ACA: EMPLOYER MANDATE FULL-TIME EMPLOYEES

The ACA requires applicable large employers – those with 50 or more full-time employees (FTEs) and full-time equivalents – to offer affordable minimum value coverage to substantially all FTEs (those working 30 hours or more per week) and their dependents, or risk paying a penalty for their failure to do so. The requirement, known as the employer mandate or employer shared responsibility provision, has been in effect since 2015.

Employers that are subject to the employer mandate must be familiar with the rules for determining an employee's full-time status and must ensure that they have reliable systems for tracking work hours. This publication addresses these matters in detail. For additional information about determining whether an employer is subject to the employer mandate, and for more detailed information regarding penalties that apply for failure to offer affordable coverage, see the NFP publications **ACA: Applicable Large Employers** and **ACA: Employer Mandate Penalties and Affordability**.

The ACA employer mandate requires employers to identify and offer coverage to full-time employees — those working at least 30 hours of service per week.

DETERMINING WHICH EMPLOYEES ARE FULL-TIME

Generally, under the employer mandate, employers must offer coverage to substantially all FTEs, defined as those who are employed on average at least 30 hours of service per week (or 130 hours of service per month). Note that there is no requirement to offer coverage to part-time employees, although part-time employees are included in the calculation of total employees for purposes of determining whether an employer meets the ACA definition of an applicable large employer (ALE).

The concept of an "hour of service" is defined immediately below and is key to determining whether an employee qualifies as an FTE under the employer mandate.

> **Hour of Service:** 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 (e.g., vacation or other paid time off (PTO), illness, incapacity (including disability), holiday, layoff, leave of absence, military leave, jury duty, etc.)

For most employers, counting hours of service and determining eligibility for coverage based on the result will be based on the following straightforward practices for hourly and non-hourly or salaried employees:

Hourly Employees

For hourly employees, employers must calculate actual hours of service from records of hours worked and hours for which payment is made or due (including hours the employee did not perform services for the employer but met the definition of work under "hours of service" for PTO). For the purpose of determining eligibility for coverage for hourly employees, employers can generally rely on records they otherwise maintain to ensure compliance with wage and hour laws.

Non-Hourly and Salaried Employees

For non-hourly and salaried employees, employers must calculate hours of service using one of three methods:

1. Actual hours of service from records of hours worked (includes non-working hours for which payment is made or due)
2. A days-worked equivalency, in which the employee is credited with eight hours of service for each day that the employee earns at least one hour of service
3. A weeks-worked equivalency, in which the employee is credited with 40 hours of service for each week that the employee is entitled to pay for worked or non-worked time (described above)

Employers are not required to use the same method for all non-hourly employees. Employers may apply different methods for different classifications of non-hourly employees, provided the classifications are reasonable and consistently applied. Whatever the method, the result must not substantially understate an employee's hours in a manner that would cause the employee to be treated as not full-time.

Most employers track hours of service for purposes of discretionary PTO policies or mandatory leave rights, such as protected leave under the federal Family and Medical Leave Act (FMLA) or Fair Labor Standards Act (FLSA). Employers that do not otherwise track employees' hours of service must implement a system to do so (such as through a third-party payroll vendor) in order to satisfy the monthly tracking requirements and avoid penalties associated with ACA coverage eligibility rules.

LEAVES OF ABSENCE

How a leave of absence impacts the hours of service calculation depends on whether the leave is paid or unpaid. Paid leaves are generally counted as hours of service, as noted in the definition above. However, unpaid leaves (hours of leave for which compensation is not paid) are not included in the hours of service calculation to determine full-time status, except when "special unpaid leave" rules apply. "Special unpaid leaves" are defined as unpaid leaves under FMLA, Uniformed Services Employment and Reemployment Rights Act (USERRA), or for jury duty, specifically when an employer utilizes the look-back measurement method to determine an employee's full-time status during a measurement period. In the instance of special unpaid leaves, employers must neutralize the effect of these unpaid hours on an employee's average hours of service. There are two methods available for performing this calculation:

1. Employers can determine the employee's average hours of service by excluding any periods of special unpaid leave during the measurement period and applying the average for the entire measurement period; or
2. Employers can impute hours of service during any periods of special unpaid leave at a rate equal to the average weekly hours of service for weeks that are not part of a period of special unpaid leave.

Practically speaking, most employers use the first method. In other words, the employer disregards the unpaid time under FMLA, USERRA, and jury duty when calculating hours of service. For example, if the employee is on unpaid FMLA for three months, the employer with a 12-month measurement period would average this employee's hours over nine months (disregarding the three-month period of unpaid FMLA). For more information on measurement and look-back periods, see the NFP publication **ACA: Employer Mandate Measurement Methods**.

SPECIAL RULES FOR EMPLOYEES WITH NONTRADITIONAL WORK SCHEDULES

While the general rule of counting hours for hourly and salaried employees is fairly straightforward, its application to some types of businesses and employees can be more complicated. For example, employers in the retail, restaurant, construction, and landscaping industries may have high employee turnover, which makes it difficult to track hours. In addition, commission-based employees and employees with unique work schedules may not fit neatly into the above categories for hourly or salaried employees.

Special rules apply to these nontraditional employees, including adjunct faculty, commission-based employees, employees with layover hours (such as in the airline or transportation industries) and on-call hours, rehired employees, short-term employees, staffing and leased employees and independent contractors, student workers, teachers, and variable-hour and seasonal employees. Guidelines for tracking hours for these types of nontraditional employees, with the exception of seasonal and variable-hour employees, are outlined below. For detailed information about tracking hours for seasonal and variable-hour employees, see the NFP publication **ACA: Employer Mandate Measurement Methods**.

Adjunct Faculty

In many cases, the compensation for adjunct faculty is not directly tied to the number of hours that they work (i.e., compensation often is tied to classroom hours and does not take into account time spent on non-classroom activities such as lesson preparation, grading papers and exams, or counseling students).

For these employees, employers should use a special method, which credits 2.25 hours of service (representing a combination of teaching or classroom time and time performing related tasks such as lesson preparation and grading and counseling) for each hour of teaching or classroom time. In other words, for each hour spent teaching in the classroom, the employer would credit an additional 1.25 hours for non-classroom activities. In addition, the employer would credit one hour of service for each additional hour the faculty member spent on other non-classroom duties (such as required office hours or required attendance at faculty meetings). Employers may rely on this method until further notice.

Commission-Based Employees

Employers with commission-based employees must use a reasonable method of crediting hours for those employees that includes travel and preparation time (among other things) in addition to time spent in sales meetings.

Layover Hours

Special rules apply for employees who may have layover hours, such as airline and transportation industry employees (pilots, flight attendants, train engineers, truck drivers, etc.). If an employee receives compensation for a layover hour beyond any compensation that the employee would have received without regard to the layover hour, or if the layover hour is counted by the employer toward the required hours of service for the employee to earn their regular compensation, the employer is required to credit an hour of service for this time.

However, in cases when layover hours are not compensated or are not counted by the employer toward required hours of service, it is reasonable for employers to credit employees with eight hours of service for each day on which the employee is required, as a practical matter, to stay away from home overnight for business purposes. That is, employers should credit eight hours each day (or 16 hours total) for the two days encompassing the overnight stay. Importantly, employees must be credited with their actual hours of service for a day if crediting eight hours of service substantially understates the employee's actual hours of service for the day (including layover hours for which an employee receives compensation or that are counted by the employer toward required hours of service).

On-Call Hours

Until further guidance is issued, employers must use a reasonable method for crediting hours of service for employees with on-call hours, whether or not the employee remains on the employer's premises during the on-call time. It is unreasonable not to credit an hour of service in instances where the employee is paid for the on-call hour, where the employee remains on the employer's premises for the on-call hour, or where the employee cannot use the on-call hour effectively for their own purposes.

Rehired Employees

A special rule applies when an employee is terminated but rehired shortly thereafter. If a terminated employee is subsequently rehired within 13 weeks, all prior service credit must be considered in making a full-time status determination. Conversely, if an employee does not earn an hour of service for 13 consecutive weeks and is subsequently rehired, then the employee's status (as a full-time, variable-hour, or seasonal employee) is determined at the time of rehire, without respect to any prior service credit. This special rule is designed to limit an employer's opportunity to avoid its employer mandate obligations by firing employees at or around 90 days (since employers generally will not be liable for a penalty for the first 90 days of employment if a maximum 90-day waiting period is implemented) and rehiring them shortly thereafter. The rule also comes into play for measurement periods for seasonal and variable-hour employees.

Short-Term Employees

Short-term employees whose work or service hours are known to be full time at the time of hire will generally be considered FTEs. For example, if the employer hires a paid intern who will work 30 hours or more per week for five months, the intern will be considered an FTE. In other words, the employer cannot treat the intern as a variable-hour employee (and thereby use a measurement period for the intern); because the intern's full-time schedule is known at the time of hire, the employer must offer coverage to the intern.

Interns who are classified as seasonal employees may be exempt from offers of coverage as long as certain conditions are met. For further discussion of interns, see under the Student Workers and Interns/Externs section below.

That being said, employers can implement a maximum 90-day waiting period to exclude employees from coverage for the first 90 days of employment. Specifically, employers are not liable for employer mandate penalties if employees are excluded from coverage under a waiting period, provided the waiting period does not exceed 90 days and further provided that the employee is offered coverage thereafter. In the above example, the intern would not be considered an FTE for the first three months (i.e., 90 days) of the internship if the employer had a 90-day waiting period, but they would be an FTE for the last two months of the internship (and therefore must be offered coverage as of the 91st day to avoid a penalty).

Staffing, Leased Employees, and Independent Contractors

Employers that use temporary employee staffing or leasing companies face special issues when determining FTE status. The first step is to determine whether the employees are employees of the recipient organization (RO), which is the employer leasing or using the temporary staffing employees, or the staffing/leasing company itself. This is called the "common-law employer" analysis, which is a fact and circumstances analysis that turns on which entity has the right to control the employee's work. The analysis is beyond the scope of this publication; however, it is generally the same analysis that applies to the issue of classifying workers as employees or independent contractors (see under Independent Contractors on page 5).

Staffing Employees: The analysis for staffing employees is very similar to the analysis that should be performed to distinguish between employees and independent contractors. It requires determining which employer (either the RO or staffing agency) is responsible for controlling the employee's work. The IRS has issued three different factors that should be used in making the determination:

- Behavioral Control: Does the RO control scheduling, tools, supplies, and individual work assignments of the individual?
- Financial Control: Does the RO pay the individual directly, or is the individual paid by the staffing agency?
- Relationship Created: Was there an employee offer letter from the RO to the individual? Is the arrangement on a permanent or temporary basis? Does the RO offer the individual other benefits?

The entities must conduct the control factors analysis to determine whether the individual is an employee of the staffing agency or of the RO.

When the Employer Is the Staffing Agency

When it is determined that the staffing agency is the common-law employer, the staffing agency must offer coverage to the employee (if they are an FTE) or risk paying a penalty under the employer mandate. The next natural question is whether the employee is a variable-hour employee. Because staffing agencies vary widely in the types of assignments they fill for their recipient clients and in the anticipated assignments that a new employee will be offered, there is not a general presumption either way, but there are some general guidelines.

A new employee will be determined to be a variable-hour employee based on several factors related to the typical experience of an employee in the position with the staffing agency that hires the new employee (assuming the staffing agency employer has no reason to anticipate that the new employee's experience will differ). These factors include:

- Whether employees in the same position with the staffing agency retain as part of their continuing employment the right to reject temporary placements that the RO's staffing agency offers the employee
- Whether employees typically have periods during which no offer of temporary placement is made
- Whether employees typically are offered temporary placements for differing periods of time
- Whether employees typically are offered temporary placements that do not extend beyond 13 weeks

For additional information about the special rules that pertain to variable-hour employees, see the NFP publication **ACA: Employer Mandate Measurement Methods**.

When the Employer Is the RO

When it is determined that the RO is the common-law employer of the employee, then the RO must offer coverage to the employee (if they are an FTE) or risk paying a penalty under the employer mandate. Similar to the rules for multiemployer plans, an RO may meet its obligation to offer coverage to the employee if the staffing agency offers coverage to the individual that is affordable and meets minimum value. However, the fee that the RO pays to the staffing agency must reflect payment for health coverage.

Whether it is the staffing agency or the RO, the common-law employer will be considered the employer for purposes of the employer mandate. The common-law employer must determine whether the employee is expected to work at least 30 hours per week. If so, then the employee is considered an FTE and must be offered coverage.

Importantly, employees that satisfy a specific definition of a "leased employee," discussed next, may be excluded from consideration as FTEs.

Leased Employees: An employee who meets the definition of a leased employee, as outlined in the Internal Revenue Code (IRC), may be excluded from the RO's determination of FTEs for purposes of the employer mandate. According to the IRC, any person who is not an employee of the RO and who provides services to the RO is considered a leased employee if all of the following conditions are met:

- Such services are provided pursuant to an agreement between the RO and any other person (usually the leasing company)
- Such person has performed such services for the RO on a substantially full-time basis for a period of at least one year
- Such services are performed under primary direction or control by the RO

So, somewhat counterintuitively, if an individual has been leased to an RO, and the individual has worked for the RO (and under the RO's primary direction/control) for at least one year, the RO may consider the individual a leased employee and therefore does not need to offer coverage to the individual. Instead, the individual under these circumstances is considered an employee of the leasing company, and the leasing company must offer coverage to the employee or risk paying a penalty under the employer mandate.

In summary, a leased employee is considered the employee of the RO during the first year, and the RO must offer coverage to the employee (if they are an FTE) or risk paying a penalty under the employer mandate. After the first year, the leased employee is considered the employee of the leasing organization, and the leasing organization thereafter assumes coverage responsibilities under the employer mandate.

Independent Contractors: The determination of who is an employee versus an independent contractor is based on the nature of the individual's employment. It includes an analysis of factors such as who directs the individual's work, provides tools, determines work processes, etc. In plain terms, a contractor is given a project or goal to accomplish. The contractor determines how the project gets completed. If the employer largely dictates how a project must be completed, then the individual is most likely an employee.

Courts have used the following factors to determine whether an individual is an employee or independent contractor:

Generally speaking, employers should limit their offerings (including tools, supplies, equipment, and employee benefits) to contract workers. If there is too much integration of the employer and the contractor, the IRS may determine that the individual is a misclassified employee. This would have tax implications for the employer as well as past liability on the group health plan.

The determination of who is an employee rather than an independent contractor for purposes of the employer mandate is based on the nature of the individual's employment and relies on the same test of behavioral and financial control that is used to determine whether an individual receives a Form 1099 as an independent contractor or a Form W-2 as an employee. If the individual appropriately receives a Form 1099 as an independent contractor, then they should not be offered coverage under the employer's plan. Importantly, the offer of coverage to an individual actually adds weight to the argument that they more closely resemble an employee than an independent contractor.

The DOL has made employee misclassification a focal point of recent investigation. Penalties can be high for misclassifying employees as independent contractors to avoid paying taxes on or offering benefits to them. See the links under the Resources section below for helpful DOL resources on this issue.

Student Workers and Interns/Externs

Under the employer mandate, there is no general exception for student workers or interns/externs. All hours of service for which a student employee of an educational organization (or of an outside employer) is paid or entitled to payment in a capacity other than through the federal work study program or a state or local government's equivalent are required to be counted as hours of service. However, services by an intern or extern do not count as hours of service to the extent that the student does not receive, and is not entitled to, payment in connection with those hours. Therefore, when student workers, interns, or externs are compensated for their services, employers must count their hours of service when determining if the employer must offer coverage to the student worker, intern, or extern (if they are an FTE) to avoid risking a penalty under the employer mandate. In addition to employer mandate requirements, it is important to note that student workers, interns, or externs who are expected to work 30 hours or more per week may be entitled to coverage under the employer's group health plan eligibility terms.

In some cases, interns can be classified as seasonal employees, which may allow employers to place them in a look-back measurement period during their initial employment period. A "seasonal" employee is one whose customary annual employment does not exceed six months and whose work begins at approximately the same time each year. Interns who are hired for brief periods around the same time each year (such as summer interns) may therefore qualify as seasonal employees. However, employers should not automatically classify all interns as seasonal employees without first reviewing the details of the internship to confirm that the program is sufficiently circumscribed. For further discussion of seasonal employees and the look-back measurement method, see the NFP publication **ACA: Employer Mandate Measurement Methods**.

Teachers and Other Employees of Educational Institutions

Considering the traditional summer and winter breaks in academic school years, work schedules of teachers present a clear challenge for educational institutions that are attempting to determine the full-time status of their teachers and faculty. Whether employers use the monthly measurement period versus the look-back measurement period to determine whether employees are FTEs will impact how hours are counted.

Look-Back Measurement Period

If the leave is a period of paid leave, then the employer must follow the general "hours of service" rule outlined above (i.e., hours of service include hours for which the employee is paid even if the employee is not actually working).

If the leave is a period of unpaid leave, and the employer is using the look-back measurement period, then the employer may use one of two alternative methods to calculate the employee's hours.

- Under the first method, the employer simply disregards the employment break and uses the average hours of service over the remaining school year.
- Under the second method, the employer credits the employee with hours of service during the employment break at a rate equal to the average weekly rate at which the employee is credited during the rest of the school year.

Monthly Measurement Period

If the leave is a period of paid leave, then the employer must follow the general "hours of service" rule outlined above (i.e., hours of service include hours for which the employee is paid even if the employee is not actually working).

If the leave is a period of unpaid leave, and the employer is using the monthly measurement period, the employer must determine whether the employee is a "new" employee upon return from a break in service. The averaging method for periods of special unpaid leave and employment break periods does not apply under the monthly measurement period, regardless of whether the employer is (or is not) an educational organization.

In other words, if an educational organization counts the work hours of teachers using the monthly measurement method, a teacher that is unpaid during a summer break is not considered an FTE for the summer months. Therefore, the employer is not responsible for offering coverage during the summer break period. However, if a teacher is paid an annual salary, then they would be an FTE (since their salary is paid even when they are not working). There could be situations where a teacher is not necessarily a full-time permanent teacher yet works full-time hours in the teaching months and zero hours during the summer break. In this case, under the monthly measurement period, the teacher would not be considered an FTE during the summer months.

EXCLUSIONS

Members of Religious Orders

Members of religious orders are not treated as FTEs; thus, until further guidance is issued, employers should not count as an hour of service any work performed by an individual who is subject to a vow of poverty as a member of a religious order when their work is in the performance of tasks usually required (and to the extent usually required) of an active member of the order.

Volunteers

Hours of service are generally disregarded for services performed by volunteers for a government entity or a tax-exempt organization (such as volunteer firefighters). However, volunteers may only be excluded from offers of coverage if the only compensation they receive is in the form of expense reimbursements or reasonable benefits or fees customarily paid by similar entities in connection with the services provided by volunteers.

SUMMARY

The ACA requires employers that are subject to the employer mandate to offer affordable coverage to their FTEs or risk paying a tax penalty for their failure to do so. The rules for determining the full-time status of regular hourly or salaried employees are similar to the rules that govern federal and state leave of absence laws, and employers can generally rely on the same "hours worked" tracking and quantification systems that they use for those compliance obligations. Employers that hire employees with nontraditional work schedules should ensure that they are familiar with the special hours worked quantification rules that apply to these segments of the workforce. To discuss your ACA employer mandate compliance obligations and other aspects of your employee benefits program, or for copies of NFP publications, contact your NFP benefits consultant. For further information regarding NFP's full range of consulting services, see **NFP.com**.

RESOURCES

Final Regulations

IRS FAQs

DOL Misclassification Initiative

DOL Fact Sheet

eLaws Advisor

About NFP

NFP is a leading property and casualty broker, benefits consultant, wealth manager, and retirement plan advisor that provides solutions enabling client success globally through employee expertise, investments in innovative technologies, and enduring relationships with highly rated insurers, vendors and financial institutions.

Our expansive reach gives us access to highly rated insurers, vendors and financial institutions in the industry, while our locally based employees tailor each solution to meet our clients' needs. We've become one of the largest insurance brokerage, consulting and wealth management firms by building enduring relationships with our clients and helping them realize their goals.

For more information, visit **NFP.com**.