



IRS Releases Final Rule Concerning Treatment of Adjunct Faculty Under Affordable Care Act – Mostly Good News for Community Colleges

February 21, 2014

Dear Colleague:

Last week, the U.S. Department of the Treasury (Treasury) and IRS published [final regulations](#) implementing the shared responsibility provisions of the Affordable Care Act (ACA). This provision is more commonly known as the employer mandate. Treasury issued a proposed rule on this topic in early 2013. AACCC submitted formal comments on the proposed regulation and had a number of subsequent contacts with Treasury officials concerning it. This intense interest was driven by the fact that hanging in the balance was the question of whether community colleges would typically be required to provide to adjunct faculty health care insurance under the ACA. Among other things, the ACA requires large employers to provide health care insurance that is “affordable” and of minimum value to all full-time employees (and their dependents), or face a potential financial penalty. The crucial issue was how to determine whether adjunct faculty are full time.

AACCC is generally pleased with the final regulation’s resolution of this issue. Although AACCC’s [formal proposal](#) was not adopted in its entirety, it appears that our arguments convinced regulators to move largely to our position. For this, we are extremely grateful to Treasury for being sensitive to the financial realities facing community colleges.

What follows is a summary, and in some cases quotes, of the final regulation. It does not aspire to be a comprehensive summary. There are many additional aspects of the regulation that your financial officer, human resources personnel, and others will have to master in order to ensure compliance. This bulletin focuses primarily on the issue of the treatment of adjunct faculty and under what conditions they might be considered a full-time employee for purposes of the employer mandate. We are also providing other relevant information.

We urge all institutions to review their current and prospective policies in light of these final regulations. We believe that they provide flexibility such that colleges will not be required to provide insurance in a sizeable majority of instances.

We fully recognize that adjunct faculty are indispensable to the mission of our colleges in providing high quality, relevant education. We know colleges will want to continue to utilize adjuncts’ abilities in the broadest array of circumstances.

Regulatory Standard on Judging Whether Adjunct Faculty Are Full-Time

Under the ACA, if an individual works more than 30 hours per week (based on actual hours or averaged over a formal measurement period), his/her employer may be penalized if it does not offer him/her

sufficient health insurance coverage. The final regulation gives institutions *two* options in measuring these “service” hours of adjunct faculty to determine whether or not they are full-time employees who should be offered coverage to avoid a penalty. The first offers colleges substantial institutional flexibility/discretion in setting policies, while the second is a “safe harbor” that, by design, gives institutions the security of a precise standard to measure adjunct effort.

Option 1 for Determining Adjunct Hours of Service (“Reasonable Method”):

Until and unless further guidance is issued, employers of adjunct faculty (and of employees in other positions that raise analogous issues with respect to the crediting of hours of service) are required to use a “reasonable method” for crediting hours of service with respect to those employees that is consistent with section 4980H of the Internal Revenue Code (i.e., the employer mandate section).

The regulation’s preamble states that a method of crediting hours is *not* reasonable if it takes into account only a portion of an employee’s hours of service with the effect of characterizing, as a non-full-time employee, an employee in a position that traditionally involves at least 30 hours of service per week.

The regulation’s preamble also states that, “With respect to adjunct faculty members of an educational organization who are compensated on the basis of the number of courses or credit hours assigned, the commenters noted that a wide variation of work patterns, duties, and circumstances apply in different institutions, academic disciplines, and departments, and apply to different courses and individuals, and that this might factor into the reasonableness of a particular method of crediting hours of service in particular circumstances.”

Generally speaking, this option appears to give institutions significant flexibility in setting policies about the measurement of adjunct effort, within certain parameters. It is an option that many institutions may want to use.

Option 2 for Determining Adjunct Hours of Service (“Safe Harbor”):

In addition, the government has determined that, until further guidance is issued, one (but not the only) method that is reasonable to determine adjunct effort would be to 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 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).

For example, if an adjunct faculty member taught 13 credit hours in a semester and had no other required responsibilities, their effort would be calculated under this framework at 13 credit hours X 2.25 = 29.25 hours. Consequently, an institution would not be required to provide coverage under the ACA.

Although further guidance may be issued in this area, institutions may use the method described at least through the end of 2015. To the extent any future guidance modifies an employer's ability to rely on that method, the period of reliance will not end earlier than January 1 of the calendar year beginning at least 6 months after the date of issuance of the guidance. This extended period of reliance is provided so that if the method described in Option 2 is modified or replaced, employers will have sufficient time to make necessary adjustments. Of course, employers may credit more hours of service than would result under this method, and also may offer coverage to additional employees beyond those identified as full-time employees under that method.

Please note that Treasury and IRS are continuing to consider additional rules for the determination of hours of service for purposes of the employer mandate, including adjunct faculty. The regulation authorizes the promulgation of such rules through additional guidance, published in the Internal Revenue Bulletin.

For your background information and to provide greater context on the key issue of measuring adjunct "service" (i.e., employment) hours, the preamble to the regulation also stated the following:

"Commenters requested guidance on the application of the hours of service definition to certain categories of employees whose hours of service are particularly challenging to identify or track or for whom the final regulations' general rules for determining hours of service may present special difficulties."

"Until further guidance is issued, employers of adjunct faculty...are required to use a reasonable method of crediting hours of service consistent with Section 4980H."

"The examples of reasonable methods provided are not intended to constitute the only reasonable methods of crediting hours of service. Whether another method of crediting hours of service in these situations is reasonable is based on the relevant facts and circumstances."

"Commenters raised issues relating to adjunct faculty who receive compensation for teaching a certain number of classes (or credits) and whose compensation is not based on the actual time spent on non-classroom activities such as class preparation, grading papers and exams, and counseling students. Comments from employers generally suggested that the hours of service equivalencies for non-hourly employees (eight hours per day or 40 hours per week) were too high for this purpose, but that counting actual hours would be administratively burdensome. These commenters suggested various methods for permitting assumptions for hours of service that would be applied for each task completed, for example, a set number of hours of service per week per class or credit taught by an adjunct faculty member. Comments from employees and their representatives included two very different types of suggestions. Some suggested that any assumption be set sufficiently high and be subject to robust periodic review so as not to fail to attribute adequate hours of service for the work performed. Others suggested that the assumption be set at a relatively moderate level that would avoid giving undue incentives for institutions to reduce adjunct faculty members' teaching assignments to avoid full-time employee status."

When determining an adjunct's hours using any equivalency method, it is important to note that hours must be counted across an employer's entire controlled group, which is challenging for individuals who work at two or more related educational institutions over the span of a year. Further, for a governmental educational institution, if a state determines all state agencies, including its colleges and

universities, are within the same controlled group, work performed by an employee for another state agency must be taken into consideration. AACC will be providing further guidance on this particular issue in the near future.

Measurement Period and Related Issues

Use of Measurement Period:

Although the shared responsibility employer mandate does not start until January 1, 2015 (and may apply at the later start date for non-calendar year plans), many institutions will choose to implement a measurement period of no less than 3 months (and no more than 12 months) beginning in 2014 to be ready for the 2015 effective date. This measurement period determines whether the individual in question qualifies for coverage based on their hours of service, and might include adjuncts. If, after the measurement period, an individual is determined to have worked for an average of 30 or more hours per week, they must receive coverage prospectively. For colleges that use the safe harbor described above to calculate adjuncts' hours of service, the measurement period might not need to be used because the employer would know in advance how to determine the service hours of adjunct faculty with whom they have contracted.

Treatment of Breaks in Academic Year:

Education institutions cannot take into account the potential for, or likelihood of, an employment break period in determining hours of service. For purposes of applying the look-back measurement method (which is then used to determine if an employee merits coverage), an educational organization employer determines the employee's average hours of service for a measurement period by computing the average after excluding any special unpaid leave and any employment break period during that measurement period and by using that average as the average for the entire measurement period.

Treatment of Different Categories of Employees:

An employer is not required to use the same measurement method for all non-hourly employees, and may apply different methods for certain, defined categories of non-hourly employees, provided the categories are reasonable and consistently applied.

Potential Institutional Penalties

Penalty for Not Providing Required Coverage:

There are two potential penalties for institutions that fail to provide adequate coverage for their employees. The first relates to the obligation to provide "minimum essential coverage" (MEC) to 95% of all full-time employees and their dependents (there is transitional relief for plans that do not yet provide dependent coverage, and as noted below, for 2015, the applicable percentage is reduced to 70%). This MEC is statutorily prescribed, and the penalty for non-compliance is \$2,000 for each full-time employee—a very steep assessment. Institutions will be required to submit to the IRS detailed information delineating their compliance with these requirements, also known as a Section 6056 form.

In addition, a large employer that, for a calendar month, fails to offer to its full-time employees health coverage that is affordable and provides minimum value (as specified in statute) is subject to an assessment if a full-time employee enrolls for that month in a qualified health plan on an Exchange for which the employee receives a premium tax credit (i.e., federal subsidy). For an employer's purpose, coverage is affordable as long as the employee's required contribution for self-only coverage does not exceed 9.5% of his/her income as reflected on his/her W-2. (There are other measurement options.) The penalty is \$3,000 per year per employee (assessed on a case-by-case, individual basis). This process is the means through which the ACA's employer mandate will be enforced. As can be seen, it would not necessarily cover all of an institution's potentially impacted employees, as they would have to have sought insurance through an exchange and received a premium tax credit.

Delay in Implementation of Employer Mandate for 2015:

The preamble to the final regulation provides that for 2015 the \$2,000/employee penalty will not apply as long as the employer offers MEC to at least 70% (rather than 95%) of its full-time employees (and their dependents). The relaxed requirement for 2015, which has not attracted a great deal of media coverage, provides institutions with substantial leeway in implementing the employer mandate in 2015—it sets a relatively low bar for the required coverage, as institutions work to determine who will and will not qualify.

We hope that the above information is useful to you. Again, we believe that it provides our colleges with a number of options in complying with this important regulation. Please contact David Baime of our staff if you have any further questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Walter G. Bumphus". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Walter G. Bumphus, Ph.D.
CEO and President

