A Union of Professionals

American Federation
of Teachers, AFL-CIO

AFT Teachers
AFT PSRP
AFT Higher Education
AFT Public Employees
AFT Healthcare

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Submitted via e-mail to notice.comments@irscounsel.treas.gov

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CC:PA:LPD:PR (Notice 2012-58)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Dear Ladies and Gentlemen:

On behalf of our 1.5 million members, the American Federation of Teachers (AFT) welcomes the chance to respond to IRS Notice 2012-58, Determining Full-Time Employees for Purposes of Shared Responsibility for Employers Regarding Health Coverage (Section 4980H). The AFT is a union of professionals that champions fairness; democracy; economic opportunity; and high-quality public education, healthcare and public services for our students, their families and our communities.

On July 17, 2011, in response to Notice 2011-36, the AFT submitted comments on the process of determining full-time employees for purposes of the employer shared responsibility provisions of the Internal Revenue Code Section 4980H. We welcome the chance to comment again on this matter.

The AFT represents many hourly employees whose work follows the academic calendar. School custodians, office employees, school bus drivers, school food service workers, special education assistants and many others work in public schools, often only during the school year. Many of our members perform similar support work at community colleges and universities. The safe harbor methods described in Notice 2012-58 leave open the unwelcome possibility that such employees may not be considered full-time for purposes of the shared responsibility provisions, despite working an average of 30 or more hours per week.

The proposed safe harbor must protect nonseasonal employees who work 30 or more hours per week during the academic year or during other nonstandard working years. The proposed safe harbor would permit a measurement period of "not less than three but not more than twelve consecutive months, as chosen by the employer. The employer has the flexibility to determine the months in which the standard measurement period starts and ends. …" (Notice 2012-58, p. 6)

As written, the safe harbor would permit employers to choose a measurement period composed nearly entirely of the summer months, which are not part of the work year for

many full-time school employees. Under no circumstances should the determination of the measurement period be left solely to the discretion of the employer. Explicit guidance on this issue is needed to avoid an employer-selected measurement period that includes only or primarily summer months, or months that include lengthy school vacations.

Employers should be required to use a measurement period that encompasses typical working months. For example, if an employee works full time for nine months of the year, the employer should be compelled to use three or more of those nine working months as its measurement period.

It is essential that all school employees who work 30 or more hours per week be considered full time for the purpose of calculating potential employer penalties under the Affordable Care Act (ACA).

School employees who are regularly scheduled to work at least 30 hours per week during the school year should not be considered "variable hour" employees. School employees who work regularly scheduled hours during the school year should have their full-time status based on their workweek during the school year.

Employees' work schedules should not be manipulated to avoid the shared responsibility penalty. We would welcome a regulatory prohibition against the manipulation of employees' work schedules for the sole purpose of avoiding potential penalties. Prohibiting employers from reducing workweeks to 29 hours would help ensure that the ACA enhances rather than reduces workers' ability to pay for coverage. A clear procedure for monitoring and reporting such schedule manipulation would also ensure the fair implementation of the ACA.

The 30-hour threshold should not undermine more-inclusive collectively bargained coverage thresholds. Many of our collective bargaining agreements extend heath insurance coverage to employees who work fewer than 30 hours per week, yet are contractually defined as full-time employees. Because the laudable intent of the Affordable Care Act is to expand coverage, not reduce it, we would like to ensure that the 30-hour definition of "full time" is not used by the employer as a mandate or as an excuse to terminate such coverage. We strongly encourage the regulation to state that the ACA neither requires nor condones the termination of coverage currently extended to employees working fewer than 30 hours per week.

Employees who perform multiple part-time jobs for the same employer should have all hours worked for that employer count toward the calculation of their full-time status. For example, if a school hires bus drivers to perform custodial tasks in between their bus runs, all hours worked for that school should count toward the 30-hour threshold. If the regulations are silent on this issue, we fear that employers will shirk their shared responsibility by putting more of our members in this situation to avoid potential penalties.

The safe harbor should include a provision for contingent/adjunct faculty. The AFT also represents contingent faculty in higher education. Many of these contingent positions, also known as adjunct or part-time faculty positions, are held by employees with a teaching load equivalent to or greater than that of a full-time faculty member.

For the purpose of determining full-time status under the Affordable Care Act, the regulation should establish a calculation method for contingent faculty that is based on contact and/or credit hours.

The common standard for gauging workload in higher education is that for each credit taught, an instructor works a minimum of three hours per week. This credit-hour standard is derived from the Carnegie Unit and is commonly used in higher education.[1] Therefore, if a contingent instructor teaches one three-credit course, that instructor is considered to work a minimum of nine hours per week. Consequently, an instructor who teaches four three-credit classes works over 30 hours per week and should be considered a full-time employee for the purpose of the employer penalty, even if his or her institutional status is adjunct or part-time.

For other non-hourly academic-year employees, employers should be required to choose a calculation method that maximizes the number of employees defined as "full-time." This is especially important for teachers and other employees who may regularly conduct a portion of their work at home, or outside normal business hours.

In conclusion, a fair and thoughtful approach to the situation of education employees and others with nonstandard work schedules will go a long way toward ensuring the effective implementation of the Affordable Care Act provisions on employer shared responsibility. Thank you for the opportunity to comment on this important issue.

Sincerely,

Tom Moran
Director, AFT PSRP

Craig P. Smith
Director, AFT Higher Education

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[1] For more discussion of the credit hour standard in higher education, as well as its use in determining faculty workload, see the transcript of the Department of Education Inspector General's Review of Standards for Program Length in Higher Education Hearing held June 17, 2010 (Washington, DC: US Government Printing Office, 2010), and Thomas Ehrlich's article, "The Credit Hour and Faculty Instructional Workload," in *New Directions for Higher Education*, Issue 122, pp. 45-55 (Wiley: 2003).