

Negotiations Under Health Care Reform

Minnesota Counties Human Resources Management Association

Thursday, April 4, 2013

Presented By

Darcy L. Hitesman, Esq.

 **HITESMAN & WOLD** P.A.

763-503-6620

www.HitesmanLaw.com

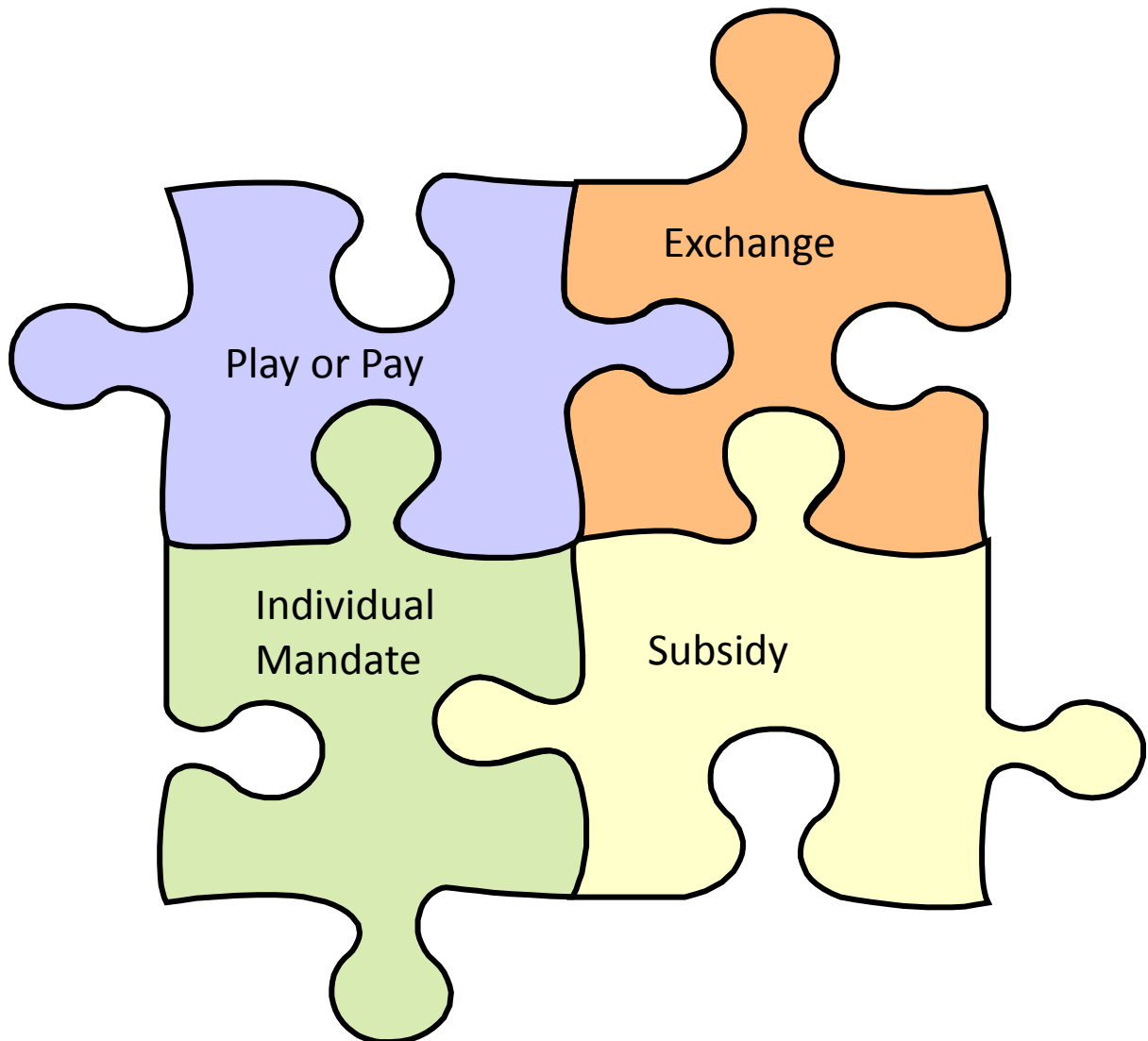
Today's Agenda

- Play or Pay Overview
 - Ripple Effects
 - Penalty Category 1
 - Penalty Category 2
- Collective Bargaining
- Questions

Play or Pay Overview



2014 Concerns: How the Pieces Fit Together



All interrelated

Subsidy at Exchange



- Subsidy at Exchange triggers penalty calculations for employer (*more later*)
- Two requirements
 - In general, household income between 133% and 400% “federal poverty level”
 - 138% in Minnesota due to Medicaid expansion
 - **Not eligible** for MEC elsewhere (e.g., employer coverage, spouse’s coverage, etc.)
- Exchange determines whether subsidy is available
- Section 1411 Certification to employer



Subsidy Exchange

PERSONS IN FAMILY	FEDERAL POVERTY GUIDELINES (2012)	HCR 400%
1	\$11,490	\$45,960
2	\$15,510	\$62,040
3	\$19,530	\$78,120
4	\$23,550	\$94,200
5	\$27,570	\$110,250
6	\$31,590	\$126,360
7	\$35,610	\$142,440
8	\$39,630	\$158,520
For each add'l person, add:	\$4,020	

Play or Pay



-
- ***Important:*** Employer ***not*** mandated to provide coverage
 - Large employer makes available certain level of coverage to certain employees (“plays”) or ***potentially*** faces a penalty (“pays”)
 - Lots of areas still needing guidance/further guidance
 - Continue to get guidance of all shapes and sizes
 - ***Does not operate in isolation***

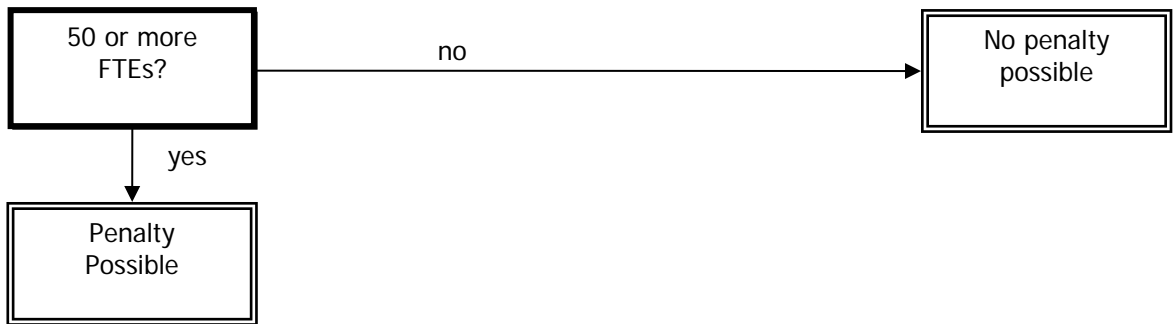
Ripple Effects

- Interplay with plan eligibility and termination of coverage language
- Interplay with plan operations (open enrollment(s), COBRA, etc.)
- Interplay with nondiscrimination requirements (Code and HCR)
- Interplay with ***collective bargaining agreements***, personnel policies, employment contracts, etc.
- Impact on OPEB calculations
- Impact on Pay Equity
- Others ???

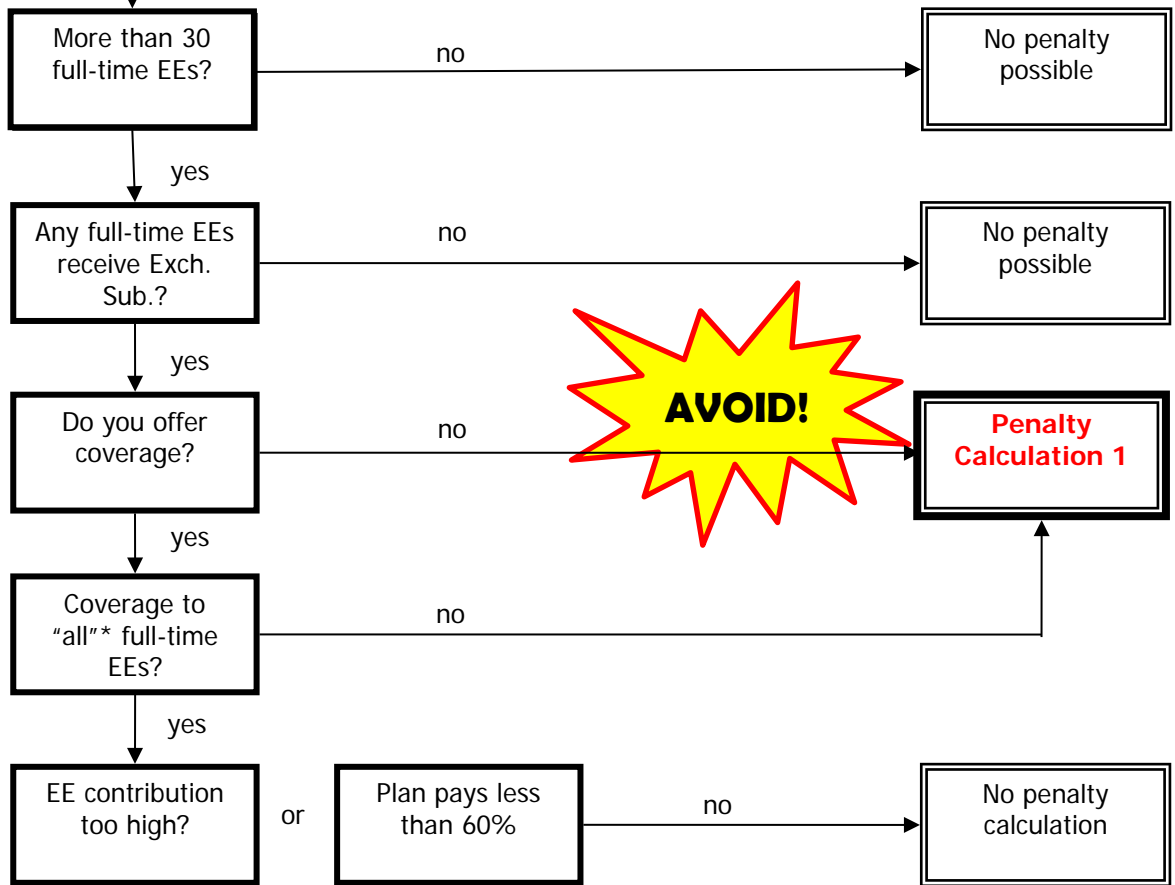
Large Employer Approach

- Inventory current situation
 - Employee groups (formal and informal; collectively bargained)
 - Plan language regarding eligibility and excluded groups
- Identify “hot spots”
- Identify and evaluate ways to deal with “hot spots”
 - Not all identified options will work
 - Ripple effects (described later)
 - Collective bargaining issues (described later)
- Implement
 - Plan language changes
 - Collective bargaining language changes
 - Ongoing administrative changes

Play or Pay Chart at a Glance



"LARGE" EMPLOYER ONLY



* All but 5%, or if greater 5

Penalty Possibilities

- ***Two distinct categories*** of penalty
 - Fail to offer coverage to ***all*** “true” full-time employees

Note: Prop. Regs. define “all” as all but 5%, or if greater 5 (a/k/a 95% test).

- Offer to all “true” full-time employees ***but*** coverage is “not enough” (cost or level of benefits)

Note: Prop. Regs. add third category for employees who are part of the 5% or 5.

- Regardless of penalty category, must be one “true” full-time employee ***subsidized at Exchange*** to trigger calculation



“Full-time” Status

- Does not matter how you use the term for other purposes
- “Full-time” defined as an employee averaging 30 or more hours of service per week
 - Determined on monthly basis; 130 hours per month equivalency
 - Common law employees
 - Equivalency options for non-hourly employees

Hour of Service

- “Hour of service” defined as including
 - Each hour ***paid or entitled to payment*** for performance of services, plus
 - Each hour ***paid or entitled to payment*** for period of time when no services performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty, or leave of absence
 - Special rules regarding certain unpaid leaves

Penalty Category 1



AVOID!

Where employer *does not offer* coverage to *all* (all but 5%, of if greater 5) full-time employees.

- Employers subject to penalty must pay \$2,000 per year for each full-time employee in excess of 30 full-time employees
 - No penalty assessed for first 30
- Based upon employer's total number of true full-time employees (including those offered coverage)
- Monthly calculation
[\$2,000/12=**\$166.67** per month]
- Penalty for month during which at least one full-time employee goes to Exchange *and* receives a subsidy

Penalty Category 1



AVOID!

Where employer *does not offer* coverage to *all* (all but 5%, of if greater 5) full-time employees.

- **Focus** – the population of full-time employees that are not offered coverage – who and how many
- Where part of 5% under substantially all, if go to Exchange for coverage and get subsidized, treated under Penalty Category 2 (described below)



Strategy

Penalty Category 1



AVOID!

Where employer ***does not offer*** coverage to ***all*** (all but 5%, of if greater 5) full-time employees.

- Must be one full-time employee that (a) actually goes to Exchange ***and*** (b) receives subsidy
 - To get subsidy, cannot be eligible for employer coverage
- ***Not*** tied to number of “true” full-time employees receiving subsidy at Exchange
- In general, ***NO*** offset/credit if provide something to less than all...may be paying penalty on covered employee

Penalty Category 2



MINIMIZE!

Where employer offers coverage to **all** (all but 5%, of if greater 5) full-time employees but **coverage is not enough**.

- “Not good enough” – Employer coverage **either**
 - “**Unaffordable**” – individual contribution toward cost of self-only coverage under lowest cost option exceeds 9.5% of household income;
 - or**
 - **Not sufficient** – where plan pays less than 60% on average of covered health expenses (a/k/a minimum value (MV))

Note: Where part of 5% under substantially all addressed.

Penalty Category 2



MINIMIZE!

- 9.5% household income recognized as difficult for employers



**Planning
Opportunity**

- Safe harbors – instead of household

Note: Can vary from reasonable classification to another.

- W-2 (Box 1) from that employer
- Rate of pay
 - Hourly
 - Salaried
- Federal Poverty Line (FPL) for single individual

Note: Can use different safe harbors for different reasonable employee classifications.

Federal Poverty Guidelines

- **2013 HHS Poverty Guidelines for the 48 contiguous states and the District of Columbia**

<http://aspe.hhs.gov/poverty/13poverty.cfm>

Persons in family/household	Poverty guideline
For families/households with more than 8 persons, add \$4,020 for each additional person.	
1	\$11,490
2	15,510
3	19,530
4	23,550
5	27,570
6	31,590
7	35,610
8	39,630

9.5% = \$1091.55 or \$90.96 per month

Penalty Category 2



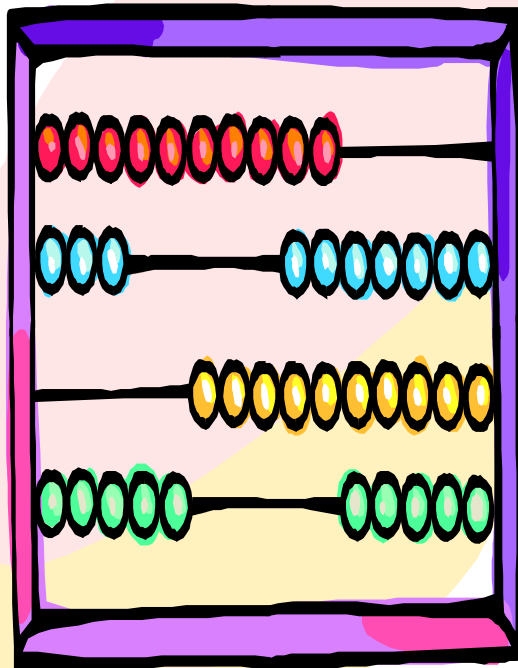
MINIMIZE!

Where employer offers coverage to **all** (all but 5%, of if greater 5) full-time employees but **coverage is not enough**.

- Employers subject to penalty must pay \$3,000 per year for each true full-time employee **actually receiving subsidy** at Exchange
 - Monthly calculation [$\$3,000/12=\250 per month]
 - Only pay penalty for those that actually go to Exchange and receive subsidy subject to cap
- Penalty capped at amount would have to pay if didn't offer a health plan at all (i.e., Penalty Category 1)
 - If less than 30 “true” full-time employees, penalty is \$0

Question: What would Penalty Category 1 be?

Counting Rules



Counting Safe Harbors

Note: “Safe harbor” is optional. If do not use, then general rule applies.

- Instead of real time counting
- Longer periods of time
 - Look back period (initial or standard)
 - Stability period
 - Optional administrative period
- Safe harbors for ongoing employees
- Safe harbors for certain new employees

Ongoing Employee Safe Harbor

- Ongoing employee - employed for full standard measurement period
- Standard measurement period
 - Not less than 3 but not more than 12 consecutive calendar months
 - Period chosen by employer
- Stability period
 - At least the greater of 6 consecutive calendar months or the length of standard measurement period
 - Period chosen by employer
- Administrative measurement period
 - Up to 90 days
 - Optional
 - Between measurement and stability; time to determine, notify, enroll, etc.

Ongoing Employee Safe Harbor

- All employees on same cycle

Example from Regulations:

Standard measurement – 12 months, **October 15 – October 14**

Administrative period – not to exceed 90 days, **October 15 – December 31**

Stability period – 12 months, **January 1 – December 31**

- We recommend 12 month stability period match plan year and 12 month measurement period as starting point.
- Transition from new to ongoing
 - Overlapping measurement periods
 - Best of both worlds

Ongoing Employee Safe Harbor

- Can have different periods for following groups:
 - Separate collectively bargained groups
 - Collectively bargained and non-bargained groups
 - Salaried and hourly
 - State by state
- If average 30 hours of service during measurement period, then treated as full-time during next following stability period, ***provided remains an employee***

New Employees

- Reasonably expected to average 30 hours of service or more per week over initial measurement period
 - As of start date
 - “Not penalty assessable” if offered coverage on or before first day of fourth calendar month

Question: What are your current plan eligibility and waiting period requirements?

- Does not count for penalty calculations
- Roughly coincides with maximum 90-day wait on coverage

New Employee Safe Harbors

- Cannot say reasonably expected to average 30 hours of service or more per week over initial measurement period
 - As of start date
 - Regulators still considering what factors
 - Variable hour employee or seasonal employee
- Initial measurement period
 - Not less than 3 but not more than 12 consecutive calendar months
 - Period chosen by employer

New Employee Safe Harbors

- Stability period
 - At least the greater of 6 consecutive calendar months or the length of standard measurement period (*see ongoing employees*)
 - If determined ***to be full-time*** during measurement, stability must be same length as stability period for ongoing employees
 - If determined ***not to be full-time*** during measurement, stability period must not be more than one month longer than initial measurement period; earlier chance to qualify
 - Periods chosen by employer

New Employee Safe Harbors

- Administrative measurement period
 - Up to 90 days
 - Optional
 - Between measurement and stability; time to determine, notify, enroll, etc.

Caution: Initial plus administrative cannot extend beyond last day of first calendar month on or after one year anniversary of start date (a/k/a 13 month rule).

- Can have different periods for following groups:
 - Separate collectively bargained groups
 - Collectively bargained and non-bargained groups
 - Salaried and hourly
 - State by state

New Employee Safe Harbors

- If average 30 hours of service during measurement period, then treated as full-time during next following stability period, provided remains an employee
- As with ongoing safe harbor, we recommend 12 month initial measurement period and 12 month stability period as starting point.

Numerous “Special” Counting Rules

- Special rules regarding educational organizations
- Special rules regarding rehired employees and resuming employees
 - If no hours of service in 26 consecutive weeks, can be treated as new employee
 - May use parity rule for less than 26 consecutive weeks absence
- “Special unpaid leave” recognized but limited to FMLA, USERRA, and jury duty; special treatment when occurs in look back measurement period
- Non-calendar plan year transitional relief
- More to come – hopefully addressing collectively bargained employees

Non-Calendar Plans (a/k/a fiscal year plans)

- Non calendar plan years (i.e., where the medical plan does not operate on a calendar year)
- Transitional relief may be available
- ***Not a “get out of jail free” card***
- Two categories of relief
- For either type of relief, non calendar plan year must have been in existence as of Dec. 27, 2012

Category 2

Note: Consider first because offers most expansive relief.

- In essence, provides an employer that was providing coverage to a “significant” a break with respect to the portion of the 2013 plan year that occurs in 2014.
- Look at employees covered and employees eligible for coverage
 - If 33% or more eligible for coverage during the most recent open enrollment period prior to Dec. 27, 2012
 - If 25% or more actually covered as of Dec. 27, 2012
- Percentages may be determined as of the end of the most recent enrollment period or any date between October 31, 2012 and December 27, 2012
- Relief: no full-time employee is penalty assessable
- Relief is contingent on compliance as of start of 2014 plan year

Category 1

- If category 2 cannot be satisfied, may still get partial relief through category 1
- Look at eligibility terms as of Dec. 27, 2012
- Identify employees that would be eligible as of 2014 plan year under the eligibility terms as of Dec. 27, 2012
 - Applies to current employees and new hires
- Those employees are not penalty assessable
- Does not protect “other” employees from triggering penalty or from being counted in calculating penalty.
- Relief is contingent on compliance as of start of 2014 plan year

Non-Calendar Cafeteria Plan (a/k/a fiscal year plans)

- Where the cafeteria plan does not operate on a calendar year, transitional relief for 2013 may be available
- Reflects fact that most cafeteria plans operate on the same plan year as the major medical coverage
- Under current regulations, elections are irrevocable for the plan year unless a recognized exception applies
- No exception applies that covers the in and out of the Exchange situation
- Only applies to the portion of the cafeteria plan election relating to the major medical coverage
- Applies prospectively only
- Requires an amendment; can be made any time prior to Dec. 31, 2014 and be retroactive to the first day of the 2013 plan year

Collectively Bargained Employees

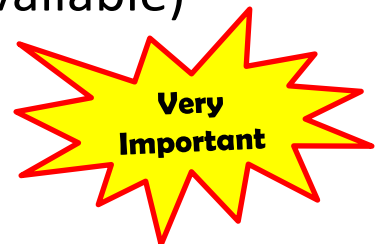


Collectively Bargained Employees

- Proposed Regulations provide a special rule for 2014 for certain employers contributing to *multiemployer health* and welfare plans.
- Preamble to Proposed Regulations describes Taft Hartley multiemployer plans – run by joint board of trustees (half management and half union)
- Recognition many multiemployer plans have contribution formulas based other than on hours worked.
- Large employer will not be treated as failing to offer coverage to a full-time employee for purposes of Penalty Category 1 and will not be subject to Penalty Category 2 for a full-time employee if (i) the employer is required to make a contribution to a multiemployer plan for a full-time employee pursuant to a collective bargaining agreement, (ii) coverage under the multiemployer pan is affordable and provides minimum value.

Collectively Bargained Employees

- **Not a “get out of jail free” card**
 - If Penalty Category 1 is otherwise triggered, full-time employee under multiemployer plan included in penalty calculation (number of full-time employees minus 30)
 - Does not extend to non-bargained employees participating in the multiemployer plan
 - Affordability depends upon the employer contribution towards the cost of multiemployer plan coverage (single coverage, lowest cost option available)
- No similar rule exists with respect to collective bargained employees in general
- No similar rule exists with respect to employer obligations to other types of plans not sponsored by the employer (e.g., PEIP).



Collectively Bargained Employees

- Absent special rule addressing collectively bargained employees (not benefiting under a multiemployer plan), there is no special treatment available
- Look to existing law regarding collective bargaining agreements
- Minnesota Statutes Chapter 179A, Minnesota Public Employee Labor Relations Act (“MPELRA”)

MPELRA

- Prohibits public employers from “refusing to meet and negotiate in good faith with the exclusive representative of its employees in the appropriate unit”
 - “Meet and negotiate” means to meet at reasonable times, including where possible in advance of budget making process, with the good faith intent of entering into an agreement on terms and conditions of employment.
- Limited to the “terms and conditions” of employment
 - “Terms and conditions” broadly defined
- In general, health care coverage needs to be bargained

Other Limitation

- Minn. Stat. Section 471.6161, subd.5 explicitly ***prohibits the reduction of the aggregate value*** of benefits without agreement from the appropriate bargaining unit.
 - Changes to a health care plan may be made unilaterally so long as the aggregate value of benefits is not reduced.
 - Could you unilaterally increase the aggregate value of benefits?
 - Does a unilateral increase then become part of the aggregate value going forwards?
 - ***“Aggregate value” not defined.***

How far does it go?

- “Aggregate value of benefits”
 - What “benefits” are considered?
 - How do you determine “value”?
 - What does “aggregate” mean?



How do you determine “value”?

- Many ways to argue:
 - Defined benefit v. defined contribution
 - Defined benefit value determined actuarially
 - Per item v. overall program
 - On an employee population basis or sum of employees basis?
 - Pre-tax v. after-tax
 - Does adding create new threshold?
 - Projected inflation
 - Rollover/accumulation value of HRA/HAS
 - Does employer get the benefit of new mandates?

Aggregate Reduction in Value Case

- *West St. Paul Federation of Teachers v. Independent School District No. 197*, 713 N.W.2d 366 (Minn. Ct. App. 2006).
 - Medica Choice and Medica Elect.
 - Same except breadth of provider network.
 - Looking at 11.3% increase.
 - Requested alternatives from Medica.
 - Insurance committee review.
 - Elect left as is.
 - Choice changed.
 - Lawsuit: Violation of state law; unfair labor practice.

CBA Status

- Difference between contracts being negotiated and contracts mid cycle.
- CBAs in general
 - Language regarding illegal provisions not effective
 - Employer being subject to penalties is not “illegal”
- CBAs in negotiation
 - Agree to provisions consistent with employer’s need to avoid, minimize and manage penalties
 - Means the employer must have done some analysis ahead of time
 - Build in wiggle room for next cycle
- CBAs during term of CBA
 - Aggregate reduction in value issues
 - Reopeners
 - Wiggle room language
 - Memorandum of Understanding

Going Forward



- Suggestions:
 - Bargain it.
 - Work on CBA language.
 - Legislative clarification.

Questions



Thank you

- Darcy L. Hitesman
Hitesman & Wold, P.A.
12900 – 63rd Avenue North
Maple Grove, MN 55369
763-503-6620
Darcy@HitesmanLaw.com

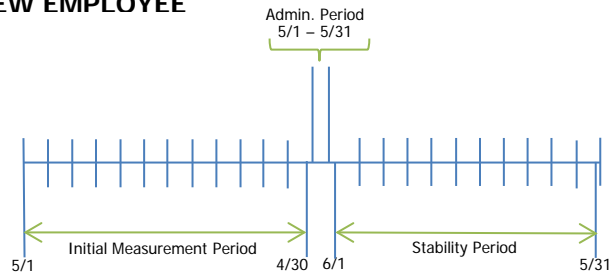
Handout 1 illustrates a *new employee* 12-month look back initial measurement period, an administrative period that when taken together with the initial measurement period does not exceed 13 months, and an initial stability period of 12 months.

A new employee shifts to *ongoing employee* status when he/she has been employed for a full standard measurement period. [This makes sense because there must be a full standard measurement period to do the look back for the ongoing employee stability period.]

To bridge a new employee to ongoing employee status, there is an overlap between the initial periods and the first year of ongoing employee status. Matching up Handout 1 and Handout 2 illustrates the overlap from the new employee status to the first year of ongoing employee status.

In future years, there will continue to be an overlap that is the duration of the administrative period. Matching up Handout 2 and Handout 3 illustrates the overlap from one ongoing year to the next ongoing year.

NEW EMPLOYEE



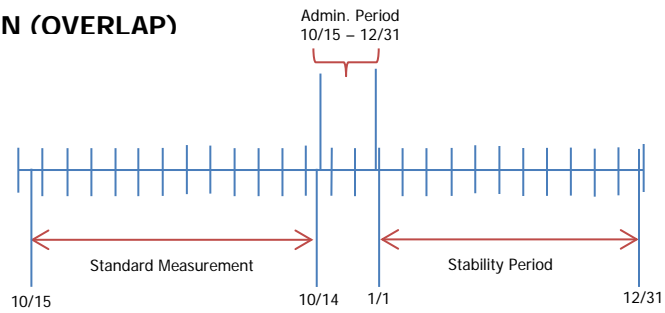
Start date: 5/1

IMP: 12 months

AP: 1 month

SB: 12 months

TRANSITION (OVERLAP)

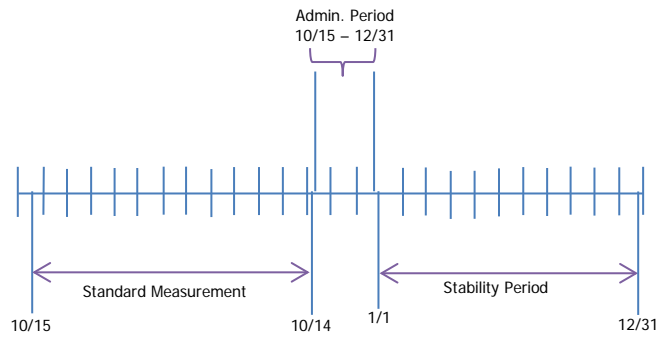


SMP: 10/15 – 10/14
12 months

AP: 10/15-12/31
2.5 months

SB: 1/1 – 12/31
12 months
* matches plan year

ONGOING EMPLOYEE



and so on...

SMP: 10/15 – 10/14
12 months

AP: 10/15-12/31
2.5 months

SB: 1/1 – 12/31
12 months
* matches plan year