FMLA
Overview & Compliance
ERISA & ACA updates

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FMLA Topics

- FMLA Defined
- FMLA Eligibility
- FMLA Qualifying Events
- Understanding FMLA
- Employer Rights
- Types of Leave
- Continued Benefits
- Notification Requirements
- DOL Investigations
- Handling Tricky Situations
- Solutions

FMLA Administration

FMLA Defined

- **Family Medical Leave Act of 1993** (FMLA)

  Enacted by Congress in 1993, the Family Medical Leave Act was a Federal Law intended to help employees better balance the demands of the workplace with the demands of their family and health. It has since been expanded to include Military caregiver leave, and leave for Military families during times of deployment to a foreign country.

What is FMLA?

- Federal law applying to all public employers; and all private employers with over 50 employees on 20 or more weeks the previous calendar's year payroll
- Requires employers have a written policy
- Requires employers have posted signage in a common area
  - $110.00 per day fine possible for willful violations
- Illegal to interfere, deny, or retaliate against an employee for utilizing FMLA rights

FMLA Requirements

- Employees have to give notice of an event to an employer
  - Employees don't have to know what FMLA is, or use the words FMLA
  - Managers have individual liability
- Employers have 5 days from the date of notice to respond with
  - Notice of Rights and Responsibilities
  - Notice of Eligibility
  - Request for Medical Certification
  - Outline Return to Work Requirements

Record Retention

- DOL and FMLA regulations require that the following records be stored for 3 years
  - Basic payroll and identifying employee data, including name, address, occupation, rate of pay, terms of compensation, daily hours worked, deductions from wages and total compensation paid
  - Dates FMLA leave is taken by FMLA eligible employees
  - Hours of the leaves if not full days
  - Copies of all notices
  - Any documents describing employee benefits or employer policies regarding the taking of paid or unpaid leave

FMLA Eligibility

- Employee must have 12 months of service, and also needs 1250 hours worked in the 12 months preceding their need for Leave.
  - 12 months does not have to be consecutive, 1250 hours does have to be in past 12 months.
  - **Work at a location where there are 50 employees of the employer within a 75 mile radius**
  - Former employees are also covered and are able to bring lawsuits (not re-hired due to past record) up to seven years.

FMLA Qualifying Events

- Serious health condition for employee
  - Serious health condition has it's own definition under the FMLA regulations
- Birth of a child
  - Also covers Fathers for paternity leave
- Placement of a child for Adoption or foster care
- Serious health condition of a family member
  - Family Member is defined as only parents, spouses, and children under 18. Children over 18 have to meet additional requirements
- Qualified Exigency
  - For employees with deployed family members
- Caring for Military Personnel*

*26 week events

Definition: Serious Health Condition

- Inpatient care – an overnight stay in a hospital

OR

- A period of incapacity of more than three days followed by treatment by a provider of healthcare services. This may include prescription drugs, physical therapy; weekly follow up appointments, and chronic conditions

OR

- A period of incapacity due to pregnancy or prenatal care

Types of Leave

- ***Continuous:*** Taken in one block of time
- ***Intermittent:*** Taken in separate blocks of time as needed
  - Can take in smallest increment of time used by payroll
  - May have incapacitations lasting up to a month
  - May be a reduction of hours, such as no OT or reduced schedule

FMLA Regulatory Changes
Effective March 8, 2013

- Changes to Military Family Leave (a partial listing)
  - Expanding caregiver leave to include care for veterans discharged within the past five years.
  - Allowing caregiver leave for a pre-existing injury or illness that was aggravated in the line of duty.
  - Extending exigency leave to family members of those serving in the Regular Armed Forces.
  - Requiring that service members be deployed to a foreign country in order for their family members to qualify for exigency leave.
  - Extending from 5 to 15 days employee leave during a military family member's "rest and recuperation" period.
- Additional Changes (a partial listing)
  - Enforcement of using lowest payroll method for FMLA calculations.
  - Revisions regarding (a) the physical impossibility of a return to work in the middle of a shift (FY), (b) 2010 National Defense Authorization Act (NDAA) amendments, and (c) the Airline Flight Crew Technical Corrections Act (AFCTCA).

Continued Benefits

- Employees accrued benefits are retained while on Leave:
  - Life insurance
  - Health insurance
  - Disability
  - Sick leave
  - Pensions
- Benefits must be in force while Leave commences
- Employee responsible premiums may still be requested while on Leave
- May recover employer share of premiums if employee does not return from Leave

Employer Rights

- Expect 30-day notice for planned absences and notice within 2 days of an unplanned event
- May require certification of condition from employee as frequently as every 30 days
- May insist on a second opinion
- May choose to require that paid time be used before unpaid time off is granted
- Employer is not liable for FMLA violation if the employee is not providing notice of the need for leave. Employee does not have to use the term FMLA for the employer to be obligated to recognize the event as a qualifying event under FMLA.

Understanding FMLA

- Employer Defined:
  "...*any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer*..." 20 U.S.C. §2611(4)(ii). An "employer" also includes any "public agency".
- ***So what does that mean?***
  - Supervisors can be personally liable for violations of FMLA
    - A recent Chicago verdict set a record $11.65 Million dollar verdict, with $400,000.00 levied against two supervisors individually

ERISA Violations - Related to FMLA

DOL in Action June 4, 2015

- **Lawsuit Victory for Former Staples Worker Denied FMLA Protection**

A former sales executive will receive $275,000 in back wages, benefits and damages after Staples, Inc., the global office supply retailer, and its subsidiary entered into a settlement agreement with the federal government. In 2012, the Wage and Hour Division opened an investigation and found the companies failed to inform the employee of his right to take job-protected, unpaid leave under the Family and Medical Leave Act when his wife became critically ill. In settling the lawsuit brought by the department, Staples agreed to pay back wages, benefits and damages and to promote an enterprise-wide policy for FMLA compliance. It will provide training for human resources and other managerial personnel with respect to FMLA notice and eligibility requirements. "This case shows the department's strong commitment to use all enforcement tools at our disposal, including litigation, to uphold FMLA protections for workers and make sure that all employers operate in compliance with the law and get it right the first time," said Wage and Hour Division Administrator Dr. David Weil.

ERISA Violations - Related to FMLA

DOL in Action July 9, 2015

- **Employer Ordered to Reimburse Employee for Medical Expenses Incurred during FMLA Leave**
  Hosler v. Jay Fulkroad and Sons, 2015 WL 3865877 (M.D. Pa. 2015)

The employee in this case sued her former employer after her employment and her health insurance were terminated while she was absent from work for a surgical procedure. A jury concluded that the employer had interfered with her rights under the FMLA, and awarded her back-pay. The employee then asked the court for additional relief, including penalties for failure to provide a timely COBRA election notice, and reimbursement of unpaid medical expenses. The employer argued that the employee had been "laid off" before her surgery and was not entitled to any relief under the FMLA.

The court declined to impose penalties for failure to provide a timely COBRA notice. Acknowledging that the employer failed to send a COBRA election notice at the end of the employee's FMLA-qualifying leave period, the court noted that a notice had been provided when she was initially "laid off," and concluded that it "could not find any purpose served" by imposing a penalty for the notice violation. The court did, however, order the employer to reimburse the employee for medical expenses incurred during her FMLA-qualifying leave. Noting that the FMLA plainly required the employer to maintain the employee's insurance during her leave and that COBRA violations resulting in a loss of coverage may be compensated in an amount equal to the individual's medical expenses less deductibles and premiums, the court concluded that it was "entirely inequitable and patently unfair" to make the employee pay the medical expenses.

WHD investigations

- Last year, the WHD received more than 2,100 complaints alleging violations of **the Family and Medical Leave Act (FMLA), and its investigations concluded that violations occurred in about half of those cases. The most common violations involved employers refusing to grant FMLA leave, illegally terminating employees who requested leave, and discriminating against employees who requested leave.**

Where to find updates

- What do Employers Need to do?
  - Update applicable posters. Updated versions of the Federal poster can be located here: http://www.dol.gov/whd/regs/compliance/posters/fmlaen.pdf
  - Update written policies to include the changes to the NDAA and AFCTCA amendments. A Frequently Asked Questions listing can be found here: http://www.dol.gov/whd/fmla/2013rule/militaryFR_FAQs.htm
  - Educate managers to ensure they understand the additional FMLA qualifying events related to the expanded definitions.

Be Prepared for DOL Investigation

- **Conduct a thorough review of your FMLA policy**
- **Adhere to the Employer Posting Requirements.**
- **Ensure your FMLA forms are legally compliant**
- **Prepare legally compliant FMLA correspondence**
- **Conduct a comprehensive audit of your FMLA practices and procedures**
- **Clean up recordkeeping now**
- **Train management employees NOW!**

Potential FMLA Problems

COBRA & FMLA

- The IRS COBRA regulations provide special rules for COBRA and leaves of absence under the FMLA.
  - the taking of an FMLA leave is not a COBRA qualifying event
- COBRA Qualifying Event Occurs When Employee Fails to Return From FMLA Leave.
- COBRA qualifying event occurs when;
  - an employee (or the spouse or a dependent child of the employee) is covered on the day before the first day of the FMLA leave (or becomes covered during the FMLA leave) under a group health plan of the employee's employer;
  - the employee does not return to employment with the employer at the end of the FMLA leave; and
  - the employee (or the spouse or a dependent child of the employee) would, in the absence of COBRA coverage, lose coverage under the group health plan before the end of the maximum coverage period

HIPAA Privacy and the FMLA Medical Certification Requirement

- An employer may require that an employee's request for FMLA leave be supported by a medical certification supporting the need for leave.
- **Employer Contact With Health Care Provider:**
  - The final FMLA regulations prohibit an employer from contacting the employee's health care provider directly.
  - Employee must be provided with certification form by employer
  - Employee returns form to Employer
  - No authorization required by provider since employee returns to employer

HIPAA Privacy and the FMLA Medical Certification Requirement

- **Verifying Authenticity of Medical Certification or Gaining Clarification:**
  - the employer may contact the health care provider for purposes of clarification and authentication of the medical certification after the employer has given the employee an opportunity to cure certain deficiencies
  - employer must use a health care provider, a human resources professional, a leave administrator, or a management official
    - Under no circumstances, however, may the employee's direct supervisor contact the employee's health care provider; nor may employers ask health care providers for additional information beyond that required by the certification form
  - If an employee chooses not to provide the employer with authorization allowing the employer to clarify the certification with the health care provider, and does not otherwise clarify the certification, the employer may deny the taking of FMLA leave if the certification is unclear.
  - If an employer has reason to doubt the validity of a medical certification, the FMLA regulations permit the employer to demand a second opinion and, under certain circumstances, a third opinion.

Plan Design & Administrative Failures

- Some potential red flags to consider when reviewing for compliance with FMLA:
  - failing to recognize that FMLA obligations apply to all "group health plans" offered by an employer, not just "major medical" plans;
  - failing to provide advance written notice to employees of the terms and conditions under which premiums must be paid if they elect to continue their coverage while absent on FMLA leave;
  - requiring employees on FMLA leave to pay more for coverage than they would have paid if they had remained actively employed instead of taking the leave (e.g., by failing to continue an employer subsidy or applicable flex credits during the leave);
  - failing to provide a 15-day advance written notice to employees who are absent on FMLA leave before canceling coverage due to nonpayment of the required premium;

Plan Design & Administrative Failures

- failing to provide open enrollment rights to employees who are on FMLA leave;
- failing to provide employees who are on FMLA leave the same right to change their enrollment in the employer's group health plans than is being provided to employees who are not on leave;
- reimbursing medical expenses of employees (or their spouses or dependents) incurred while on FMLA leave for a period of time during which health FSA coverage had terminated (e.g., had not been elected during the leave), or allowing employees to retroactively elect coverage for that period;
- failing to restore any health benefits that were terminated during the leave unless otherwise elected by the employee;
- failing to offer employees who are being reinstated in their health FSAs the choice between resuming coverage at the level in effect before the leave, with the unpaid premium payments being made up, or resuming coverage at a level that is reduced, with premium payments at the level that was in effect before the leave;

Plan Design & Administrative Failures

- not observing the special rules that prescribe how an employee's share of the premiums for coverage during an FMLA leave must be handled (e.g., prepayment cannot be the only option);
- failing to provide COBRA election notices when an employee fails to return from FMLA leave (even if coverage was dropped at the beginning of the leave or during the leave);
- failing to provide a HIPAA certificate of creditable coverage when group health coverage ends-either at the end of the FMLA leave or, if the employee drops his or her coverage during the leave, at the time coverage ends;
- failing to provide the new types of FMLA leave (qualifying exigency leave and service member family leave) to eligible employees for up to 12 or 26 workweeks, as applicable for the type of leave, including expanded leave rights for employees who are relatives of veterans and members of the Armed Forces;

Plan Design & Administrative Failures

- failing to take into account the impact of the new 26 workweek period (e.g., upon COBRA election notices, HIPAA creditable coverage certificates, and upon plan sponsor decisions whether to continue paying for the employee's share of coverage during FMLA leave, subject to the catch-up option);
- failing to revise plan documents, SPDs, employee handbooks, employee communications, and other documents to reflect the impact of the final DOL FMLA regulations;
- failing to count periods of FMLA leave based on the lowest increment of time used for any other leave (or in one-hour increments, if less); and
- failing to appropriately account for FMLA leave when determining health care reform shared responsibility penalties.

We recommend that employers with any of the above plan designs, features, or administrative failures consult with their benefits advisors to determine whether the plan complies with FMLA, and to take immediate actions to put it in compliance

Why Outsource FMLA?

- Outsourced FMLA administration is:
  - Consistent
  - Efficient and accurate
  - Compliant – a reduction in your company liability and manger and supervisor liability
  - Centralized
- Positive Work Culture
  - Greater employee attraction and retention
  - Reduces workload for HR professionals
  - Monitors potential FMLA abuse by employees
  - Increasing employee comfort related to FMLA requests by removing PHI from HR staff

ERISA Updates

What is ERISA?

- Stands for “Employee Retirement Income Security Act of 1974”
- The federal law that regulates employee benefit “plans”
- ERISA is governed by the U.S Department of Labor and enforced by the Employee Benefits Security Administration (EBSA).
- Excludes government plans and church plans
- Preempts most state laws that regulate employee benefit plans

ERISA Defined

- **Employee Retirement Income Security Act (ERISA)**
  - Federal Law Enacted in 1974
  - Title 1 is part of U.S. labor laws; governs the structure of employee benefits Plans.
    - Requires detailed disclosure to covered individuals (applies to all Private Sector Employers regardless of size).
    - Requires detailed reporting to the government (generally Plans with 100 or more Participants).
    - Imposes strict fiduciary code of conduct on those who sponsor and administer ERISA Plans.
    - Imposes federal mechanism for enforcing rights and duties with respect to ERISA Plans and preempts a large body of state laws.

Why are So Many Employers out of Compliance?

- Overall Lack of Awareness in Marketplace
- Carrier Documents thought to be Compliant
- Confusion due to a Complexity of the Regulations
- Prior Limited Enforcement

- However, Compliance is “Not An Option”…It’s the Law!
  - Statistics are that 90-95% of Employers have at least one violation of ERISA regulations.

Employers Subject to ERISA

- Private-Sector Employers
  - Corporations
  - Partnerships
  - Sole Proprietorships
  - Non-Profit Organizations
    - Unless Exempt under 501a as Governmental entity
      - (listing the following nine factors applied by the courts and the DOL in determining whether the governmental plan exception applies: whether (a) the state or local government exercised control over the plan; (b) the plan provides for only employer or employee contributions or for both; (c) government employees acted as fiduciaries under the plan; (d) the state or local government created the entity; (e) the entity is "administered by individuals who are responsible to public officials or to the general electorate"; (f) the state or local government exercises authority over the entity; (g) the entity performs traditional government functions; (h) the entity's employees are considered government employees under federal and state employment laws; and (i) the entity is funded by state or local government taxes or bonds.

Benefits Subject to ERISA

- Health, Dental and/or Vision Insurance or Plans
- Health Flexible Spending Accounts (separate Plans)
- Health Reimbursement Arrangements (separate Plans)
- Accidental Death & Dismemberment Insurance
- Group Term Life Insurance
- Short Term and Long Term Disability
- Severance Insurance Policy
- Wellness providing medical care
- Employee Assistance Programs providing counseling
- Group Travel Accident Insurance benefits

Examples of penalties

- DOL (Department of Labor)
- –Failure to comply with ERISA's requirements can be quite costly
    - •Through DOL enforcement actions
    - **–Government Penalties for Non-Compliance**
    - **1) $86,500 – Failure to File Complete and Accurate Form 5500**
    - ***Airport Hospitality, LTD, King of Prussia, Penn., 2010***
    - **2) $241,000 – Failure to Provide SPD to Participant**
    - ***Gorini v. AMP Inc., 117 Fed. Appex, 193 (3d Cir. 2004)***
    - ***3) $10,780* - Failure to Provide SPD to Participant**
    - ***Kasireddy v. Bank of America Corp. Benefits Committee,***
    - **2010 WL 4168512 (N.D. Ill. Oct. 13, 2010)**
    - ***4) $13,750* - Failure to Provide SPD to Participant**
    - ***Latimer v. Wash. Gas Light Co., 2012 WL 2119254 (E.D. Va. 2012)***
    - ***5)* $8,910- statutory penalties failure to and delay in providing SPD**
    - ***Cultrona v. Nationwide Life Insurance Company (2014)***

US Department of Labor

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DATA ENFORCEMENT

HOME | SEARCH | DATA CATALOG | LABS | AGENCY TOOLS | FAQ | WHAT'S NEW

CENSUS DATA

AGENCIES & VIEWS

Reporting and Excise Taxes for Health Plan Noncompliance

- Return of Certain Excise Taxes Under Chapter 43 of the Internal Revenue Code
  - Historically, the IRS has not been very active in examining health Plans for compliance
  - IRS final regulations require employers to self-report violations of these rules and pay related excise taxes
  - Must report health Plan compliance failures annually on IRS Form 8928

Reporting and Excise Taxes for Health Plan Noncompliance (cont'd.)

- Violations of COBRA, HIPAA and the genetic anti-discrimination law (GINA) can result in excise taxes of $100 per day per individual affected.
  - Federal healthcare continuation requirements (COBRA).
  - Health Plan portability and nondiscrimination requirements (HIPAA).
  - Mental health parity (Mental Health Parity & Addiction Equity Act, or MHPAEA).
  - Minimum hospital stays for newborns and mothers (Newborns' & Mothers' Health Protection Act).
  - Women' s Health & Cancer Right Act (WHCRA).
  - ACA Mandates (includes required (Notices)
  - Genetic nondiscrimination requirements (Genetic Information Nondiscrimination Act, or GINA).
  - Coverage of dependent students on medically necessary leaves of absence (Michelle's Law).
  - Health savings account (HSA) and Archer medical savings account (Archer MSA) contribution comparability requirements.

DOL Increased Fines & Penalties

- *The Department of Labor published in the Federal Register on June 30, 2016, an interim final rule to adjust for inflation the civil monetary penalties enforceable by the Department of Labor.*
- The rule's catch-up adjustments apply to penalties assessed after August 1, 2016, whose associated violations occurred after November 2, 2015, the enactment date of the 2015 Inflation Adjustment Act Text
- Subject to change each January beginning in 2017

Highlights of DOL penalty Adjustments

ERISA Penalty Statute	Description of ERISA Violations Subject to Penalty	Current Penalty Amount	New Penalty Amount
ERISA § 502(c)(2)	Failure or refusal to file annual report (Form 5500)	Up to $1,100 per day	Up to $2,063 per day
ERISA § 502(c)(6)	Failure to furnish information requested by Secretary of Labor under ERISA §104(a)(6)	Up to $110 per day not to exceed $1,100 per day	Up to $147 per day not to exceed $1,472 per day

Highlights of DOL penalty Adjustments

ERISA Penalty Statute	Description of ERISA Violations Subject to Penalty	Current Penalty Amount	New Penalty Amount
ERISA § 502(c)(9)(A)	Failure by an employer to inform employees of CHIP coverage opportunities each employee a separate violation.	Up to $100 per day	Up to $110 per day
ERISA § 715	Failure to provide Summary of Benefits Coverage under Public Health Services Act section 2715(f).	Up to $1,000 per failure	Up to $1,087 per failure

Form 5500 reporting

- *On July 21, 2016, the Department of Labor (DOL), the Internal Revenue Service (IRS), and the Pension Benefit Guaranty Corporation (PBGC) published in the Federal Register a Notice of Proposed Forms Revisions to the Form 5500 Annual Return/Report Series. A Notice of Proposed Rulemaking to propose updates to the DOL's reporting regulations to implement the proposed forms revisions was published on July 21, 2016.*
- This includes eliminating for group health plans the current exemption from Form 5500 reporting for small insured and self-insured welfare benefit plans. "There will probably be millions of employers that didn't previously need to file that will now have to."
- This requirement will begin for plan years beginning in 2019.

Impact of DOL Penalty Adjustments

- “These rules have no impact upon regulated entities that operate in compliance with the laws that the Department enforces”.
- “For those entities that are not in compliance with the law, the Department projects the rules could result in up to $140 million in additional fines and penalties”. (DOL faq)
- “The fact that inflation adjustments are now being made “might be a signal that they will be paying more attention in the future,” Also, the government is under pressure to replace as much lost tax revenue as possible that was intended to help finance the Affordable Care Act”. (“EBN”)

ACA Employer Reporting Updates

ACA Summary of 2016 changes

BECOMPLIANT SC

- Lowest cost employee-only coverage increased to 9.66% or less of FTE's household income to meet affordable coverage rule.
  - Lowest cost employee-only coverage can be affected by the following:
    - Cafeteria plan Employer contributions COULD lower Employee required contribution level for affordability rule
    - HRA Funding newly made available can lower contribution affordability if HRA is employer sponsored group health plan coverage.
- 2015 Dependent Coverage Transitional Relief is eliminated.
- Non-Calendar plan year transitional relief eliminated
- Elimination of 1095-C Series 1 and Series 2 Codes (1I and 2I)
- Addition of 1095-C Series 1 and Series 2 Codes- (**1J and 1K)**
- Notice of Exchange (1411 Certification) to employer began June 20,, 2016
- Updated 1094 and 1095 forms (both B &C forms)

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ACA Penalties

- Increased from $100 to $250 for each return
- Total increased from $1.5ML to $3ML
- Applies separately to BOTH returns to file to IRS and each payee statement
- Failure to file corrected with 30 days, penalty increased from $30 to $50 per return, maximum $500k.
- Failure corrected after 30th day but before August 1, penalty increased from $60 to $100 per return, maximum $1.5ML.
- Intentional disregard, the $250 for each return becomes $500, with no limit.
- Increased penalties apply for returns required to be filed after December 31, 2015.
- HealthAffairs.org reports ten-year projections by Congress regarding penalties and the estimates are astonishing. During the ten-year period from 2017 through 2026 (provided the Affordable Care Act remains in effect), the Congressional Budget Office in conjunction with the Joint Committee on Taxation estimates that employer responsibility penalties will see a staggering $228 billion.

ACA and ERISA SPD

- The ACA document amendment applies to those employers who are deemed an **Applicable Large Employer (ALE)** under the Affordable Care Act.
  - An employer is an ALE for any calendar year in which they employed (along with members of its controlled group) an average of at least 50 “full-time employees” (including full-time equivalent employees) on business days during the preceding calendar year. Rules for determining full time employee and full time employee equivalents are set forth in the regulations.
- Employers determined to be ALEs are subject to the employer shared responsibility mandate (“Play or Pay”) under Internal Revenue Code (IRC) §4980H. Employers considered ALEs must provide “affordable” “minimum value” health coverage to all “full-time” employees (employees who perform 30 or more hours of service a week (130 or more hours of service a month)) during any calendar year in order to avoid penalties
  - In order to enforce this mandate, i.e., determine compliance and assess penalties, certain reporting requirements were established under Internal Revenue Code (IRC) § 6056.

Health Care Reform and ERISA SPD

- In order to meet these reporting requirements, ALEs must track employee and health coverage information throughout the year and report to both the IRS and employees following the close of the plan year (the first reporting will be due in 2016 for the 2015 plan year). Penalties apply to employers with 100+ employees. 50+ must report.
- In order to insure all full-time employees receive an offer of coverage, the hours of those employees that are variable hour, part-time or seasonal employees must be tracked and an offer of health coverage made when the employee meets eligibility.
- Hours are tracked either monthly or during a measurement period. The measurement period is period of time set by the employer (using the guidelines set forth in ACA) over which employees hours are tracked. There is a subsequent administrative period set by the employer, to allow time to make full-time employee determinations, make an offer of coverage and enroll the employee in health coverage. Once enrolled the employee would be covered during a stability period (set by the employer) even if the employee does not work enough hours to be considered full time during that period.
- Employers must advise employees of the tracking method being used (monthly or measurement).

Thank You!

BECOMPLIANT