



The Affordable Care Act¹

The federal [Patient Protection and Affordable Care Act](#) (ACA), signed into law in March 2010, enacted sweeping changes to the nation's healthcare system. The ACA includes several significant provisions, such as those addressing minimum insurance standards, Medicaid expansion, the individual mandate, health insurance marketplaces, and employer shared responsibility.

What is the status of the ACA and the individual mandate?

The ACA has been subject to several legal challenges over the years, most focusing on the individual mandate provisions. The individual mandate requires individuals to maintain health insurance coverage or be assessed a penalty by the Internal Revenue Service (IRS) referred to as a shared responsibility payment. In 2012, the U.S. Supreme Court in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012) upheld the constitutionality of the individual mandate as an exercise of Congress' taxing powers. *Nat'l Federation of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

In 2017, Congress reduced the reduced the shared responsibility payment amount to \$0 through the U.S. Tax Cuts and Jobs Act. A lawsuit was filed by several states and private citizens arguing that the individual mandate was unconstitutional because it no longer generated revenue and therefore was not a tax. They also argued the mandate was inseverable from the ACA and asked the court to enjoin the entire ACA. Recently on appeal, the Fifth Circuit Court of Appeals agreed, ruling for the states and citizens, and remanded the case to the district court to conduct a precise severability analysis that explains how each provision of the ACA is linked to the individual mandate. *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019). Notably, the court of appeals did not enjoin the ACA; therefore, it remains effective pending the outcome of the case.

What is the health insurance marketplace?

Each state is required to have a health insurance marketplace that provides individuals the opportunity to compare and select from participating health insurance plans. The Texas marketplace is run by the federal government and can be accessed through the federal government's website, [Healthcare.gov](https://www.healthcare.gov). A lawful resident of the state who is not incarcerated may enroll in an insurance plan through the marketplace even if the person's employer offers the person insurance. Tex. Dep't of Ins., [Affordable Care Act Resource Page](#); U.S. Ctrs. for Medicare & Medicaid Servs., Healthcare.gov, [Are You Eligible to Use the Marketplace?](#).

¹ An electronic version of this document is available on [TASB College eLaw](https://tasb.org/services/community-college-services/resources/tasb-college-elaw/documents/affordable-care-act.pdf) at tasb.org/services/community-college-services/resources/tasb-college-elaw/documents/affordable-care-act.pdf.

Individuals may qualify for a tax credit toward their premiums for insurance purchased through the marketplace. To be eligible, a person must not be eligible for affordable coverage through the person's employer, must enroll in insurance through the marketplace, and must meet an income test. To meet the income test, the person's total household income must be between 100 percent and 400 percent of the federal poverty line for the taxpayer's family size. *Family size* means the number of individuals for whom a taxpayer claims a deduction for a personal exemption on the person's federal income taxes. 26 C.F.R. §§ 1.36B-1-.36B-2.

The marketplace open enrollment period changes annually but typically begins in November, and in recent years has lasted about six weeks. The enrollment dates are published on [Healthcare.gov](https://www.healthcare.gov). An individual who experiences a special enrollment event, such as loss of a job, may enroll outside of open enrollment. U.S. Ctrs. for Medicare & Medicaid Servs., Healthcare.gov, [Getting Health Coverage Outside Open Enrollment](https://www.healthcare.gov/coverage/outside-open-enrollment).

What information must community colleges provide employees about the marketplace?

The ACA requires all employers to provide employees with a notice regarding the applicable state health insurance marketplace. The notice regarding the marketplace must:

- inform employees of the existence of the marketplace, including a description of the services provided and how an employee may contact the marketplace to request assistance;
- if the employer's plan does not provide *minimum value*, as defined by the ACA, provide notice that an employee may be eligible for a premium tax credit and a cost sharing reduction if the employee enrolls in health insurance through the marketplace;
- provide notice that, if an employee enrolls in insurance through the marketplace, the employee may lose any premium contribution paid by the employer; and
- explain that all or a portion of the contribution paid by an employer may be excludable from income for federal income tax purposes.

29 U.S.C. § 218b; U.S. Dep't of Labor, Technical Release No. [2013-02](https://www.dhs.gov/2013-02).

A community college may use the U.S. Department of Labor (DOL) model notice or a modified notice that addresses the elements described above. The college must provide the notice to all employees, even temporary employees, within 14 days of the employee's start date. The notice may be provided by first-class mail. Hand-delivery should also suffice. The notice may be provided electronically if the DOL's electronic disclosure safe harbor requirements are met. Once delivered, the college should document the method of delivery and the persons to whom notice was provided. U.S. Dep't of Labor, Technical Release No. [2013-02](https://www.dhs.gov/2013-02), U.S. Dept' of Labor, [Notice to Employees of Coverage Options](https://www.dhs.gov/2013-02).

What are the employer shared responsibility requirements?

ACA employer shared responsibility addresses two requirements: the requirement to offer insurance to full-time employees and the requirement that the insurance be affordable.

Offer requirement: A community college must offer insurance that provides minimum essential coverage to any employee who has 130 or more hours of service in any calendar month during the plan year and to that employee's dependents. *Dependent* is defined as a biological or adopted child who is under 26 years old. An employer complies with this requirement if it offers coverage to an eligible employee at least once per plan year, even if the employee declines. 26 C.F.R. §§ 1.5000A-1(a), 54.4980H-4.

Community colleges participate in the Employees Retirement System of Texas Texas Employees Group Benefits Program (GBP). The plans provided by the GBP provide minimum essential coverage. Tex. Ins. Code ch. 1551; Employees Retirement Sys. of Tex., [Affordable Care Act \(ACA\)](#).

Affordability requirement: A community college is required to offer affordable insurance that provides minimum value to full-time employees. Insurance is *affordable* if the net monthly cost to the employee is less than or equal to a percentage, adjusted annually, of the employee's monthly household income. The 2020 percentage is 9.78%. *Net monthly cost to the employee* is based on the lowest-cost, employee-only option, net of the employer contribution, even if the employee selects a more costly option. 26 C.F.R. §§ 54.4980H-1(a)(28), .4980H-5; IRS Rev. Proc. [2019-29](#).

Because employers typically lack the information necessary to accurately determine an employee's household income, an employer may use one of three safe harbors for calculating monthly household income: (1) W-2, (2) rate of pay, or (3) federal poverty line. The employer may use separate safe harbors for different categories of employees as long as those categories are reasonable. 26 C.F.R. § 54.4980H-5(e)(2); IRS, [Questions and Answers on Employer Shared Responsibility Provisions under the Affordable Care Act](#). For most colleges, the rate of pay safe harbor—the employee's hourly rate times 130—is the best method for determining monthly household income. It provides for determination of affordability during the year instead of waiting until the end of the year to apply the W-2 safe harbor and is less likely to underestimate the employee's income than the federal poverty line safe harbor.

Community colleges generally must contribute the entire premium for full-time employees enrolled in the GBP; therefore, the coverage offered will typically be affordable. The plans provided by the GBP provide minimum value. Tex. Ins. Code ch. 1551; Employees Retirement Sys. of Tex., [Affordable Care Act \(ACA\)](#).

Is my community college subject to the employer shared responsibility requirements?

A community college is subject to the ACA employer shared responsibility requirements if the college is an applicable large employer (ALE). An ALE is an employer that employed an average of 50 or more full-time employees and full-time equivalents (FTEs) per calendar month during the preceding calendar year. The determination is made at the beginning of each calendar year. 26 C.F.R. §§ 54.4980H-1(a)(4), .4980H-2(b).

For purposes of the ALE calculation, employees who are regularly scheduled to work 30 or more hours per week are considered full-time. In addition, employees who are not regularly scheduled for 30 or more hours per week, such as temporary employees, are considered full-time for any calendar month in which they have 130 or more hours of service, a concept discussed below. 26 C.F.R. §§ 54.4980H-1(a)(21), .4980H-3.

The number of FTEs for a calendar month is determined by adding all hours of service performed in a calendar month by employees who do not meet the ACA definition of full-time and dividing the total by 120. 26 C.F.R. §§ 54.4980H-1(a)(22), .4980H-2(b)-(c).

Note, an employee who has Tricare or Veterans Administration health coverage, as described by 26 U.S.C. § 4980H(c)(2)(F), is excluded from the large employer calculation during any month the employee has that coverage. 26 U.S.C. § 4980H(c)(2)(F).

When may a community college be liable for an employer shared responsibility payment?

A community college that is an ALE may be penalized for failure to satisfy the employer shared responsibility requirements.

Failure to offer penalty: A community college faces a penalty for any month that it does not offer qualifying insurance to at least 95% of its employees who meet the ACA definition of full-time for that month and their dependents and at least one full-time employee receives a premium tax credit to purchase insurance through the marketplace. The penalty is calculated by determining the number of full-time employees serving during the calendar month and subtracting 30. The total is then multiplied by an amount that is adjusted annually for inflation. For 2020, the amount is \$2750 annually or about \$216 monthly. For example, a college with 250 full-time employees in a calendar month is potentially subject to a penalty for failure to offer of over \$47,000—for one month. 26 C.F.R. § 54.4980H-4; IRS, [Questions and Answers on Employer Shared Responsibility Provisions under the Affordable Care Act](#).

Affordability penalty: A community college is subject to a penalty if it fails to offer affordable insurance to one or more full-time employees. The penalty is \$3,860 annually or about \$322 monthly for every applicable employee. An applicable employee is an

employee for whom coverage is not affordable and who, in the month the penalty is assessed: (1) is full-time; (2) obtains coverage through the marketplace, and (3) qualifies for a premium tax credit. 26 C.F.R. § 54.4980H-5; IRS, [Questions and Answers on Employer Shared Responsibility Provisions under the Affordable Care Act](#).

What are the reporting obligations associated with the employer shared responsibility requirements?

A community college is required to file a [Form 1095-C](#) with the IRS annually for every employee who was full-time for even one calendar month the preceding calendar year. The college must also provide a statement to the employee. 26 C.F.R. § 301.6056-1.

The form has three major sections. The first two address basic employee information and information regarding the offer of coverage to the employee and must be completed by employers in their capacity as an employer. The third section addresses covered individuals under the insurance plan and must be completed by employers that are considered self-insured in their capacity as insurer. IRS, [About Form 1095-C, Employer-Provided Health Insurance Offer and Coverage](#). Texas community colleges participating in the GBP are considered self-insured by ERS; therefore, colleges must fill out section three unless the reporting is delegated to ERS. If so, ERS will submit a 1095-B to the IRS and distribute it to the employee.

The IRS provides [instructions](#) for completing the 1095-C that address the use of codes to indicate whether the college offered qualifying insurance to the employee and if the employee enrolled in the insurance or a safe harbor applies. The application of the codes is complex. A community college should consult local counsel or a qualified vendor to determine the appropriate code to use in a particular situation.

The IRS will use the information from the 1095 forms, as well as information from individual tax returns, to determine which individuals were without insurance for any month(s) during the previous calendar year. If the IRS concludes that a community college failed to offer affordable insurance to one or more full-time employees for any month(s), the IRS will send the college a statement including any penalties. The college will have an opportunity to respond before it must make payment. 79 Fed. Reg. 13232 (Mar. 10, 2014). The college should contact local counsel to assist with the response.

Who is a full-time employee for purposes of the employer shared responsibility requirements?

The ACA requires employers to offer affordable health insurance to full-time employees. A *full-time employee* for purposes of the employer shared responsibility requirements is a person who is employed for 30 hours per week. Alternatively, an employer may apply a standard of 130 hours of service in a calendar month provided that the employer applies

this equivalency rule on a reasonable and consistent basis. A community college must consider an employee to be full-time if the employee is reasonably expected to meet the threshold. 26 C.F.R. § 54.4980H-1(a)(21); 79 Fed. Reg. 8552-8553 (Feb. 12, 2014).

The IRS rules are the minimum standards for determining status as a full-time employee under the ACA. Employers may treat additional employees as eligible for coverage or otherwise offer coverage more expansively than would be required by the ACA without affecting ACA liability. 26 C.F.R. § 54.4980H-3(a); 79 Fed. Reg. 8552 (Feb. 12, 2014).

The ACA definition of full-time employee becomes problematic when applied to employees who work variable schedules, such as temporary employees. The IRS created two approaches for determining full-time status in those cases: the monthly measurement method and the look-back method. 26 C.F.R. § 54.4980H-3(a).

What is the monthly measurement method?

The monthly measurement method is the default method for determining full-time status for purposes of the requirement to offer affordable insurance. Under the monthly measurement method, an employer determines whether an employee is full-time by counting the employee's hours of service for each calendar month. An employee who has 130 or more hours in a calendar month will be considered full-time for that month. 26 C.F.R. §§ 54.4980H-1(a)(21), .4980H-3(c)(1), (4)(iii); 79 Fed. Reg. 8552-8553, 8555 (Feb. 12, 2014). An employee's status may vary from month to month, depending on hours of service, under the monthly measurement method.

First 3-months of employment: An employer that uses the monthly measurement method is not subject to shared responsibility penalties, with respect to an employee who is otherwise eligible for the employer's insurance, if the employee is offered affordable insurance within the first three months that the employee is eligible for insurance. 26 C.F.R. § 54.4980H-3(c)(2).

Weekly rule: The weekly rule is a variation of the monthly measurement method that considers the fact that some months are longer than others. The weekly method is intended to correlate, to some extent, with payroll periods. 26 C.F.R. § 54.4980H-3(c)(3).

Under the weekly method, an employer may determine an employee's full-time status for a calendar month by averaging hours of service over either four or five weeks, depending on the length of the month. In a four-week month, an employee with at least 120 hours of service is a full-time employee. In a five-week month, an employee with at least 150 hours of service is a full-time employee. In general, the period measured for the month must contain either the week that includes the first day of the month or the week that includes the last day of the month, but not both. 26 C.F.R. § 54.4980H-3(c)(3).

What is the look-back method?

Another method for determining full-time status for purposes of the requirement to offer affordable insurance is to average an employee's hours of service by looking back over a specified period to determine if an employee should be considered a full-time employee for a defined future period of time. The look-back method consists of three time periods: (1) a measurement period, (2) a stability period, and (3), if a community college chooses, an administrative period.

What is a measurement period for purposes of the look-back method?

Two types of measurement periods are involved with the look-back method, the initial measurement period and the standard measurement period. A community college must track the hours of every employee in the same job category using the applicable measurement period. The employer chooses the months of the measurement periods, subject to ACA rules. 26 C.F.R. §§ 54.4980H-1(a)(25), .4980H-3(d)(1)(i).

Initial measurement period (IMP): An *initial measurement period* is a period of three to twelve consecutive months that is used to determine the full-time status of new variable-hour, part-time, and seasonal employees. A *new employee* is an employee who has been employed for less than one complete standard measurement period. A community college is not subject to penalties during a new employee's IMP. 26 C.F.R. §§ 54.4980H-1(a)(25), (30)-(31), (46), .4980H-3(d)(1)(i), (3)(i).

Each qualifying employee's IMP begins on that employee's start date, or on any date up to and including the first day of the first calendar month following the employee's start date. *Start date* means the first date on which an employee is required to be credited with an hour of service. 26 C.F.R. § 54.4980H-1(a)(47), .4980H-3(d)(3)(i).

A community college cannot apply an IMP to a new employee who is reasonably expected to be full-time, averaging 30 hours of service per week, unless the employee is a seasonal employee. The determination of the employee's status is based on the facts and circumstances at the employee's start date. In making the determination, the college should consider several factors, such as whether the employee is replacing a full-time or a variable-hour employee, the hours of employees in the same or comparable positions during recent measurement periods, and the hours communicated or documented (e.g., through a contract or job description) as required by the job. 26 C.F.R. § 54.4980H-3(d)(2)(ii).

Instead of the IMP, if a new employee is reasonably expected to be full-time, the employee's status is based on hours of service per calendar month until the employee is employed for at least one complete standard measurement period and is considered an ongoing employee. If the employee's hours for a calendar month equal or exceed an average of 30 hours of service per week, or 130 for the full calendar month, the

employee is full-time for that calendar month. The community college will not be subject to a penalty for the first three months of employment provided the employee is offered affordable coverage by the first day of the fourth full calendar month of employment. 26 C.F.R. § 54.4980H-3(d)(2)(i), (iii).

All seasonal employees must be subject to an IMP. A *seasonal employee* is an employee who is hired into a position for which the customary annual employment is six months or less. The reference to *customary* means that by the nature of the position an employee typically works for a period of six months or less, and that period should begin each calendar year in approximately the same part of the year, such as summer or winter. In certain unusual instances, an employee can still be considered a seasonal employee even if employment is extended in a particular year beyond its customary duration. If the full-time employee is seasonal, the employer is protected from penalties for failure to offer affordable coverage during the entire IMP, instead of only the first three months like nonseasonal employees. 26 C.F.R. § 54.4980H-1(a)(38); 79 Fed. Reg. 8557-58 (Feb. 12, 2014).

Standard measurement period (SMP): A *standard measurement period* is a period of three to twelve consecutive months that is used to determine the full-time status of all ongoing employees. An *ongoing employee* is an employee who has been employed for at least one complete SMP. 26 C.F.R. §§ 54.4980H-1(a)(31), (46), .4980H-3(d)(1)(i), (3)(i).

Determination of employment status based on the measurement period: At the end of the applicable measurement period, the employer determines the employee's average hours. If the employee averages 30 or more hours of service per week, or 130 hours per month, during the measurement period, the employer must treat the employee as full-time for a subsequent stability period. All other employees are treated as part-time during the stability period. 26 C.F.R. § 54.4980H-3(d)(1)(iii)-(iv), (vii), (3)(iii)-(iv).

Exclusion of extended break periods and special unpaid leaves: Employment break periods and special unpaid leaves are excluded in calculating average hours of service under the look-back method. An *employment break period* is a period of at least four consecutive weeks during which an employee is not credited with hours of service. 26 C.F.R. § 54.4980H-1(a)(17), (49)(ii)(C). *Special unpaid leave* means unpaid FMLA leave, unpaid military leave under USERRA, and unpaid jury leave. Special unpaid leaves are not likely to be a factor for new variable-hour, part-time, or seasonal employees, but they would be a factor when calculating average hours of ongoing, regular employees. 26 C.F.R. § 54.4980H-1(a)(44).

What is a stability period for purposes of the look-back method?

A *stability period* is a period following the associated measurement period during which the community college applies each employee's employment status determined at the end of the measurement period. The employee retains the applicable status for the entire stability period, regardless of the number of hours the employee works and even if the employee is

reassigned to a position that involves different hours, unless the employee separates from employment. The length of each stability period varies with the type of measurement period and whether the employee is determined to be full-time or not full-time based on the measurement period. 26 C.F.R. § 54.4980H-3(d)(1)(iii)-(iv), (vii), (3)(iii)-(iv).

IMP and full-time: If an employee is considered full-time based on the IMP, the community college must treat the employee as full-time during the subsequent stability period. The stability period must be at least six consecutive calendar months and no shorter than the IMP. 26 C.F.R. § 54.4980H-3(d)(3)(iii).

IMP and not full-time: If an employee is not considered full-time based on the IMP, the community college may treat the employee as not full-time during the subsequent stability period. The stability period may not be more than one month longer than the IMP and may not exceed the remainder of the first entire SMP for which the employee has been employed. 26 C.F.R. § 54.4980H-3(d)(3)(iv).

SMP and full-time: If an employee is considered full-time based on the SMP, the community college must treat the employee as full-time during the subsequent stability period. The stability period must be at least six consecutive calendar months but no shorter than the SMP. 26 C.F.R. § 54.4980H-3(d)(1)(iii).

SMP and not-full-time: If an employee is not considered full-time based on the SMP, the community college may treat the employee as not full-time during the subsequent stability period. The stability period may not be longer than the SMP. 26 C.F.R. § 54.4980H-3(d)(1)(vi).

Stability periods for rehired employees: An employee who is rehired retains, upon resumption of services, the status the employee had with respect to the application of any stability period. An exception to this rule applies if the employee has a period of at least 26 consecutive weeks with no hours of service. In that case, the employee may be treated as a new employee, rather than an ongoing employee, when the employee resumes work. A rule of parity is available if the employee's previous period of employment was less than 26 weeks. 26 C.F.R. § 54.4980H-3(d)(6)(ii)-(iv).

What is an administrative period for purposes of the look-back method?

An employer may provide for an administrative period that begins immediately after the end of the SMP and ends immediately before the associated stability period. Any administrative period between the SMP and the stability period for ongoing employees may neither reduce nor lengthen the measurement period or the stability period. The administrative period following the SMP may last up to 90 days. 26 C.F.R. § 54.4980H-3(d)(1)(vi).

To prevent an administrative period from creating a period during which coverage is not available, the administrative period for ongoing employees must overlap with the prior stability period. During the administrative period, ongoing employees who are enrolled in coverage because of their status as full-time employees based on a prior measurement period must continue to be covered through the administrative period. 26 C.F.R. § 54.4980H-3(d)(1)(vi).

What are *hours of service*?

To determine the FTE for ALE calculations and to determine if an employee is full-time, a community college must use the ACA's definition of *hours of service*. *Hours of service* means:

- hours for which an employee is paid, or entitled to payment, for the performance of duties for the employer; and
- 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

26 C.F.R. § 54.4980H-1(24); 79 Fed. Reg. 8549 (Feb. 12, 2014).

Note that *hours of service* include paid leave. A separate provision of the ACA rules defines *special unpaid leave*—unpaid leave under the FMLA, unpaid military leave subject to USERRA, and unpaid leave for jury duty. Special unpaid leave is excluded when averaging hours of service during a measurement period under the look-back method. 26 C.F.R. §§ 54.4980H-1(44), .4980H-3(d)(6)(i)(B).

What are the exceptions to the definition of *hours of service*?

The ACA rules specify that time spent performing certain types of work, such as volunteer work, work-study, and services outside of the country, is not considered when calculating hours of service.

Volunteer work: *Hours of service* does not include services performed as a bona fide volunteer. A *bona fide volunteer* means an employee of a government entity or tax-exempt organization whose only compensation is in the form of reimbursement or reasonable allowance for reasonable expenses incurred in the performance of volunteer services or reasonable benefits, including length of service awards, and nominal fees customarily paid by similar entities in connection with the performance of volunteer services. 26 C.F.R. § 54.4980H-1(7), (24)(ii)(A).

Work-study: The term *hours of service* excludes services performed by a student as part of a federal work-study program, as defined by federal regulations, or a substantially similar program of a state or political subdivision. All other hours of service for which a student employee of an educational institution or of an outside employer is paid or entitled to payment must be counted as hours of service for ACA purposes. 26 C.F.R. § 54.4980H-1(24)(ii)(B), 34 C.F.R. part 675; 79 Fed. Reg. 8550-1 (Feb. 12, 2014).

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. 26 C.F.R. § 54.4980H-1(24)(ii)(C); 26 C.F.R. §§ 1.861-3. This exception may apply where a community college employs an instructor through a foreign exchange program and the instructor's compensation comes from the instructor's home country. Similarly, this exception may apply to the services of a college's employee who performs services abroad and who is compensated by another country. Before excluding such services from ACA calculations, an institution should consult a tax advisor.

How are hours of service calculated?

Special rules apply when calculating hours of service for ACA purposes.

Employees paid on an hourly basis: 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. 26 C.F.R. § 54.4980H-3(b)(2).

Note, 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 college 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. 79 Fed. Reg. 8549 (Feb. 12, 2014).

Employees paid on a non-hourly basis: Some community college 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 college must calculate hours of service for these non-hourly employees using one of three methods:

- Actual hours of service—the employee is credited based on 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.

26 C.F.R. § 54.4980H-3(b)(3)(i); 79 Fed. Reg. 8549 (Feb. 12, 2014).

The number of hours of service calculated using the days-worked or weeks-worked equivalency rules must reflect generally the hours actually worked and the hours for which payment is made or due. A community college is not permitted to use the days-worked equivalency or the weeks-worked equivalency if the result is to substantially understate one employee's hours of service or understate the hours of service of a substantial number of employees. For example, a college 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 and would result in the employees being considered part-time. 26 C.F.R. § 54.4980H-3(b)(3)(iii).

A community college may apply different methods for different categories of non-hourly employees, provided the categories are reasonable and consistently applied. Moreover, a college is not required to use more than one method of determining hours of service for any particular employee. A college is not required to apply the method that will be most favorable to the employee. Once a method is chosen, the college must apply that method for the entire calendar year and may not change the method until the next year. 26 C.F.R. § 54.4980H-3(b)(3)(ii); 79 Fed. Reg. 8549 (Feb. 12, 2014).

How should a community college apply the hours of service calculation to employees with hours that are particularly difficult to track?

Some community college employees work hours that are difficult to track. This may be because of the employee's position category, such as adjunct faculty, or because the employee is assigned a certain category of hours, such as on-call hours. The IRS has provided guidance on how to handle these special circumstances.

Adjunct faculty: Special rules apply to the calculation of hours of service for 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. 79 Fed. Reg. 8551 (Feb. 12, 2014).

Because adjunct faculty 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. The IRS provided a default method of crediting an adjunct faculty member with:

- 2.25 hours of service for each hour of instructional time, plus

- 1 hour of service for each additional hour the adjunct spends performing other required duties, such as required meetings or office hours.

A community college may factor more than 2.25 hours per credit hour depending on the amount of work an adjunct is required outside the classroom, so long as the college's method is reasonable. 79 Fed. Reg. 8551-8552 (Feb. 12, 2014).

Because the number of hours of instruction each month and class length may vary and because the college must credit the employee with time for each required activity, the college will typically need to individually calculate the hours of service for each adjunct each calendar month.

Employees available on-call: A variety of compensation structures may apply to on-call hours. Community colleges with 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. 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. 79 Fed. Reg. 8552 (Feb. 12, 2014).

Other services: The ACA rules do not address every type of employment arrangement. Community colleges with 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 must use a reasonable method of crediting hours of service that is consistent with the employer shared responsibility requirements. 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. 79 Fed. Reg. 8551 (Feb. 12, 2014).

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