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## WHAT COUNTS AS AN HOUR OF SERVICE?

Under the Patient Protection and Affordable Care Act (“PPACA”), an employee’s status for purposes of the Employer Mandate depends upon the employee’s “hours of service.” Final regulations published in February 2014 prescribe which hours must be included. Generally, “hours of service” include any hour for which an employee is paid or entitled to payment when duties are not performed such as vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty, or leave of absence. For purposes of Section 4980H penalties (i.e., the “\$2,000” penalty (indexed annually) for failure to offer coverage and the “\$3,000” penalty (indexed annually) for failure to offer coverage that provides minimum value and is affordable), an employee is a full-time employee for a calendar month if she averages at least 30 hours of service per week or 130 hours of service for that month. To help employers understand at a glance which hours of service must be included in the calculation, we have created the chart below. For more specific information, please see our Counting Hours Toolkit available via this [LINK](#).

TYPE	PPACA REQUIREMENTS	COMMENTS
Hours for which Employee is Paid	Required to be credited	IRS Reg. 54.4980H-1(a)(24)
Hours for which Employee is Paid, but No Duties are Performed		
<ul style="list-style-type: none"> <li>Vacation</li> </ul>	Required to be credited	IRS Reg. 54.4980H-1(a)(24)
<ul style="list-style-type: none"> <li>Holiday</li> </ul>	Required to be credited	IRS Reg. 54.4980H-1(a)(24)
<ul style="list-style-type: none"> <li>Illness</li> </ul>	Required to be credited	IRS Reg. 54.4980H-1(a)(24)

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<ul style="list-style-type: none"> <li>Incapacity (including disability)</li> </ul>	<p>Required to be credited (so long as individual remains an “employee” unless the employer did not directly or indirectly contribute to the arrangement from which payments are made)</p>	<p>IRS Reg. 54.4980H-1(a)(24). FAQ# 14 in IRS Notice 2015-87 states that if an individual is not performing services and is still employed, but is receiving payments for short-term disability or long-term disability, the time counts as “hours of service” unless the payments the individual receives are from an arrangement to which the employer did not directly or indirectly contribute. For example, if an employee receives long-term disability payments from an LTD program for which the employee paid with <i>after-tax</i> contributions, then the time on LTD would not count as hours of service. However, if the employee paid for long-term disability coverage on a <i>pre-tax</i> basis and receives payments from that arrangement during a period while the individual is still employed, then those hours would count as “hours of service.”</p>
<ul style="list-style-type: none"> <li>Layoff</li> </ul>	<p>Required to be credited</p>	<p>IRS Reg. 54.4980H-1(a)(24)</p>
<ul style="list-style-type: none"> <li>Jury Duty</li> </ul>	<p>Required to be credited</p>	<p>IRS Reg. 54.4980H-1(a)(24)</p>
<ul style="list-style-type: none"> <li>Military Duty</li> </ul>	<p>Required to be credited</p>	<p>IRS Reg. 54.4980H-1(a)(24)</p>

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<ul style="list-style-type: none"> <li>• Leave of Absence</li> </ul>	Required to be credited	IRS Reg. 54.4980H-1(a)(24)
<ul style="list-style-type: none"> <li>• FMLA Leave</li> </ul>	Required to be credited	IRS Reg. 54.4980H-1(a)(24)
<ul style="list-style-type: none"> <li>• Workers Compensation Leave</li> </ul>	Not required to be credited	IRS Reg. 54.4980H-1(a)(24); 29 C.F.R. 2530.200b-2(a)(2)(iii)
<ul style="list-style-type: none"> <li>• Unemployment Compensation</li> </ul>	Not required to be credited	IRS Reg. 54.4980H-1(a)(24); 29 C.F.R. 2530.200b-2(a)(2)(iii)
Unpaid Leaves of Absence		IRS Reg. 54.4980H-1(a)(24); 29 C.F.R. 2530.200b-2(a)
<ul style="list-style-type: none"> <li>• Maternity (or Paternity) Leave</li> </ul>	Required to be credited if also federal FMLA leave	If employee also qualifies for FMLA leave, apply rules for unpaid FMLA leave.
<ul style="list-style-type: none"> <li>• Military Leave under USERRA</li> </ul>	Special rule applies – see comments	Per final regulations, under the look-back method, an employer that is not an academic institution must either: (1) determine an employee’s average hours of service for a measurement period by computing the average after excluding any special unpaid leave
<ul style="list-style-type: none"> <li>• FMLA</li> </ul>	Special rule applies – see comments	



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<ul style="list-style-type: none"><li>Jury Duty</li></ul>	Special rule applies – see comments	<p>(defined as unpaid leave for FMLA, USERRA, or jury duty) during that measurement period and by using that average as the average for the entire measurement period, or (2) may choose to treat the employee as credited with hours of service for any periods of special unpaid leave during that measurement period at a rate equal to the average weekly rate at which the employee was credited with hours of service during the weeks in the measurement period that are not part of a period of special unpaid leave.</p> <p>An employer that is an academic institution must either: (1) determine an employee’s average hours of service for a measurement period by computing the average after excluding any special unpaid leave (defined as unpaid leave for FMLA, USERRA, or jury duty) and a break in employment due to a closure of the institution such as a summer break during that measurement period and by using that average as the average for the entire measurement period, or (2) may choose to treat the employee as credited with hours of service for any periods of special unpaid leave during that measurement period at a rate equal to the average weekly rate at which the employee was credited with hours of</p>



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		<p>service during the weeks in the measurement period that are not part of a period of special unpaid leave. However, the academic institution employer is not required to exclude (or credit) more than 501 hours of service for employment breaks. Special unpaid leave is not subject to the cap.</p> <p>Neither the special unpaid leave rule nor the employment break period rule apply under the monthly measurement method, regardless of whether the employer is an educational organization.</p>
Back Pay Hours	Not specifically required	IRS Reg. 54.4980H-1(a)(24); 29 C.F.R. 2530.200b-2(a)(3)
On-Call Hours	Required to be credited	<p>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 Section 4980H. The final regulations indicate 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</p>



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		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.
Hours for employees compensated on commission	Required to be credited	Until further guidance is issued, employers of commissioned employees are required to use a reasonable method for crediting hours of service that is consistent with Section 4980H. Final regulations indicate it is not reasonable for an employer to fail to take into account travel time for a travelling salesperson compensated on a commission basis.
Special Issues for Academic Employers		
<ul style="list-style-type: none"><li>Hours for Adjunct Faculty</li></ul>	Required to be credited	Until further guidance is issued, final regulations indicate one (but not the only) method that is reasonable for this purpose would credit an adjunct faculty member of an institution of higher education with (a) 2.25 hours of service (representing a combination of teaching or classroom time and time performing related tasks such as class preparation and grading of examinations or papers) per week for each hour of teaching or classroom time (in other

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		<p>words, in addition to crediting an hour of service for each hour teaching in the classroom, this method would credit an additional 1.25 hours for activities such as class preparation and grading) and, separately, (b) an hour of service per week for each additional hour outside of the classroom the faculty member spends performing duties he or she is required to perform (such as required office hours or required attendance at faculty meetings).</p>
<ul style="list-style-type: none"> <li>• Student Employees</li> </ul>	<p>Required to be credited unless hours of service for work-study program</p>	<p>IRS Reg. 54.4980H-1(a)(24); IRS Reg. 54.4980H-1(a)(24)(ii)(B). All hours of service for which a student employee of an educational organization (or of an outside employer) is paid or entitled to payment in a capacity other than through a federal work study program (or a state or local government's equivalent) are required to be counted as hours of service for section 4980H purposes.</p>
<ul style="list-style-type: none"> <li>• Students Enrolled in Work-Study Programs</li> </ul>	<p>Not required to be credited</p>	<p>IRS Reg. 54.4980H-1(a)(24)(ii)(B). Hours of service for students involved in a Federal Work-Study program (or a state or other local entity equivalent) are not counted for purposes of the Employer Mandate under PPACA.</p>

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<ul style="list-style-type: none"> <li>Student Employees with On-Call Hours</li> </ul>	Required to be credited	<p>The final regulations indicate 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.</p>
<ul style="list-style-type: none"> <li>Unpaid Interns or Externs</li> </ul>	Not required to be credited	<p>Services by an intern or extern do not count as hours of service under the general definition of hours of service contained in the final regulations to the extent that the student does not receive, and is not entitled to, payment in connection with those hours.</p>
Special Issues for Airline Employers		
<ul style="list-style-type: none"> <li>Layover Hours for Airline Employees</li> </ul>	Required to be credited	<p>According to final regulations, for layover hours for which an employee does not receive additional compensation and that are not counted by the employer towards required hours of service, it would</p>

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		<p>be reasonable for an employer to credit an employee in the airline industry with 8 hours of service for each day on which an employee is required to stay away from home overnight for business purposes (8 hours each day or 16 hours total) for the two days encompassing the overnight stay). The employee must be credited with the employee's actual hours of service for a day if crediting 8 hours of service substantially understates the employee's actual hours of service for the day (including layover hours for which an employee receives compensation or that are counted by the employer towards required hours of service).</p>
Hours for Home Health Care Workers	Required to be credited	No special rules. However, may be common law employee of service recipient rather than home care agency.
Volunteer Hours of Service	Not required to be credited	<p>IRS Reg. 54.4980H-1(a)(24)(ii)(A). Under the final regulations, an hour of service does not include any hour of service performed by a <i>bona fide</i> volunteer (e.g., a volunteer firefighter or emergency medical provider who receives expense reimbursements).</p> <p><i>Bona fide</i> volunteers include any volunteer who is an employee of a government entity or an</p>



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		<p>organization described in Section 501(c) that is exempt from taxation under Section 501(a) whose only compensation from that entity or organization is in the form of (i) reimbursement for (or reasonable allowance for) reasonable expenses incurred in the performance of services by volunteers, or (ii) reasonable benefits (including length of service awards), and nominal fees, customarily paid by similar entities in connection with the performance of services by volunteers.</p>
<p>Hours of Service for Ordered Members</p>		<p>Until further guidance is issued, a religious order is permitted, for purposes of determining whether an employee is a full-time employee under Section 4980H, to not count as an hour of service any work performed by an individual who is subject to a vow of poverty as a member of that order when the work is in the performance of tasks usually required (and to the extent usually required) of an active member of the order.</p>
<p>Special Issues for Multi-National Organizations</p>		

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<ul style="list-style-type: none"> <li>Non-U.S. ex-patriates working within the United States (or “In-Pats”)</li> </ul>	Unclear	The employer mandate regulations do not explicitly address this issue. Regulators may interpret PPACA to penalize large employers that do not offer coverage to their full-time employees located in the U.S. even though some of those employees are not U.S. citizens. Until further guidance is issued, large employers should not assume that there will be no consequences for failure to offer coverage to non-U.S. citizen employees working in the U.S.
<ul style="list-style-type: none"> <li>U.S. ex-pats working outside of the United States</li> </ul>	Not required to be credited	IRS Reg. 54.4980H-1(a)(24)(ii)(C). Hours of service outside the United States are not included in the calculation for determining full-time employee status.
Holders of H-2A and H-2B Visas	Required to be credited	No special rules. May be “seasonal employees” for purposes of Employer Mandate.

Note: This chart does not necessarily address every source of hours of service for purposes of PPACA. It is merely intended to highlight the most common sources of hours of service.

*The intent of this analysis is to provide general information regarding the provisions of current federal laws and regulation. It does not necessarily fully address all your organization’s specific issues. It should not be construed as, nor is it intended to provide, legal advice. Your organization’s general counsel or an attorney who specializes in this practice area should address questions regarding specific issues.*