

COMPLIANCE ADVISOR



WHAT YOU NEED TO KNOW

## Perfect Attendance! How to Handle Leaves of Absence under the ACA

The Patient Protection and Affordable Care Act (ACA) requires applicable large employers (ALEs) to offer full-time employees health coverage, or pay one of two employer shared responsibility penalties. An ALE is an employer with 50 or more full-time or full-time equivalent employees (for 2015, this threshold is 100). A full-time employee is an employee who works 30 hours or more a week.

Leaves of absence can make it difficult for an employer to determine if or how an employee counts toward the ALE threshold of 100, as well as determining if an employee is considered full time and must be offered coverage.

Under the ACA, any hour for which an employee is paid or entitled to payment must be counted as an hour of service. This includes:

- An hour worked
- Vacation
- Holiday
- Sick time
- Incapacity (including disability)
- Layoff
- Jury duty
- Military duty
- Paid leave

Exceptions to the rule exist for:

- Hours worked by a student as part of the Federal Work-Study Program (or a similar state or local program).
- Hours which are considered income from sources outside the United States.
- Hours performed as a “bona fide volunteer.”
- An hour for which an employee is paid during which no duties are performed, if the payment is made to comply with workers' compensation, unemployment, or disability insurance laws.
- An hour of service for a payment that reimburses an employee for medical or medically related expense incurred by the employee.

## Counting Hours

For hourly employees, an employer must count actual hours worked or paid.

For employees who are not paid hourly, an employer must use any of these three methods:

- Counting actual hours worked or for which vacation, holiday, etc. are paid
- Crediting an employee with eight hours' work for each day for which the person was paid for at least one hour of work, vacation, holiday, etc.
- Crediting an employee with 40 hours' work for each week for which the person was paid for at least one hour of work, vacation, holiday, etc.

An employer using a crediting system must be careful not to underestimate an employee's hours. For instance, an employer may not use the eight hour method for an employee who works 10 hours a day, three days a week.

As a general rule, if an employee terminates employment or is terminated from employment (not a layoff) and is rehired within 13 weeks (26 weeks for individuals working for an educational institution), or has unpaid non-FMLA (Family and Medical Leave Act) leave and returns to work within 13 weeks, the employee's status as either full-time or non-full time must be reinstated, and he or she cannot be treated as a new hire, subject to a waiting period. Coverage must resume by the first of the month on or following the date the employee returns to work.

When an employer is tracking an employee's hours to determine if the employee is full time and should be offered benefits, the employer can use one of two methods; the monthly method or the measurement and look-back method.

**Monthly Method.** Under the monthly method, the employer looks at each employee's actual hours of service (an hour worked or an hour of vacation, holiday, sick time, incapacity including disability, layoff, jury duty, military duty, or paid leave) each calendar month. An employee is assumed to be full-time for the month if he or she works 130 hours (regardless of the actual length of the month). If an employee takes paid FMLA leave, the paid hours would count in the monthly total of hours. If the employee takes unpaid FMLA leave (or any other unpaid leave) the employee would not have any hours credited to them during their leave. Once the employee drops below 30 hours per week for the month, the employer does not need to offer coverage. If the employee returns from a leave of absence within 13 weeks, coverage must resume by the first of the month on or following the date they return from work (assuming the employee was and is full time).

**Look-back Method.** Under the look-back method, the employer looks at the number of hours the employee averaged during a look-back period called a "measurement period." Once the employer determines whether or not the employee worked full time during the measurement period, that determination generally will apply throughout the immediate stability period regardless of the number of hours the employee actually works (unless the employee's employment ends).

Employers must remember that an employee can only have one limited non-assessment period per employment period. This means it is important for an employer to determine if an employee is a continuing employee or a terminated and rehired employee.

## Counting Hours for Educational Institutions

**Monthly Method.** Under the monthly method, if an employee of an educational institution (whether public or private, and from primary through university level) has a break in service because, for example, he or she has unpaid leave, it is summer break, or his or her employment terminates, and the employee returns to work or is rehired within 26 weeks, the employee must be treated as a continuing employee, and no new waiting period can be imposed when he or she returns to work. Coverage must resume by the first of the month on or following the date he or she returns to work. If the break in service is more than 26 weeks, the employee can be treated as a new employee, subject to a new waiting period.

**Example:** Steve teaches full-time at Rose School. Steve does not work for Rose during summer break, which runs from May 27, 2015, through August 22, 2015. Steve's coverage must resume as of September 1, 2017, because his break in service was less than 26 weeks. Rose does not need to offer coverage to Steve during June, July, or August, since he worked less than 30 hours per week during those months and Rose has adopted the monthly measurement method. Rose does need to offer coverage to Steve from September through May.

If the employer wishes, it may use a shorter measurement period for short-term employees. The employer may use a break period equal to the employee's original period of employment (but not less than four weeks) instead of 26 weeks as the break period if the employee has a break in service during his or her first 26 weeks of employment. This is called the parity rule.

**Example:** Rose hires Jill as an aide on September 14, 2015. Jill resigns on December 15, 2015 (after 15 weeks of employment). Jill is rehired on May 30, 2016 (22 weeks after she resigned). Rose uses the parity rule. Because Jill's period of employment was less than her break in service, Rose does not have to offer coverage to Jill until she completes three full calendar months of employment after her rehire.

**Note:** Spring break and Christmas vacation often will be paid; paid hours of service are considered time worked even if the employee does not actually perform services during the week or month.

The IRS has determined some educational organizations are attempting to avoid these rules by using staffing agencies for certain roles, under the idea that staffing agency employees would be subject to the 13-week rehire rule.

The IRS plans to propose amendments to regulations so that staffing agency employees providing services for educational organizations would be subject to the 26-week rule, not the 13-week rule. The amendments will apply as of the applicability date in the regulations.

**Measurement and Look-back.** Under the measurement and look-back method, employees of educational institutions (whether public or private, and from primary through university level) cannot have breaks in service of *four to 26 weeks* counted against them when measuring hours. Employers may either disregard the breaks or assume the employee continued to work his or her usual schedule during summer break. There is no 501-hour limit on hours of service required to be credited to an employee on account of a continuous period of time during which the employee performs no service, if the hours would otherwise qualify as hours of service (such as for a leave of absence).

**Example:** Paul is employed by Orchard School. Paul works 38 hours per week from September 7, 2014, through May 23, 2015, and then does not work and is not paid during the summer break.

Paul goes back to work on September 7, 2015. Because Paul was off for 15 weeks, which is less than 26 weeks, Paul's coverage must be reinstated by October 1, 2015, if it lapsed. Also, for purposes of determining Paul's average hours of service per week for the measurement period, Paul is credited as having an average of 38 hours of service per week for the 15 weeks between May 24, 2015, and September 5, 2015.

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### **FMLA, USERRA, and Jury Duty**

If an employee is on a leave of absence under FMLA (paid or unpaid), USERRA (Uniformed Services Employment and Reemployment Rights Act), or jury duty, under the look-back method the employee is treated as if he or she worked during the leave, even if the leave is longer than 501 hours. This means employees are offered coverage while they are on leave, and when their hours are calculated during the leave period's contemporaneous measurement period, the period of leave is disregarded.

An employee on FMLA, USERRA, or jury duty leave essentially must be treated as if he or she worked during the leave (even if the leave is longer than 501 hours).

**Example:** Amy works for a company that uses an April 1 through March 31 measurement period, an administrative period of April 1 through May 31, and a June 1 through May 31 stability period. Amy is considered full-time for the June 1, 2015, through May 31, 2016, stability period. Amy is on an FMLA leave from October 1 through December 31, 2015. Amy must be offered coverage during her FMLA leave (regardless of whether the time is paid or unpaid). When applying Amy's April 1, 2015, through March 31, 2016, measurement period, Amy's employer will disregard the three months she was on FMLA leave and average her hours from April through September 2015 and January through March 2016 to see if she must be considered full-time for the June 1, 2016, through May 31, 2017, stability period.

If an employee declined coverage for a stability period, and then has a leave of absence, upon return the employer is not obligated to make a new offer of coverage to the employee.

### **Unpaid Leave**

If the employee is on an unpaid leave of absence (except unpaid FMLA) and in a stability period, the employee must be offered coverage through the stability period. When the employee's hours are calculated during the contemporaneous measurement period, the leave of absence will count as zero hours of service.

**Examples:** Wilson Inc. uses an October 15 through October 14 standard measurement period and a January 1 through December 31 standard stability period.

Ruth is a full-time employee for purposes of the January 1 through December 31, 2015, standard stability period. Ruth takes an unpaid leave of absence (that is not FMLA, USERRA, or jury duty leave) from March 15, 2015, to May 15, 2015. Ruth must be offered coverage during her leave, since she is entitled to coverage during the 2015 stability period. When calculating Ruth's hours during the October 15, 2014, through October 14, 2015, measurement period, Ruth will have zero hours of service from March 15 to May 15, 2015.

Don is a full-time employee for purposes of the January 1 through December 31, 2015, standard stability period. Don takes an unpaid leave of absence (that is not FMLA, USERRA, or jury duty leave) from March 15, 2015, through August 9, 2015. Don must be offered coverage during his leave because he is entitled to coverage during the 2015 stability period, but Don drops his coverage. Because Don's leave is longer than 13 weeks, he has a break in service, and Wilson may treat Don as a new employee, with a new waiting period and initial measurement period, when he returns on August 10. Until August 10, he is considered a full-time employee of Wilson Inc.

Stan is a full-time employee for purposes of the January 1 through December 31, 2015, standard stability period. Stan takes an unpaid leave of absence (that is not FMLA, USERRA, or jury duty leave) from March 15, 2015, through August 9, 2015. Stan must be offered coverage during his leave because he is entitled to coverage during the 2015 stability period, but Stan keeps his coverage. Because Stan's leave is longer than 13 weeks, he has a break in service, and Wilson may treat Stan as a new employee, with a new waiting period and initial measurement period, when he returns on August 10. Until August 10, he is considered a full-time employee of Wilson Inc. This example will be the most difficult to administer and employers should work with their counsel to develop compliant policy to handle this situation.

If an employee declined coverage for a stability period, and then has a leave of absence that is less than 13 weeks, upon return the employer is not obligated to make a new offer of coverage to the employee.

### **Layoffs**

If the employee is laid off during a stability period (not terminated) and is considered full time, coverage must be offered during the layoff.

If an employee had no hours of service and the employee discontinued coverage but then returns to work within 13 weeks, coverage must be reinstated by the first day of the month following his return to work. The time on layoff will have zero hours of service for purposes of the measurement period. If the employee had no coverage and the layoff exceeds 13 weeks, the employee can be treated as a new employee, with a new waiting period and initial measurement period, when he returns. If the employee had coverage during the layoff, there is no reinstatement issue and he will have no hours of service to measure during the time he was laid off.

### **Disability**

Disability leave is a source of confusion for many employers. Periods during which an individual is not performing services but is receiving payments from short-term disability or long-term disability will result in hours of service, if the individual retains status as an employee, unless the payments are made from an arrangement to which the employer did not contribute directly or indirectly. Disability paid for by the employee with after-tax contributions would be an arrangement to which the employer did not contribute,

and would not result in hours of service. Workers' compensation payments under state or local government programs are not hours of service.

**Conveying Policies**

ALEs should ensure that employees understand how their full-time status is determined and what happens if they are rehired or take a leave of absence. Employees should have sufficient information to determine their eligibility under the plan. This information should be contained in the summary plan description (SPD).

**Determining ALE Status**

Under the ACA, an employer is a “large employer” for a calendar year if it employed an average of at least 50 (for 2015 this threshold is 100) full-time or full-time equivalent employees during the prior calendar year. Employers must count an employee’s actual hours each calendar month during a calendar year to determine if the employer is a “large employer” – the look-back measurement and stability periods are not used here.

To determine its status as an applicable large employer (ALE), an employer must count employees’ hours of service. Specifically, an hour of service means each hour for which an employee is paid, or entitled to payment, for the performance of duties for the employer, and each hour 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.

A “full-time” employee is a common-law employee who worked an average of 30 or more hours per week during a calendar month. Any employee who averaged 30 or more hours per week (130 hours in a calendar month) is considered one full-time employee. Actual hours worked are not considered for this calculation. Part-time employees (those who average less than 30 hours per week) count on a pro-rata basis and their hours are combined to create “full-time employee equivalents.” This is done by adding up the hours of all less-than-full-time (30 hours) employees for a calendar month and dividing the total by 120. All hours worked by the full-time equivalent employees are considered for this calculation, including any overtime.

The employer must add the total number of full-time and full-time equivalent employees for each calendar month, add each month’s total together, and divide by 12. If there is a fractional number of full-time equivalent employees for a month, the fraction is retained to the nearest hundredth. If there is a fraction after the total calendar year average is determined, the fraction is dropped (that is, the employer rounds down).

**Crediting Hours to Employees**

	<b>Monthly Measurement</b>	<b>Look-Back Method</b>
FMLA (unpaid)	Employee would not be credited hours. FMLA obligations regarding benefits apply.	Employer must determine average hours of service per week for the employee during the measurement period and use that average for the entire measurement period, or, the employer can credit the employee with hours of service during the leave at a rate equal to the employee’s weekly average during the weeks he or she was not on leave. FMLA obligations regarding benefits apply, along with any obligations of the current stability period.

	Monthly Measurement	Look-Back Method
FMLA (paid)	Each hour of paid leave counts as an hour worked. FMLA obligations regarding benefits apply.	Each hour of paid leave counts as an hour worked. FMLA obligations regarding benefits apply, along with any obligations of the current stability period.
USERRA	Employee would not be credited hours. USERRA obligations regarding benefits apply.	Employer must determine average hours of service per week for the employee during the measurement period and use that average for the entire measurement period, or, the employer can credit the employee with hours of service during the leave at a rate equal to the employee's weekly average during the weeks he or she was not on leave. USERRA obligations regarding benefits apply, along with any obligations of the current stability period.
Jury Duty	Employee would not be credited hours.	Employer must determine average hours of service per week for the employee during the measurement period and use that average for the entire measurement period, or, the employer can credit the employee with hours of service during the leave at a rate equal to the employee's weekly average during the weeks he or she was not on leave. Stability period obligations regarding coverage apply.
Paid Leave (vacation, holiday, sick time, etc.)	Each hour of paid leave counts as an hour worked.	Each hour of paid leave counts as an hour worked. Stability period obligations regarding coverage apply.
Unpaid leave less than 13 weeks (not in any of the above categories)	Employee would not be credited hours.	Employee is not credited with any hours of service in the concurrent measurement period. Stability period obligations regarding coverage apply.

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