

A Step-by-Step Guide to Determining Full-Time Status under the Affordable Care Act's Employer Penalty Provisions

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The Affordable Care Act's employer penalty provisions are among the most misunderstood in the health care reform law. Unfortunately, when employers get them wrong, they often take actions that needlessly hurt students and employees alike—cutting members' hours of service and undermining the crucial relationships between education support professionals and students. When it comes to employees paid on an hourly basis, one of the most common errors we hear about the Affordable Care Act is that employers have to cut employees' hours to under 30 a week (or six a day) or to under 130 hours a month. In NEA's experience, hourly employees can often work much more than employers fear before the workers are considered full-timers.

This document walks you through how you can use basic information about employees' schedules and the school calendar to easily and effectively determine whether hourly employees are full-timers. It shows how an employee working 6.5 or even 7 hours a day on normal workdays may not be considered a full-timer given a typical school year.

Why Hours of Service Matter to the Law's Employer Penalty Provisions

Large employers can potentially face a financial penalty under the Affordable Care Act's employer penalty provisions depending on whether and how they offer health coverage. For there to be any penalty, however, several conditions must be met. One of those conditions is that at least one full-time employee must be certified to receive a federal subsidy for exchange-based coverage. That's why many employers want to make sure as few employees as possible are full-timers.

Under the statute, a full-timer is defined as an employee who works an average of at least 30 hours per week during a month.¹ Regulators have created other applicable definitions, including that a full-time employee is one who works 130 hours a month² or an average of 30 hours a week over a period of up to a year.³ Regulators also created an hours-counting method that relies on an analysis of hours of service during periods related to

¹ 26 U.S.C. section 4980H(c)(4)(A).

² Regulators established that 130 hours a month can be treated as the monthly equivalent of at least 30 hours of service per week (26 CFR § 54.4980H-1(21)(ii)).

³ Employers have the option to define full-time service as an average of at least 30 hours a week during a period of up to a year as part of the "look-back measurement method" (26 CFR § 54.4980H-3(d)).

payroll, but for simplicity's sake, we will not explore that method here.⁴ In fact, there are a lot of employer penalty rules we don't discuss here, because our sole purpose in this paper is to explain why hourly employees working more than 6 hours a day may not qualify as full-timers.

The Basic Equation for Determining Full-Time Status

To determine the average number of hours worked by an employee during a week, we rely on a basic equation:

$$\text{Number of Hours Paid} \div \text{Number of Workweeks} = \text{Average Hours}$$

To the extent that the numerator (Number of Hours Paid) gets smaller but the denominator (Number of Workweeks) stays the same or gets bigger, the employee is less likely to be found to be a full-timer. The opposite is also true: If the denominator becomes smaller while the numerator stays the same or gets bigger, the employee will be more likely to be considered a full-timer.

Here's what we mean about numerators and denominators. Assume that an employee works 1,200 hours over 42 weeks. The basic equation will return an average number of hours of 28.57 (because $1,200 \div 42 = 28.57$). Now, if we bump the total number of hours worked to 1,300 but keep the number of weeks the same, the average becomes larger, because there are more hours to spread over the same number of weeks ($1,300 \div 42 = 30.95$). If we keep the hours at the original 1,200 but increase the number of weeks to 43, the result gets smaller, because the same original hours are being spread over a greater number of weeks ($1,200 \div 43 = 27.91$).

Two Basic Methods for Counting Hours

Employers can analyze whether employees are full-timers using a month-by-month approach (called the "monthly measurement method") or using an approach that allows averaging hours over a period of up to a year (called the "look-back measurement method").⁵ Among the differences between the approaches is this: The monthly method relies on a real-time measure of whether an employee is a full-timer, meaning that whether an employee is a full-timer in June 2016, for example, will matter for whether there could be a penalty for June 2016. In contrast, the look-back method relies on a retrospective analysis of whether an employee worked full time.

⁴ 26 CFR § 54.4980H-3(d)(ii).

⁵ Penalties under the law itself are actually set to be determined on a month-by-month basis, meaning that an employer using the monthly method could potentially have to pay a penalty for one month of the year but not for other months of the year. Regulators created a different approach under the look-back measurement method. Using the look-back method, an employer can review an employee's past hours of service over a period of between three and 12 months (called a "measurement period") to determine if the employee worked full time; then, the employer applies the conclusion from the measurement period to a period of time into the future (called a "stability period"). Even if an employee does not work full time during the stability period, the employee will have to be considered a full-timer during the stability period. Any penalties due will be due for the length of the stability period.

The Monthly Method

An employer choosing the monthly method will apply the basic equation separately for each month. If all the conditions for a penalty apply during the month, a penalty will be due for that month. An employee without any hours of service during summer break will not be a full-timer during the summer, so no penalty could be due for those months.

The Look-Back Measurement Method

When it comes to determining average hours using the look-back method, it's important to keep in mind four rules:

- **RULE ONE:** For hourly employees, hours of service count if an employee is paid or due payment for those hours.⁶ So, for example, an employee who does not work on Memorial Day and does not receive Memorial Day as a paid holiday has zero hours of service on Memorial Day. On the other hand, if Memorial Day is a paid holiday, it counts toward hours of service. An employee who works 10 months a year but has a paycheck spread out over 12 months is not considered for penalty purposes to have worked for the two summer months.
- **RULE TWO:** For purposes of the basic equation's denominator, any week during which an employee has paid hours of service counts as a week. As a result, if an employee works 7 hours during the last day of school and that last day of school is the first day of the week, you'd add 7 hours to the basic equation's numerator and 1 week to the equation's denominator.
- **RULE THREE:** It's not a free-for-all with respect to counting weeks. The rules say that weeks are to be counted as consecutive 7-day periods starting from the first day of the averaging period. If the first day of the averaging period is a Tuesday, for example, you determine the number of weeks in the denominator by counting how many Tuesday-to-Monday periods there are in the averaging period.
- **RULE FOUR:** In the context of schools, unworked and unpaid weeks during the summer are excluded from the counting period.⁷ For weeks to be excluded, the employee must work zero hours during the weeks and the weeks must be part of at least four consecutive weeks during which the employee works zero hours. In practical terms, that means that an unpaid week for spring break counts but a stretch of four or more unpaid weeks during the summer does not. For a week of unpaid spring break, the numerator would have zero hours of service added and the denominator would have one week added. However, for a summer break of at least four consecutive weeks in length, neither the numerator nor the denominator would have anything added.

⁶ If an employee has two different paid jobs for the same employer, the hours are added together. If an employee receives hourly pay for one job and a stipend for another, the hours for both jobs count.

⁷ The rules establish two ways that employers can compute average hours when a summer break is involved, but, in the end, the result of both methods is the same, so we use the method that excludes summer break from the measurement period.

An Example of Determining Work Status over a Yearlong Period

For this example, we'll use the approach that relies on averaging an employee's hours of service over a year. That method more simply makes the point that hourly employees can often work more than six hours a day without being considered full-timers.

We divide the example into two parts—How to determine the numerator for the basic equation and how to determine its denominator. We end with an analysis of the results.

PART ONE: Determine the number of workweeks to include in the denominator of the basic equation.

STEP ONE: Pick the start and end dates of the full counting period.

We'll use a yearlong counting period (technically called a "measurement period") that starts on Tuesday, September 1, 2014, and ends on Monday, August 31, 2015.

STEP TWO: Identify when the employee's summer break begins and ends.

We'll say the employee's last day of work before summer is Tuesday, June 24, 2015, and that the worker's summer break runs through the end of August. In the next step, you'll see what to do if the summer break ends before the end of the yearlong counting period.

STEP THREE: Count the number of weeks in the counting period.

In our example, a week is a 7-day period starting on a Tuesday and ending on a Monday. We start counting on September 1, 2014, and count until we get to the 7-day period in which June 24, 2015, falls. For purposes of counting full 7-day periods, it would be convenient if the employee's last workday were a Monday. In the case of our example, though, June 24 is a Tuesday; as a result, the week in which June 24 falls is considered a workweek. So, we skip to the end of that workweek to figure out when to stop counting weeks. June 30 is the end of that week.

There are 43 weeks from September 1, 2014, through June 30, 2015. Up to this point, the basic equation looks like this:

$$\text{Number of Hours Paid} \div 43 = \text{Average Hours}$$

In our example, the employee's summer break lasts through the end of the yearlong counting period. If, instead, the summer break for the employee ended on August 26, 2015, the full week in which the employee returned to paid service would count as a week of work for purposes of the total number of weeks in the denominator, and there would be 44 weeks in the denominator. The equation would have looked like this:

$$\text{Number of Hours Paid} \div 44 = \text{Average Hours}$$

PART TWO: Determine the number of hours worked to include in the numerator of the basic equation.⁸

STEP FOUR: Figure out how many days a year the employee normally works.

Usually, employees expect to work a certain number of days a year, either because a contract establishes the number of days or an employer has included it in a personnel manual of some kind.

For our example, we'll say the employee normally works **180 days a year**.

STEP FIVE: Determine the total number of days during the work year for which the employee is paid but does not work.

We'll say that the employee has **7 paid holiday days**—Labor Day, Thanksgiving Day, Christmas Day, and four additional winter break days. The employee does not work and is not paid for other school-interruption days, including spring break and Memorial Day.

STEP SIX: Tally the number of hours during otherwise normal workdays that the employee does not work.

For our example, we'll say that there are two unworked and unpaid hours on the first Thursday of each month during the school year.⁹

In our example, there are 10 Thursdays that meet the criteria in the paragraph above, so there are **20 total hours** during otherwise normal workdays on which the employee does not work.

STEP SEVEN: Identify the number of hours the employee works on normal workdays.

For our example, we'll say the employee works **6.5 hours a day** on normal workdays.

STEP EIGHT: Add the number of regular workdays and the number of paid holidays.

In our example, that's STEP FOUR + STEP FIVE:

$180 + 7 = 187$ days for which the employee receives pay

⁸ Employers using the look-back measurement method may have easy access to the number of hours actually worked by a particular employee or employee group during the measurement period, because that method relies on a retrospective hours-counting approach. If so, and if the measurement period is the same as the one used to determine the number of weeks in the denominator of the basic equation, you can skip to STEP TEN.

⁹ Late-start or early release days often arise in the context of administrative meetings or teacher trainings in which hourly employees do not participate, or because some categories of workers have shortened days when students are not present for a full day.

STEP NINE: Multiply the number of total workdays and paid holidays by the number of hours normally worked during a day.

In our example, that's STEP SEVEN x STEP EIGHT:

$$6.5 \times 187 = 1,215.50 \text{ hours that could potentially be worked per year}$$

STEP TEN: Subtract from the total number of potential hours worked per year any hours that are not worked because of special schedules.

In our example, that's STEP NINE – STEP SIX:

$$1,215.50 - 20 = 1,195.50 \text{ hours actually worked during the year}$$

STEP ELEVEN: Plug the actual number of paid hours per year into the basic equation, and do the math.

Back in STEP THREE, our basic equation looked like this:

$$\text{Number of Hours Paid} \div 43 = \text{Average Hours}$$

Now, we update the basic equation with the results of STEP TEN:

$$1,195.50 \div 43 = \text{Average Hours}$$

And we do the math:

$$1,195.50 \div 43 = 27.80 \text{ average hours a week during the year}$$

Interpreting the Output of the Basic Equation

In our example, the employee worked 6.5 hours a day during normal workdays but averaged only 27.80 hours during the yearlong counting period. That put the worker well under the 30-hour threshold required to be considered a full-timer. In fact, even if the employee normally worked 7 hours a day, the average—29.98.¹⁰—wouldn't have topped the full-time threshold: Sure, an average of 29.98 hours is very close to the full-time threshold, but the point remains:

Given the number of unworked and unpaid hours and days in the typical school calendar, employees paid on an hourly basis can often work more than 6 hours a day without being considered full-timers for purposes of the ACA's employer penalty provisions.

¹⁰ REVISED STEP NINE: $7 \times 187 = 1,309$ hours that could potentially be worked per year. REVISED STEP TEN: $1,309 - 20 = 1,289$ hours actually worked during the year. REVISED STEP ELEVEN: $1,289 \div 43 = 29.98$.