Calculating Hours of Service Under the Affordable Care Act

Compliance with the Affordable Care Act (ACA) will necessitate accounting for work and leave time for all employees. Employers are accustomed to tracking hours of non-exempt employees—those who are entitled to overtime and minimum wage under the Fair Labor Standards Act (FLSA). The ACA will require employers to apply special rules when tracking the hours of non-exempt employees and also to account for hours of many exempt employees. These two requirements may result in an unprecedented administrative burden.

**Terminology:** Hours of work or leave are called *hours of service* under the ACA. *Hours of service* is a term of art and should not be confused with terms used under other laws to describe employee work time. For example, hours of service are not the same as hours worked under the FLSA. Also, the ACA rules for hours of service incorporate some—but not all—concepts relating to hours of service for purposes of administering employee pension benefit plans.\(^1\) Those who are familiar with the definition of hours of service for purposes of pension benefit plans should understand the differences for purposes of ACA administration.

**Significance:** It is important to understand how hours of service are used in determining employer compliance with the ACA.

First, hours of service of every employee are used in the calculation of workforce size. An employer that is potentially covered by the ACA must track all hours of service for all employees. Similarly, an employer that may be eligible for the delay of shared responsibility requirements to 2016 must have workforce data in order to certify its eligibility for the delay. See [*Employer Shared Responsibility Effective Dates*](#).

\(^1\) 79 Fed. Reg. 8549 (Feb. 12, 2014).
Second, hours of service are used to determine whether an individual employee works enough hours to be considered full-time. Full-time status is then used to calculate penalties, if applicable, and for purposes of employer reporting.

**Definition:** For purposes of full-time status and to calculate the workforce extender (WFE), a district must use the ACA’s definition of hours of service.\(^2\) Hours of service means:\(^3\)

- hours for which an employee is paid, or entitled to payment, for the performance of duties for the employer
- hours for which an employee is paid or entitled to payment by the employer for a period of time during which no duties are performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence

Note that hours of service include paid leave. A separate provision of the ACA rules defines special unpaid leave—unpaid leave under the Family and Medical Leave Act, unpaid military leave, and unpaid leave for jury duty.\(^4\) Special unpaid leave is excluded when averaging hours of service during a measurement period under the look-back method.\(^5\) Special unpaid leaves are not used when calculating hours of service under the monthly measurement method, which is the method most Texas districts will use.\(^6\) Districts that use the monthly measurement method will not include special unpaid leaves when calculating total hours of service in a calendar month.

The ACA recognizes exceptions from the definition of hours of service. Three of these exceptions—volunteer work, work-study, and services outside the United States—may apply to school districts. The exceptions are described immediately below, at *Exceptions*. Special rules apply to the calculation of hours of service for employees who are not compensated on an hourly basis, such as substitutes and other shift workers, part-time teachers, and on-call staff. The special rules for non-hourly employees are addressed afterwards, at *Calculating hours of service*.

**Exceptions:** The ACA rules specify that time spent performing certain types of work is not considered when calculating hours of service. Three of these exceptions are described below.

**Volunteer work:** Hours of service does not include services performed as a bona fide volunteer.\(^7\) A *bona fide volunteer* means an employee of a government entity or tax exempt organization whose only compensation is in the form of: \(^8\)

- reimbursement or reasonable allowance for reasonable expenses incurred in the performance of volunteer services; or

\(^3\) 26 C.F.R. § 54.4980H-1(24).
\(^4\) 26 C.F.R. § 54.4980H-1(44).
\(^6\) 26 C.F.R. § 54.4980H-3(c)(4)(iii).
\(^7\) 26 C.F.R. § 54.4980H-1(24)(ii)(A).
\(^8\) 26 C.F.R. § 54.4980H-1(7).
• reasonable benefits (including length of service awards) and nominal fees customarily paid by similar entities in connection with the performance of volunteer services.

The IRS rules use the term *employee*, which is in some cases a misnomer. Most volunteers in schools are not district employees: They are parents, community members, and others not regularly employed by the district. Before characterizing the services of such individuals as volunteer work exempt from the ACA, a district should ensure that the services also meet the definition of volunteer work under wage and hours laws. FLSA rules specify when a person who is putatively acting in a volunteer capacity must be treated as an employee for purposes of the wage and hour laws. If an individual does not meet the definition of volunteer under the FLSA, the individual must be compensated according to wage and hour laws and it is likely that the time worked by the individual will be considered hours of service under the ACA.

Others who volunteer their services in schools are regularly employed by the district. FLSA regulations restrict the types of work that can be performed, in a volunteer capacity, by district employees. Speaking broadly, a school district employee cannot perform volunteer services that are the same type of work as the employee’s regular duties. In addition, compensation for the volunteer services, if any, must meet the definition of nominal compensation under the FLSA. Because this is a narrow exception, districts should exercise caution before characterizing services performed by district employees as volunteer services excluded from the ACA.

**Work-study:** There is no general exception for student employees: All hours of service for which a student employee of an educational organization (or of an outside employer) is paid or entitled to payment must be counted as hours of service for ACA purposes. Similarly, hours worked by a student in an internship or externship count as hours of service for ACA purposes if the student receives or is entitled to payment in connection with those hours. Unpaid student internships and externships would not count as hours of service if the student neither receives nor is entitled to payment.

Nonetheless, the term *hours of service* excludes services performed as part of a Federal Work-Study Program, as defined by federal regulations, or a substantially similar program of a State or political subdivision. The federal work study program is a federally-subsidized financial aid program with the primary purpose is to advance education. Federal work study is targeted at students of institutions of higher education who need financial assistance with tuition, room and board, and other educational costs. Accordingly, primary and secondary students employed in Texas school districts are not likely to be employed under a work study program. However, students enrolled in institutions of higher education who perform services for a school district through a work-study program, such as teacher interns, may fall under this exception.

9 29 C.F.R. pt. 553, subpart B.
10 29 C.F.R. pt. 553, subpart B.
11 29 C.F.R. pt. 553, subpart B.
12 29 C.F.R. pt. 553, subpart B.
17 34 CFR part 675.

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Services outside the United States: *Hours of service* does not include services the compensation for which constitutes income from sources outside the United States as described in federal tax regulations.\(^{18}\) This exception may apply where a district employs a teacher through a foreign exchange program and the teacher’s compensation comes from his or her home country. Similarly, this exception may apply to the services of a district teacher who performs services abroad and who is compensated by another country. Before excluding such services from ACA calculations, a district should consult a tax advisor.

**Calculating hours of service:** Special rules apply when calculating hours of service for ACA purposes. The rules for employees paid on an hourly basis are straightforward: An employer must calculate hours of service from records of actual hours worked or paid, or hours for which payment is made or due.\(^ {19}\)

The term “records of actual hours worked or paid” indicates that hours of service should be calculated from time records, meaning actual start and stop times. Districts often track hours worked by substitutes in shifts. For example, some half day shifts are recorded as 3.75 hours and others as 4.0 hours. The ACA rules do not provide for treating shift times as “actual hours worked or paid.” Accordingly, the rules for non-hourly employees should be applied if a district tracks only shift times and does not require employees to record actual start and stop times.

The ACA rules do not permit employers to use the equivalency methods described below for employees who are compensated on an hourly basis.\(^ {20}\)

**Employees paid on a non-hourly basis:** Some school district employees are not paid on an hourly basis. For example, some employees are paid on a half-day or full-day basis, or by the number of classes taught. A district must calculate hours of service for these non-hourly employees using one of the following methods:\(^ {21}\)

- **actual hours of service:** records of actual hours worked or hours for which payment is made or due, described above
- **days-worked equivalency:** the employee is credited with eight hours of service for each day for which the employee would be required to be credited with at least one hour of service
- **weeks-worked equivalency:** the employee is credited with 40 hours of service for each week for which the employee would be required to be credited with at least one hour of service

The first option—actual hours of service—involves tracking actual start and stop times, as with hourly employees. It is important to note that this is a method for tracking hours of service under the ACA and should not impact an employee’s exempt status under the FLSA: the exemption is maintained so long as the employee is not compensated based on the quality or quantity of

\(^{19}\) 26 C.F.R. § 54.4980H-3(b)(2).
\(^{21}\) 26 C.F.R. § 54.4980H-3(b)(3)(i).
Accordingly, a district may decide to track the hours worked of non-hourly employees, such as substitutes, instead of applying one of the equivalency methods.

If a district decides to use one of the equivalency methods, the number of hours of service calculated using the days-worked or weeks-worked equivalency must reflect generally the hours actually worked and the hours for which payment is made or due.\(^2\) An employer is not permitted to use the days-worked equivalency or the weeks-worked equivalency if the result is to: (1) substantially understate one employee’s hours of service; or (2) understate the hours of service of a substantial number of employees.\(^3\) For example, an employer may not use the days worked equivalency in the case of an employee who generally works three 10-hour days per week. The equivalency would substantially understate the employee’s hours of service as 24 hours of service per week, rather than the actual 30 hours worked. The understatement would result in the employee’s being treated as not a full-time employee.\(^4\)

The equivalency rules apply if an employee is credited with even one hour of service in a day or week. In the case of the days-worked equivalency, an employee must be credited with 8 hours in a calendar day if the employee has even one hour of service that day.\(^5\) In the case of the weeks-worked equivalency, an employee must be credited with 40 hours in a week if the employee has even one hour of service that week.\(^6\) The hour of service need not be an hour worked: It may be an 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 due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence.\(^7\)

### Example: Hours of Service for Substitute

Mary is a substitute teacher for Lone Star ISD. LSISD pays its instructional substitutes on a half-day or daily rate basis, as applicable. In October, Mary works 8 half-days (4 hour shifts) and 10 full days (8 hour shifts).

**Actual hours:** If LSISD tracks Mary’s actual hours worked, her hours of service under the ACA would be approximately:

- 8 x 4 = 32
- 10 x 8 = 80
- 32 + 80 = 112

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\(^2\) 29 C.F.R. § 541.602(a).
\(^3\) 26 C.F.R. § 54.4980H-3(b)(3)(iii).
\(^4\) 26 C.F.R. § 54.4980H-3(b)(3)(iii).
\(^5\) 26 C.F.R. § 54.4980H-3(b)(3)(iii).
\(^6\) 26 C.F.R. § 54.4980H-3(b)(3)(i)(B).
\(^7\) 26 C.F.R. § 54.4980H-3(b)(3)(i)(C).
\(^8\) 79 Fed. Reg. 8549 (Feb. 12, 2014).
Because Mary worked less than 130 actual hours in October, Mary would not be considered full-time under the ACA. However, the district would use the 112 hours she worked in calculating its workforce extender.

**Days-worked equivalency:** If LSISD did not track Mary’s actual hours worked, LSISD would use the days-worked equivalency and Mary hours of service under the ACA would be:

- \(8 + 10 = 18\) (calendar days in which Mary had at least one hour of service)
- \(18 \times 8 = 144\)

Because Mary is deemed to have worked more than 130 hours in October, she would be considered full-time under the ACA.

**Different methods for different categories of employees:** An employer must use one of the three methods described above—actual hours, days-worked equivalency, or weeks-worked equivalency—but an employer is not required to use the same method for all non-hourly employees.\(^{29}\) An employer may apply different methods for different categories of non-hourly employees, provided the categories are reasonable and consistently applied.\(^ {30}\) Moreover, an employer is not required to use more than one method of determining hours of service for any particular employee: In other words, an employer is not required to apply the method that will be most favorable to the employee.\(^ {31}\)

**Change in method:** An employer may change the method of calculating the hours of service of non-hourly employees (or of one or more categories of non-hourly employees) for each calendar year.\(^ {32}\) For example, a district may use days-worked equivalencies for substitute teachers in 2015 then change to tracking actual hours worked in 2016. It is important to note that the rules permit a change on a “calendar year” basis, not work year or school year basis. Thus, a change in methodology may necessitate a change in the middle of the school year.

**Part-time teachers:** Special rules apply to the calculation of hours of service for part-time teachers or “adjunct faculty.” Adjunct faculty are employees who receive compensation for teaching a certain number of classes (or credits) and whose compensation is not based on the actual time spent on non-classroom activities such as class preparation, grading papers and exams, and counseling students.\(^ {33}\) An example of an adjunct faculty member for Texas school districts is a part-time teacher; for example, a teacher who teaches only one or two classes for an entire semester and who is paid based on the number of classes taught, not the actual hours worked.\(^ {34}\)

\(^{29}\) 26 C.F.R. § 54.4980H-3(b)(3)(ii).

\(^{30}\) 26 C.F.R. § 54.4980H-3(b)(3)(ii).


\(^{32}\) 26 C.F.R. § 54.4980H-3(b)(3)(ii).


\(^{34}\) Teachers who teach four or more classes will generally fit the definition of classroom teacher under state law, a full-time position during the instructional year. See Tex. Educ. Code § 5.001(2); 19 Tex. Admin. Code § 153.1022(a) (full-time teacher is one that teaches an average of four hours each day).

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Because part-time teachers will spend time outside the classroom on planning, grading, and other activities, crediting such employees with hours of service only for instructional time would understate actual hours worked. Conversely, 8-hour daily or 40-hour weekly equivalents would likely overstate actual hours worked. In its commentary to the final regulations, the IRS stated that employers must use a “reasonable method” for crediting hours of service to adjunct faculty and employees in other positions that raise analogous issues. Until further guidance is issued by the IRS, employers may use a default method of crediting a part-time teacher with:

- 2.25 hours of service for each hour of instructional time, plus
- 1 hour of service for each additional hour the part-time teacher spends performing other required duties, such as required conferences meetings

An employer may rely on this default method to calculate hours of service of part-time teachers at least through the end of 2015.

**Example: Hours of Service for Part-Time Teachers**

John teaches two classes: Digital Design and Media Production and Web Game Development. Both classes meet every day for one hour per day.

During the month of October 2015, the district has 22 instructional days. In addition, John is required to attend two ARD meetings and to hold office hours at least one hour every Friday. There are five Fridays in the month.

The district would credit John with the following hours of service:

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\begin{align*}
2 \text{ classes} \times 1 \text{ hour per class} \times 22 \text{ instructional days} \times 2.25 &= 99 \\
2 \text{ ARD meetings} \times 1 \text{ hour} &= 2 \\
1 \text{ office hour} \times 5 \text{ Fridays} &= 5 \\
99 + 2 + 5 &= 106 \text{ hours of service for the month}
\end{align*}
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Because John worked less than 130 hours in October, he would not be considered full-time under the ACA. However, the district would use the 106 hours he worked in calculating its FTEs for the month of October.

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Example: Hours of Service for Part-Time Teachers

Sylvia teaches three classes: Introduction to Cosmetology, Cosmetology I, and Cosmetology II. Each class meets every day for one hour per day. During the month of October 2015, the district has 22 instructional days. Sylvia is not required to have office hours and she does not attend any required meetings during the month.

The district would credit Sylvia with the following hours of service:

3 classes x 1 hours per class x 22 instructional days x 2.25 = 148.5 for the month

Because Sylvia worked more than 130 hours in October, she would be considered full-time under the ACA.

Note that the default method is based on the number of hours of instructional time in a calendar month, which will vary with the number of instructional days in the month. For example, a class may meet 22 times in October but only 15 in December. Block scheduling, under which a class may meet every other instructional day, may further complicate the calculation, as will variations in class length. The district must also credit the employee with time for each required meeting, conference, or other activity. Accordingly, it will in most cases be necessary to individually calculate the hours of service for each part-time teacher each calendar month.

The default method is just one example of a methodology for determining hours of service of a part-time teacher. A district may assign a teacher with more—or less—than 2.25 hours per credit hour depending on the amount of work required outside the classroom, so long as the district’s method is reasonable.

On-call services: A variety of compensation structures may apply to on-call hours. In some cases, employees are paid a reduced hourly wage for on-call hours. In other cases, employees are not paid additional compensation for on-call hours but are required to remain on call periodically as a condition of employment. Until further guidance is issued, employers of employees who have on-call hours are required to use a reasonable method for crediting hours of service that is consistent with the ACA’s employer shared responsibility requirements.38 It is not reasonable for an employer to fail to credit an employee with an hour of service for any on-call hour for which payment is made or due by the employer, for which 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.39

Other services: The ACA rules do not address every type of employment arrangement. Employers of employees whose hours of service are particularly challenging to identify or track or for whom the ACA rules for determining hours of service may present special difficulties, such as commissioned salespeople, must use a reasonable method of crediting hours of service that is consistent with the employer shared responsibility requirements. 40 A method of crediting hours is not reasonable if it takes into account only a portion of an employee’s hours of service with the effect of characterizing, as a non-full-time employee, an employee in a position that traditionally involves at least 30 hours of service per week. 41 For example, it is not a reasonable method of crediting hours to fail to take into account travel time for a travelling salesperson compensated on a commission basis. 42

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