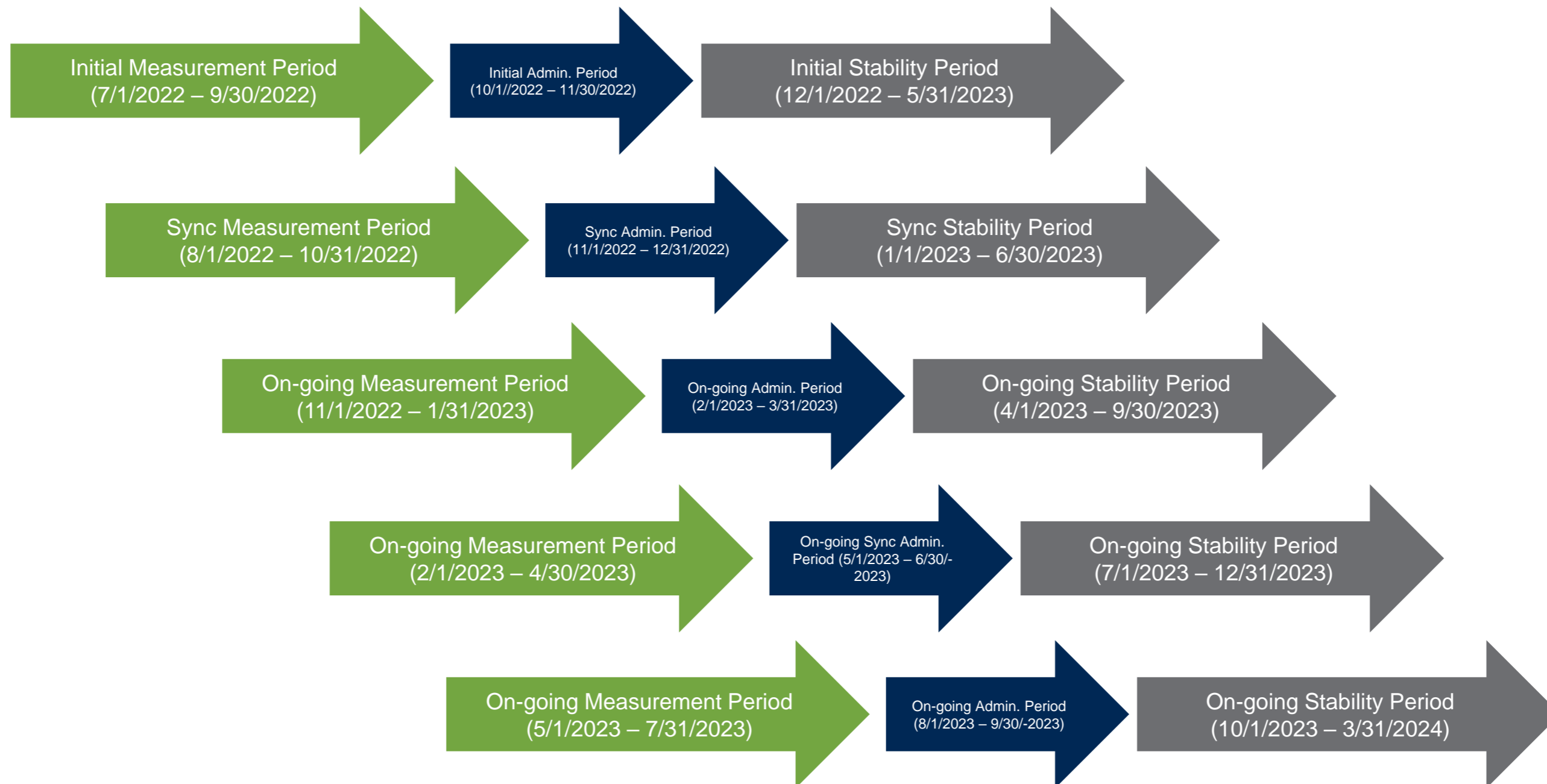


## New Hire Measurement Assumptions

1. New employee starts June 6
2. Measurement begins first of month following date of hire
3. Two-Month Administrative Period
4. On-going Measurement Period begins at the start of the first on-going measurement period following date of hire

# 3-Month Measurement Period

## CALENDAR YEAR PLAN YEAR



# 3-Month Measurement Period

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## CALENDAR YEAR PLAN YEAR

### On-going Measurement Assumptions

1. Plan On-going Stability Periods:
  - January 1 - June 30
  - April 1 - September 30
  - July 1 - December 31
  - October 1 - March 31
2. Two-Month Administrative Period
3. Measurement Periods
  - August 1 - October 31
  - November 1 - January 31
  - February 1 - April 30
  - May 1 - July 31



### New Hire Measurement Assumptions

1. New employee starts June 6
2. Measurement begins first of month following date of hire
3. Two-Month Administrative Period
4. On-going Measurement Period begins at the start of the first on-going measurement period following date of hire

# Job-Protected Leaves

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## WHAT ABOUT UNPAID LEAVES WHILE MEASURING?

### Unpaid FMLA, USERRA and Jury Duty

- Exclude special unpaid leave for determining hours of service (remove this period from the numerator and the denominator), or
- Treat the employee as credited with hours of service for any periods of special unpaid leave at a rate equal to the average weekly rate at which the employee was credited with hours of service during the weeks in the measurement period that are not part of a period of special unpaid leave (averaging method).



# Unprotected Leaves

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## WHAT ABOUT UNPROTECTED LEAVES OF ABSENCE?



**A common scenario is an employee that is out on LTD and is no longer (or never was) protected by FMLA**

- If they remain an employee, and they are in a stability period, they remain eligible for offer of coverage under ACA
  - » If plan terms result in loss of eligibility, COBRA must be offered
- Whether such employees keep their coverage during unprotected leave depends on the terms of the plan
- Further, if they are on non-state-mandated-disability, they continue to get credit for hours worked



# Position Changes

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## What Happens When an Employee Changes From a Full-Time Position to a Non-Full-Time Position?

- The employer can use the 3-month rule, or
- The employer can place the employee into the current stability period and give the employee the choice to drop their coverage because of a significant reduction in hours.
  - » Special allowable status change if:
    - Employer's cafeteria plan permits election change for reduction in hours without a loss of eligibility, and
    - Employee enrolls in other group coverage or Medicare coinciding with drop in coverage.
- If the change occurs within the time period of what would have been the initial measurement period, terminate coverage at the time of change and measure through the end of the initial measurement period



# Position Changes

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## What Happens When an Employee Changes From a Non-Full-Time Position to a Full-Time Position?

- Technically, under the Employer Mandate, the employer could hold the employee off the plan until the completion of the next full measurement period
- Very few employers do this
- Only applies when the position change occurs during a stability period
- ERISA plan document language will usually require the employee to be offered coverage as a full-time employee (with or without a waiting period)
- Many employer-sponsored plans provide credit for part-time service



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