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# Employees on Leave May be Full-time Employees for Employer Penalty Purposes

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Informal guidance indicates that an employee who has attained full-time employee ("FTE") status in the prior measurement period remains an FTE while on leave at any time during the stability period.

## Background

Large employers not offering affordable, minimum value coverage to their FTEs may be penalized. In general, under the look back measurement method, FTE status in a stability period is based on hours of service in the prior applicable measurement period, regardless of whether the employee experiences a change in employment status during the stability period. If the change in employment status results in a change in hours of service, that change is captured in a subsequent stability period.

It is clear that employees not working for a long period can be asked to complete the waiting period again upon return to service with no employer penalty exposure. It is clear that an employee whose employment was terminated during the break in service is not an FTE during that time. However, what is not clear is the status of the employee while on leave when employment is not terminated.

## Employees on Leave Treated as FTEs

In the American Bar Association's annual Q&A session this year with the IRS, the Committee on Employee Benefits posed a question to better clarify this issue. Specifically, it asked whether an FTE who is on non-FMLA leave for over 21 weeks continues FTE status during the stability period (here, the plan year) even though the employee has no hours of service during this time.

The IRS representative concluded that the individual would be treated as a new hire upon return so that he could be asked to complete the waiting period again; however, the official went on to state that while he was on leave, so as long as he remained an employee of the employer during the stability period, he retained FTE status.

This result seems inconsistent with the fact that there is an exception available allowing employers to discontinue FTE status for employees who switched to part-time status with no penalty exposure. It is unclear in this situation whether the leave would qualify as a "change in employment status," potentially making this exception available. If not, some employees still working for the employer on a part-time basis (e.g., 20 hours per week) are not FTEs while employees working 0 hours are FTEs.

## Employer Action

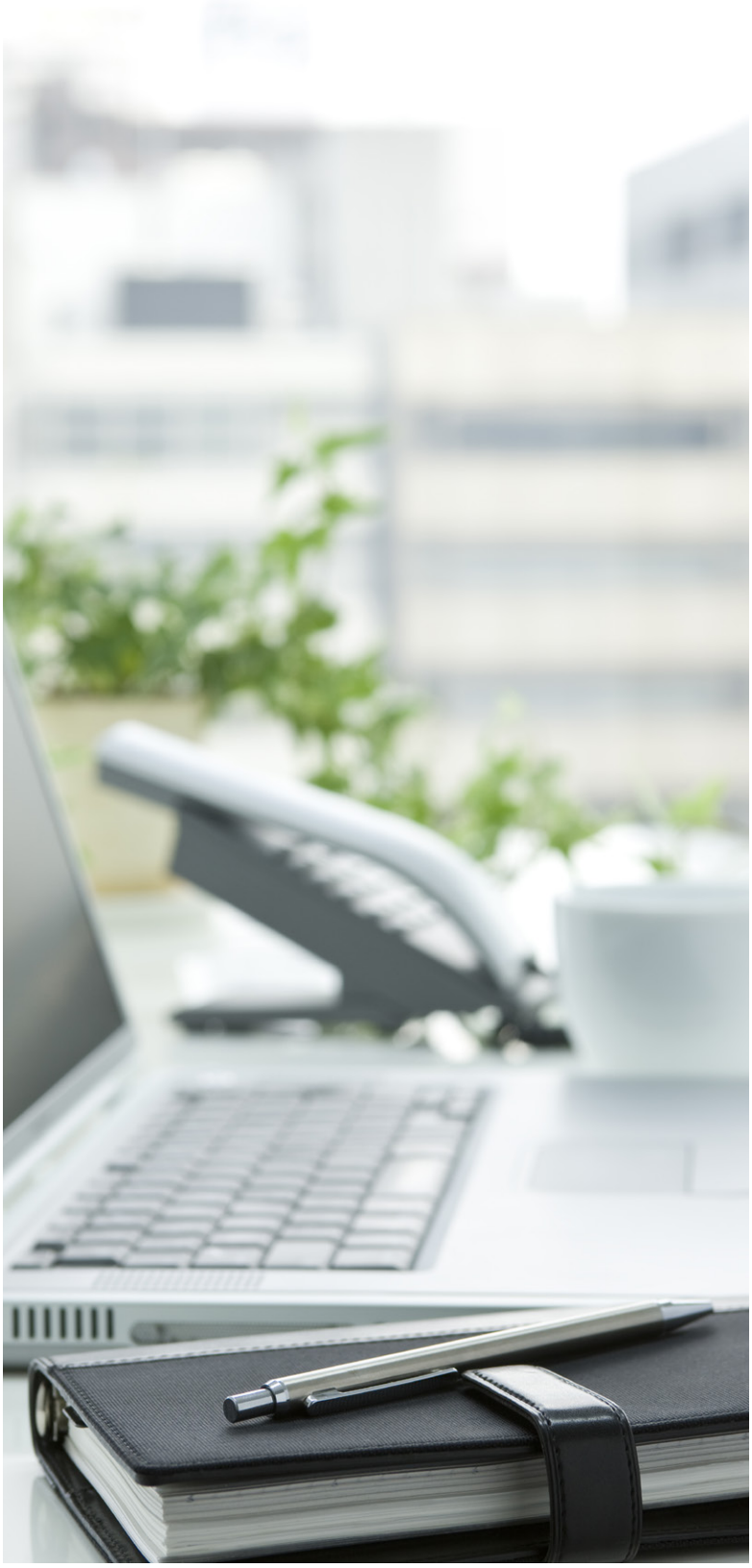
No action is required. These are informal, non-binding comments. However, employers should be aware of this comment. In addition, employers should understand that there are two distinct issues here:

- **Plan language**
  Plan language is legally binding from an ERISA and contractual perspective. Employees and other individuals should not be enrolled in a plan unless eligible according to plan terms and employees and other individuals should have their coverage terminated according to plan terms. Most plans do not allow for continuation of coverage outside being actively at work or at least for a very limited time following the employee's change to inactive status (or under FMLA, USERRA, or COBRA/state continuation).

- **Employer Penalty**
  Under the Employer Penalty, employers do not need to extend coverage to any particular employee or even offer coverage at all. However, penalties may be assessed for failure to do so. For example, an employer with plan language that triggers an offer of COBRA continuation of coverage to the FTE when hours drop to 0 due to the leave could be penalized under the "Offer Coverage" Penalty if that coverage is not "affordable."

Employers can try to bring these two issues together. Taking into account the IRS representative's informal comments, this could entail:

- Amending plan document language to be consistent with the ACA's full-time employee definition, if necessary. Such a change may not be an option for an insured plan.



- Subsidizing an employee's COBRA while on leave to make coverage "affordable."

- Terminating the employee. Outside laws such as the ADA should be considered before terminating employment.

- Accepting the potential penalty risk in these situations. For failure to offer an affordable plan to an FTE, the penalty is $250 per month for which the FTE received a subsidy under the Exchange.