

The ACA Final Pay or Play Rules: Five Practical Strategies for Institutions of Higher Education

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Final rules related to the employer shared responsibility provisions of the ACA contain numerous transition rules and guidance useful to educational institutions. The employer shared responsibility provisions of the ACA (a/k/a the “employer mandate” or “pay or play”) require large employers¹ to offer health care coverage to their “full-time employees” and certain dependents² or risk the assessment of monthly penalties called “assessable payments.” As with any complex law, the devil is in the details. Some of those details have been omitted in order to help you focus on the big picture.

Strategy 1. Make ACA Compliance a Collaborative Effort. It is essential that your ACA pay or play game plan be developed with input from various constituencies within your organization. You should include individuals with decision-making authority from finance, human resources, payroll, benefits, legal and, if applicable, labor relations. While your brokers and consultants are important to your compliance efforts, you need to be careful what you discuss with them. If the event of litigation related to your ACA compliance strategies or ACA Whistleblower actions, there is no broker/client or consultant/client privilege.

Strategy 2. Understand the Risk of Non-Compliance. If you fail to offer health care coverage (called “minimum essential coverage”) to at least 70% (95% in 2016) of your ACA full-time employees, and just one ACA full-time employee qualifies for subsidized Marketplace coverage, then you may be assessed an annual penalty that is \$2,000 x all of your full-time employees (minus a toss-out of 80 employees or 30 employees in 2016). An insufficient coverage penalty may be imposed if you offer coverage to your ACA full-time employees, but it is either not “affordable” (lowest value, employee-only coverage costs more than 9.5% of employee’s household income) or does not provide “minimum value” (plan pays less than 60% of the anticipated medical expenses). In that case, the penalty is \$3,000 x each ACA full-time employee who qualifies for subsidized Marketplace coverage. Both penalties are assessed monthly.

Strategy 3. Identify Who Has to Be Offered Coverage. To avoid potential penalties, you must offer coverage to your ACA full-time employees and certain dependents. As noted above, you need to identify all employees who are credited on average at least 30 hours of service a week or 130 hours of service a month. You can measure each employee’s hours of service monthly. The optional method of determining ACA full-time status is to use certain “look-back” measurement periods. A “standard measurement period” is used for determining whether on-going employees are ACA full-time.³ Hours of service for new hires are measured by “initial measurement periods.” There are “administrative periods” to conduct open enrollment; and periods when health coverage must be continued (“stability periods”), even if an employee’s hours are reduced. The logistics of using measurement periods are extremely complicated and beyond the scope of this article. However, if you intend to utilize measurement, administrative and stability periods for determining your ACA full-time employees, you should have these tracking systems in place no later than July 1, 2014.⁴

1. An “applicable large employer” is an employer with 50 or more full-time employees, including full-time equivalents, in the preceding year, determined on a controlled group basis. Full-time equivalents are determined for each month by adding up all of the hours of employees who do not work at least 30 hours a week (up to 120 hours a month) and divide that total by 120. We will assume in this article that most, if not all, institutions of higher education are large employers.

2. An ACA full-time employee is any employee who is credited with at least 30 hours of service a week or 130 hours of service a month. A “dependent” does not include the employee’s spouse, and under the final rules, does not include a stepchildren or foster children.

3. An ongoing employee is one who has been employed during an entire standard measurement period.

4. If an employee terminates from employment with an educational institution and later returns, the employee will generally be treated as a new hire (and not an on-going employee) if the individual has no hours of service for 26 or more weeks (13 weeks for other employers).

Strategy 4. Learn How To Count Hours of Service. The term “hours of service” means each hour for which an employee is paid, or entitled to payment, for the performance of duties, and each hour for which an employee is paid, or entitled to payment for a period of time during which no duties are performed. For employees paid on an hourly basis, you must count actual hours. For employees who are not paid on an hourly basis, you may calculate actual hours of service (the same as for hourly employees), or may use certain equivalency methods based upon “days worked” or “weeks worked,” unless the use of such equivalencies results in an understatement of the employee’s actual hours of service.⁵

Adjunct Faculty – New Safe Harbor Method for Counting Hours. Until formal guidance is issued, the IRS has provided a “safe harbor” method for calculating the hours of service for adjunct faculty. Under the safe harbor, you count 2-1/4 hours of service for each hour an adjunct faculty member spends teaching. In addition, each hour of service for required office hours and mandatory faculty meetings must be counted. In the alternative, you can elect to count the hours of service of adjunct faculty by using any “reasonable method that is consistent with the statutory provisions of the employer mandate.”

Student Employees. There is no general exception under the pay or play rules for students who perform services for educational institutions. Under the final rules, paid hours of service in connection with federal work-study programs (or comparable state or local programs) do not have to be counted. Also, hours of service performed by an intern or extern are not counted, but only if the student does not receive, and is not entitled to, payment in connection with those hours. Hours worked as a bona fide volunteer are excluded; and some services performed by student employees may fall into this category.⁶

Hard to Track. For employees whose hours of service are particularly challenging to identify or track or for whom the general rules for determining hours of service may present special difficulties, informal IRS guidance permits the use of a “reasonable method of crediting hours of service.”⁷ Whether a method of crediting hours of service is reasonable will be based upon the relevant facts and circumstances.

Clearly, counting actual hours of service or using one of the equivalency methods is the most conservative approach. If you decide to develop an alternative reasonable method for crediting hours of service for specific classes or groups of employees, you must take into account the nature of the position, the extent to which job descriptions, agreements and other documentation of the arrangement are consistent with the hours of service actually worked and recorded, as well whether an employee’s time is restricted or the employee is required to be “on call.” Any alternative reasonable method you decide to adopt should be used for all similarly situated employees.

There are also rules that require you to count hours of service during certain periods of unpaid leave. These rules only apply if the employee’s hours of service are being tracked by using the look-back measurement method.

Unpaid Leave: You must take into account periods of unpaid leave that is called “special leave.” Special leave includes jury duty, leave under the Family Medical Leave Act, and leave for military service under USERRA.

Other Unpaid Leave Periods – Educational Institutions Only. This leave period rule will be called the “summer vacation rule.” It applies only to educational institutions. You must take into account periods of unpaid leave that extend for at least a four-week period.⁸

Under the special leave rule, there are no limits with respect to the hours that must be credited, but under the summer vacation rule no more than 501 total hours of service must be counted for these break periods in any calendar year.

5. Under the days worked method, any employee who works one hour on any day is credited with 8 hours of service for that day; under the weeks worked method, any employee who is credited with at least one hour of service in any week is credited with 40 hours of service for that week.

6. The term “bona fide volunteer” includes any volunteer who is employed by a governmental entity or a tax-exempt organization so long as the only compensation received is limited to a reimbursement of reasonable expenses (or a reasonable allowance for expenses incurred in performing services), or reasonable benefits, such as length of service awards and nominal fees customarily paid by such entities in connection with volunteer work.

7. This is informal guidance that appears in the preamble to the final rules.

8. For both the special leave and summer vacation rule, you must either impute hours during the unpaid leave period or calculate the employee’s average hours of service by disregarding the period of time the employee was out on unpaid leave.

Strategy 5. Keep Good Employment and Enrollment Records. Even if you do not use measurement periods for determining your ACA full-time employees, there are new IRS reporting requirements. Information must be reported to the IRS by self-insured health plans (and insurers) that provide coverage to plan participants (including retirees). This report is in connection with enforcement of the individual mandate. Also, each large employer must report additional information to the IRS in connection with the enforcement of the employer mandate. There is no delay of the new IRS reporting requirements for non-calendar year plans. The first reports will be due in 2016 for 2015. Your current payroll or other employee tracking systems may need to capture additional information for this reporting.⁹ Also, keeping adequate records of “who was offered what” will be critical to defending against the assessment of penalties.

If you have questions or need advice on this topic or other Affordable Care Act matters, contact the author, Sarah Lockwood (“Sally”) Church (schurch@saul.com), or other members of Saul Ewing’s Affordable Care Act Compliance Team: Dan Brandenburg (dbrandenburg@saul.com); Kevin Wiggins (kwiggins@saul.com); or Paul Kasicky (pkasicky@saul.com). For information on Saul Ewing’s Cost Certainty for Affordable Care Act Compliance Consulting: go to: <http://www.saul.com/cost-certainty-affordable-care-act-compliance-consulting>

9. This additional information includes the ability to show, for each calendar month, whether each ACA full-time employee was offered the right to enroll in minimum essential coverage, each ACA full-time employee’s share of the lowest cost monthly premium for minimum value employee-only coverage, and the months each ACA full-time employee was actually covered under the plan during the calendar year by name, address and Social Security number.

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