Affordable Care Act (ACA) January 2015 Update: Special Categories of Employees and Hours Worked Determinations

Topics

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The information provided below should be used in your continuing efforts to become compliant with the Affordable Care Act’s Employer Mandate requirements. Changes to employee status or tracking of hours worked made as a result of information contained in this document should be implemented as soon as feasible. Generally, all part-time faculty should be using the Contact Hours to Hours Worked Conversion Chart, ‘Standard Conversion Chart’, contained in the revised Employee Categories Policy to determine hours worked or should be tracking hours and/or approving actual hours worked each pay period.

1. Use of Separate Conversion Charts

We have been approached by a few institutions that have developed and asked to use separate (modified) conversion charts to determine weekly hours worked for part-time faculty in certain disciplines. These charts generally start with the IRS proposed approach, and then make modifications (generally downward) based on assumptions that the Standard Conversion Chart contained in the revised Employee Categories policy may not accurately reflect hours worked for these part-time faculty. For instance, these charts have been proposed for use in departments such as math, science, art, music, or dance, etc. The Standard Conversion Chart is based on an IRS safe harbor, which is automatically considered to be a reasonable approach for satisfying the IRS requirements under Code Section 4980H. Any alternative approach must independently satisfy the IRS “reasonableness” standard, and cannot rely on the Standard Conversion Chart as a proxy for a starting point. Under guidance from legal counsel, an alternate approach that backs away from the IRS safe harbor would face considerable scrutiny under an IRS audit as to whether Code Section 4980H is being met and might not satisfy the ‘reasonable method’ standard proposed in the IRS guidelines. Therefore, at this time, the Standard Conversion Chart should be used for part-time faculty to determine hours worked or the alternative option is for these part-time faculty is to track actual hours worked. No other charts should be used to determine hours worked until further research and analysis of actual hours worked has been undertaken and the reasonableness of such an approach (without reference to the IRS safe harbor) is established.
2. Special Issues for Resident Assistants

We received many questions regarding tracking time for Resident Assistants, especially since there is a wide variance among institutions related to the work expectations for Resident Assistants and how they are paid. Since we can’t address each institution individually, the following is general guidance on tracking hours worked for Resident Assistants:

- Resident Assistants would generally be considered ‘common law’ employees and treated as employees under the ACA even if the only compensation they receive is room and board; this means Resident Assistants should be tracking hours worked
- Each hour the student is committed to work should be counted. In addition, any hours for which they are entitled to compensation should be counted as well.
- All hours while ‘on-call’ must be counted if the employee is ‘required to remain on-call on the employer’s premises, or for which the employee’s activities while remaining on-call are subject to substantial restrictions that prevent the employee from using the time effectively for the employee’s own purposes’.
  - By way of example, this means that hours for which an RA is responsible for monitoring a residence, providing counseling, administrative activities or performing other services must be counted.
  - Hours for which the RA is “at rest” may not need to be counted if they are not REQUIRED to remain on the premises or for which they are otherwise “on call” and their liberties during the on call period are not significantly restricted.
  - Changes to the Resident Assistant employment agreement/job description may be needed to enable the institution to ignore certain ‘down time’ hours
- All hours the student works across all departments on campus must be counted
- In determining average hours worked, we are not allowed to average in breaks in service unless the break is 26 weeks or more.
  - Example Break in Service: Joe Resident works an average of 31 hours per week prior to summer break. Due to personal reasons, Joe does not return for fall semester, but returns for winter classes after a 26 week break, Joe is treated as a new employee upon his return.
  - Example No Break in Service: Joe Resident works an average of 31 hours per week prior to summer break. He takes summer off and returns for fall semester after a 14 week break. For hours counting purposes the break is ignored and Joe resumes counting hours (averaging only his pre and post break time) for fall semester.

3. Special Issues for Athletic Coaches, Athletic Assistants or Athletic Graduate Assistants

Another employee category in which we received questions about how to handle hours worked was for part-time Athletic staff and/or Athletic Graduate Assistants. Much of the same guidance provided for regular hourly employees and Resident Assistants applies here as well although there are a few special considerations that apply specifically for this category. The guidance is as follows:
• Each hour the Athletic Staff or Graduate Assistant performs work for which they are entitled to pay should be counted. In addition, any hours for which they are entitled to compensation (even if not working) should be counted as well.
  o By way of example, this means that hours for which an Athletic staff employee is obligated to attend an administrative meeting or team function must be counted, as well as hours preparing for or reviewing practices, games, or events and/or recruiting or performing other services must be counted.
  o Hours in transit for required job activities must be counted. In addition, in the event a required activity necessitates a “layover”, the individual must be credited with the greater of actual hours spent working (on either side of the layover) or 8 hours for each day before and after a required layover.
  o Example: A part-time coach leaves Friday afternoon at 3pm to travel with the team until 10PM. He spends the night and works the athletic competition and then returns with the team with travel concluding at 4pm on Saturday. This employee would track 8 hours of work on Friday (given that he would ‘work 3pm – 10pm which is 7 hours and 8 is greater than 7). This employee would track 9 hours of work Saturday (given he started ‘work’ with the team beginning at 7am Saturday and worked through 4pm Saturday afternoon.
• All hours the Athletic staff member or Graduate Assistant works across all departments on campus must be counted
• In determining average hours worked, we are not allowed to average in breaks in service unless the break is 26 weeks or more.
  o Example Break in Service: Joe Assistant works an average of 31 hours per week during baseball season. Joe does not work again until winter pre-season (after a 26 week break), Joe is treated as a new employee upon his return.
  o Example No Break in Service: Joe Assistant works an average of 31 hours per week during spring baseball season. He takes summer off and returns for fall semester and works for another sport after a 14 week break. For hours counting purposes the break is ignored and Joe resumes counting hours (averaging only his pre and post break time) for fall semester.

4. Education Faculty – Clinicals

Several institutions have requested a separate conversion chart for part-time Education faculty with student teaching/intern observation responsibilities. Others have asked about ‘drive time’ or commuting time to the observations and whether this time should be counted.

If the part-time faculty is spending some of the time teaching in a classroom setting, the Standard Conversion Chart would apply to determine hours worked. For the time spent in observations or commuting, the Standard Conversion Chart would not apply. Current recommendation is for institutions to have these faculty track hours worked. If possible, written communication should be provided to the part-time faculty indicating the expected hours worked each week or average for the semester based on prior experience. Once we have a few semesters of historical data from our institutions, there may be other options for determining hours worked.
Regarding ‘drive time’ or commuting time, legal counsel has advised that commuting time should be counted or credit given for hours worked based on guidance given for similar employee categories.

5. Nursing Faculty – Clinicals

Institutions have requested using separate charts to calculate hours worked for part-time nursing faculty teaching clinicals because the Standard Conversion Chart does not accurately reflect hours worked. At this time, if the Standard Conversion Chart does not accurately reflect hours worked, the part-time faculty should be tracking actual hours worked. If they are working the same schedule each week, schedules may be entered in the time tracking system and the faculty can approve the hours each pay period to verify the hours worked. Ongoing nursing faculty can moved to ‘regular’ status to avoid the 1,300 hours or 26 week break in service requirement.

6. Continuing Education

If the Standard Conversion Chart does not accurately reflect hours worked for these faculty, they should be recording hours worked. Ongoing Continuing Education teachers may be moved to part-time ‘regular’ status to avoid the 26 week break in service. Hours worked should be recorded across all departments at the institution and across multiple jobs at other USG institutions. We will be working on a ‘standard’ employment agreement for continuing education instructors and will be giving additional guidance on the hiring and employing this category of employee.

7. Administration Period for Transitional Measurement Period

As communicated in the ACA workshops, the Transitional Measurement Period was May 1 through October 31, 2014. During this time, institutions were instructed to track time worked for all part-time and variable hour employees to determine benefits eligibility beginning 2015. The Shared Services Center provided time tracking reports to ADP institutions for this period a few weeks ago. Employees who worked an average of 30 hours or more during the May 1 through October 31, will be eligible for health insurance coverage from January 1 – December 31, 2015. Weeks in which the employee did not perform hours of service due to breaks of less than 26 weeks but at least 4 weeks (if a period with no hours of service is less than 4 weeks, the employee should be allocated with zero hours during those weeks) should be removed when calculating average hours worked. If you haven’t already, institutions should be using the reports to determine who is eligible for health insurance in 2015. Instructions have been released on how to enter data to indicate health benefits eligibility due to ACA reasons.

8. ACA Compliance Tool – Tracking Periods and Compliance

Recently, an RFP was released to procure an ACA Compliance Tool that can be used system-wide. We are in the final stages of the RFP process and anticipate the implementation of the ACA tool will begin in the next few months. The ACA Tool will help each institution manage the tracking periods for part-time and variable hour employees. Reports and manager dashboards will also be available for each institution and the vendor will provide the ACA IRS reporting for each institution. More information about timing and system training will be distributed after the implementation has begun.
9. **Terminating employees who become eligible for coverage under look-back period**

Generally speaking, if an assignment ends and/or there is no longer work available, an employee who has become eligible for coverage under a look-back period may be terminated. Every effort should be made to continue the employee either in the same department or in another position on campus prior to a termination action. Documentation of the job search effort should be made and included in the employee’s file. In no case should an employee be terminated due to becoming eligible for healthcare coverage.

10. **Temporary Staffing Employees**

In most cases, Temporary Staffing employees (i.e., “contingent workers”) are not employees for purposes of the Affordable Care Act. There are administrative tests that can be done to help determine if the contingent worker is a “common law” employee of the Staffing Agency or University System such as who does the hiring, firing and directing of the work. There should be language in the staffing or outsourcing agreement which specifies the terms of the relationship and addresses these items. In addition, if the Temporary Staffing Company is providing health coverage, the terms should be stated in the contract for additional payment for this coverage.

11. **Special Hours Tracking Rules for Employees of Educational Organizations**

While many employers are permitted to treat individuals with a service break of 13 weeks or more as new employees (and ignore prior service periods) educational institutions are required to use 26 weeks as the length of time that must elapse before a break in service is considered to occur. Also, when averaging hours for purposes of determining 30 hour “full time” status under the look-back determination, periods of non-service during a break (to the extent at least 4 weeks in duration) cannot used when averaging hours worked for this employee. Consider the examples below:

- **Example Break in Service**: Joe Resident works an average of 31 hours per week prior to summer break. Due to personal reasons, Joe does not return for fall semester, but returns for winter classes after a 26 week break, Joe is treated as a new employee upon his return.
- **Example No Break in Service**: Joe Resident works an average of 31 hours per week prior to summer break. He takes summer off and returns for fall semester after a 14 week break. For hours counting purposes the break is ignored and Joe resumes counting hours (averaging only his pre and post break time) for fall semester.