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American Federation
of Teachers, AFL-CIO

AFT Teachers
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Via email: j.mark.iwry@do.treas.gov

Mr. Mark Iwry
Senior Advisor to the Secretary and Deputy Assistant Secretary
(Retirement and Health Policy)
Office of the Benefits Tax Counsel
Department of the Treasury
1500 Pennsylvania Avenue, NW, Room 3044
Washington, DC 20220

Dear Mr. Iwry:

On behalf of our 1.5 million members, the American Federation of Teachers (AFT) welcomes the chance to elaborate on our response to Notice 2012-58 regarding the determination of full-time employees for the purposes of the employer shared responsibility penalty.

As you know, the AFT represents many full-time employees, both salaried and hourly, whose work follows an academic schedule.[1] We are concerned that, in the absence of specific language to the contrary, the safe harbor method proposed by Treasury in Notices 2012-58 and 2011-36 would inappropriately categorize full-time academic-year employees as part-time for purposes of the employer penalty. We are concerned that public school teachers and support staff, as well as adjunct instructors and support staff at postsecondary institutions, are vulnerable to this misclassification.

With the aim of helping Treasury avoid some of the potential pitfalls that the safe harbor holds for these employees, we have drafted some sample scenarios. I hope they help illustrate some of the concerns we have previously expressed.

[1] It is important to note that it something of an oversimplification to talk about an "academic schedule," since public school calendars differ widely from one another, sometimes even within a school district. For instance, some schools hold class during the summer, while others do not. It would be more accurate to use a phrase such as "nonstandard work year" when describing the situation of public school employees and adjunct instructors.

If you have any questions or wish to discuss this further, please do not hesitate to contact me.

Sincerely,

Amy Clary
Associate, AFT Research and Strategic Initiatives

cc: Bill Cunningham, Senior Associate Director, Legislation
Jewell Gould, Director, Research and Strategic Initiatives
Lynne Mingarelli, Deputy Director, Research and Strategic Initiatives
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Examples of full-time employees for purposes of the employer shared responsibility payments under the Affordable Care Act

Example 1—New Employee: Teacher

Facts

School District B hires Employee Q to teach English at an annual salary of $45,360. Her collective bargaining agreement stipulates that her workday is seven hours per day for 188 days per year. She frequently grades papers and prepares lessons at home after the scheduled workday ends.

Conclusions

Employee Q is a full-time teacher. Teachers are understood to be full-time employees. Therefore, Employee Q should be considered a full-time employee from her first day of work and should not be considered a "variable hour employee" or subject to a measurement period. Employee Q should be considered a full-time employee for all twelve months of the year for purposes of the employer penalty under Section 4980H.

The FMLA considers full-time teachers to be full-time employees and therefore eligible for FMLA leave regardless of their scheduled hours in the classroom. Full-time school-year employees should likewise be considered full time for purposes of the employer penalty under Section 4980H. Any employer who challenges a teacher's full-time status should bear the burden of proof and must consider time worked outside the classroom.

Concerns

Absent clarifying guidance from federal regulators, employers could treat teachers as variable-hour employees and subject them to a measurement period that includes months when school is not in session.

Example 2—Ongoing employee: School Bus Driver

Facts

Employee A is employed as a school bus driver by School District B. Employee A is expected to work six hours per day on average for 180 days per year. She is paid $11.15 per hour, but is not paid for professional development days, emergency weather closings, or other days when

students do not attend school. She occasionally volunteers to work extra hours driving students on field trips.

Employee A is halfway through her second school year at School District B. She has held her position at the same school continuously, and has passed the 90-day probation period required by her collective bargaining agreement.

Conclusions

Employee A "is employed on average at least 30 hours of service per week" and so should be considered a full-time employee for all twelve months of the year for purposes of the employer penalty under Section 4980H.

Because Employee A is regularly expected to work 30 hours per week during the school year, her full-time status should be clear without subjecting her to a measurement period as one would a variable hour employee. Notice 2012-58 defines a "full-time employee" as one who "is reasonably expected to work on average at least 30 hours per week." This bus driver should not be considered a "variable hour employee," and should not be subject to any measurement period at all.

Concerns

It is possible that School District B could rely on Notices 2011-36 and 2012-58 and consider school-year hourly employees to be "variable-hour." School District B could elect a measurement period of 12 consecutive calendar months starting on January 1 and ending December 31. The employer could then calculate that 30 hours per week is equivalent to 130 hours of service per month, as stipulated in Notices 2011-36 and 2012-58.

The school district could then conclude that because the bus driver does not work 130 hours per month during the summer months, months with school vacations, or the month of February (which only contains 20 workdays), she is not a full-time employee for those months under Section 4980H.

School District B should not be permitted to treat Employee A as "variable-hour" and subject her to a measurement period. The bus driver should be considered full-time for purposes of the shared responsibility penalty under Section 4980H.

Example 3—New employee: Teacher's Assistant

Facts

Employee N is hired by School District B as a new teacher's assistant earning $9.48 per hour. Employee N's start date is August 15. Employee N is expected to work six hours per day for 180 days per year. School is closed for four days in October due to a hurricane, so Employee N only works 19 days that month, for a total of 114 hours. Employee N is not paid for days that school is closed due to weather.

Conclusions
Same as Example 2. Because the newly-hired teacher's assistant is regularly expected to work 30 hours per week during the school year, she should be considered a full-time employee from her first day of work. She should not be considered a "variable hour employee," and should not be subject to a measurement period. Employee N should be considered a full-time employee for all twelve months of the year for purposes of the employer penalty under Section 4980H.

Concerns
Same as in Example 2. Employee N should be treated as a full-time employee. If School District B is permitted to treat Employee N as variable-hour and subject her to a look-back and stability period, Employee N could inappropriately be denied full-time status for purposes of the employer penalty because of the vagaries of weather or other scheduling irregularities.

Using a measurement period for an employee expected to work full time could inappropriately exempt employers from paying a shared responsibility payment. For instance, if School District B were permitted to use a measurement period for Employee N, the 12-month initial measurement period for Employee N could begin on September 1, and could be followed by an administrative period as defined in Notice 2012-58 that ends one month after the end of the measurement period. The combined measurement and administrative periods could total more than 13 months. Employer B would not be liable for a payment under Section 4980H for all that time, even though Employee N was expected to work full time during that period. This is not in keeping with the spirit of the ACA's shared responsibility provisions.

School District B should not be permitted to treat Employee N as "variable-hour" and subject her to a measurement period.

Example 4—Ongoing employee: School Secretary A

Facts
School Secretary A is hired by School District B as the secretary to the elementary school principal. School Secretary A is expected to work six hours per day for 210 days per year. School Secretary A is halfway through his second school year. He has held his position continuously.

Conclusions
Same as Example 2. School Secretary A "is employed on average at least 30 hours of service per week" and so should be considered a full-time employee for all twelve months of the year for purposes of the employer penalty under Section 4980H. He should not be considered a "variable hour employee," and should not be subject to a measurement period.

Concerns
Same as Example 2. School Secretary A should be treated as a full-time employee. If School District B is permitted to treat School Secretary A as variable-hour and subject him to a look-back and stability period, School Secretary A could inappropriately be denied full-time status for purposes of the employer penalty.

Example 5—New employee: School Secretary B

Facts

School Secretary B is hired by School District B as the secretary to the high school principal. She will work 248 days per year. For 200 of those days, she will work six hours per day. However, during the remaining 48 days, she will work "summer hours" of 4.5 hours per day.

Conclusions

Because School Secretary B "is employed on average at least 30 hours of service per week" during the school year, she should be considered a full-time employee for all twelve months of the year for purposes of the employer penalty under Section 4980H. School Secretary B should not be considered a "variable hour employee," and should not be subject to a measurement period.

Concerns

The fact that School Secretary B is full-time during the school year and part-time for 48 days in the summer could lead the employer to consider School Secretary B to be "variable hour." School District B could elect a measurement period of 12 consecutive calendar months starting on January 1 and ending December 31.

Because School Secretary B does not work an average of 130 hours for each month of the measurement period, School District B could conclude that she is not a full-time employee under Section 4980H.

To avoid this situation, School District B should acknowledge that School Secretary B is full-time, and should not be permitted to treat Employee S as "variable-hour" and subject her to a measurement period. School Secretary B should be considered full-time for purposes of the shared responsibility penalty under Section 4980H.

Example 6—Ongoing employee: Adjunct Instructor

Facts

Employee C is hired on August 1 by Community College X to teach four three-credit courses for the fall semester. The first day of class is August 15. Employee C taught four three-credit courses for Community College X the previous spring semester, which ended on May 15. Employee C did not teach at Community College X between May 15 and August 15.

Conclusions

a. Employee C should be considered a full-time employee for purposes of the employer penalty under section 4980H.

The common standard for gauging workload in higher education, derived from the Carnegie Unit, is that for each credit taught, an instructor works a minimum of three hours per week. Therefore, Employee C works over 30 hours per week and should be considered a full-time employee for the purpose of the employer penalty.

b. Employee C should not be treated as a new employee nor subjected to a new 90-day waiting period. Community College X should be liable for a 4980H payment if it fails to offer Employee C affordable coverage.

Notice 2012-58 says that "for new employees who are reasonably expected to work full-time, an employer … will not be subject to an assessable payment under Section 4980H for failing to offer coverage to the employee for the initial three months of employment."

However, full-time higher-education employees who work full time for the same employer for two or more consecutive semesters should not be subject to multiple 90-day waiting periods, and their employer should not receive repeated three-month exemptions from the 4980H penalty.

Because Employee C was employed full-time the previous semester by the same employer, he or she should be considered an ongoing employee for the purposes of the employer penalty under Section 4980H.

Concerns

a. Without guidance, Employee C could be considered "variable hour" and found to be part-time because Employee C is actively teaching only 12 hours per week.
b. Even if the employer acknowledges Employee C as full time, a new 90-day waiting period could be imposed on the employee each semester. This would exempt the employer from Section 4980H shared responsibility payments for nearly the entire semester. This "gaming" of the system would result in permanent exemption from 4980H penalties for all employers of adjunct instructors, even if the instructors continuously work full-time.