HR Issues for Faculty

Making sense out of the Affordable Care Act, Federal Contractor Laws, and FLSA
What is it and why do I care?

THE AFFORDABLE CARE ACT
What is the ACA and why do I care?

• The Affordable Care Act was signed on March 23, 2010.
• Includes a patient bill of rights which includes cost-free coverage for preventive services.
• Extends coverage for young adults who are now allowed to stay on parents plan until age 26.
• Individual mandate requires that most individuals have basic health coverage.
• Requires that employers offer basic health insurance coverage to all full-time employees (30 hours or more).
What did ACA Change for Colleges?

• Community Colleges were all ready required to offer health insurance to all full-time (30 hours of more) permanent employees per statute.
  – These employees are offered the SHP (70/30, 80/20, CDHP)
• ACA requires that employers offer health coverage to ALL full-time employees (30 hours or more).
  – These employees are offered the HDHP.
• The type of health coverage offered is dependent on the employment type of the employee (permanent vs temp).
How do you determine who is a full-time non-permanent employee?

- Are they reasonably expected to work at least 30 hours of service per week on average?
- Are they NOT reasonably expected to work at least 30 hours of service per week on average?
- You have no idea how many hours of service they are expected to work per week on average.
- Are they a seasonal employee? Defined as someone who is employed on a temporary basis for a defined season, such as registration.
How do you determine who is a full-time non-permanent employee?

• Are they an independent contractor? Defined as someone who is contracted to perform a service for the college for which there is no employer/employee relationship; the college has the right to control or direct only the result of the work and not what will be done and how it will be done. The earnings of a person who is working as an independent contractor are subject to Self-Employment Tax.

• Are they an employee assigned to work at the college through a staffing firm, such as a temporary employment agency?
How do you determine who is full-time and what do you offer?

• Are they an independent contractor?
  – No offer of coverage required because they are not an employee.

• Are they an employee assigned to work at the college through a staffing firm?
  – Need to check with staffing firm to ensure they are offered coverage.

• Are they a seasonal employee? Defined as someone who is employed on a temporary basis for a defined season, such as registration.
  • No offer of coverage required.
How do you determine who is full-time and what do you offer?

• Are they reasonably expected to work at least 30 hours of service per week on average?
  – Offer coverage immediately at hire.

• Are they NOT reasonably expected to work at least 30 hours of service per week on average?
  – These you have to measure to determine if they are full-time.

• You have no idea how many hours of service they are expected to work.
  – These you have to measure to determine if they are full-time.
What are service hours?

Each hour for which an employee is credited for the performance of services and, if applicable, hours for which an employee is entitled to payment during which no duties are performed due to paid leave, such as vacation, holiday, disability, jury duty, military leave or leave of absence. For faculty/instructor positions, service hours include not only classroom instruction time, but also time spent on advising students, class preparation work, course development, office hours, committee work, and other duties as assigned or required by the college.
How do you determine service hours?

• Must use a “reasonable method” to determine service hours.

• One reasonable method is to credit faculty with 2.25 hours of service per week for each classroom hour
  – Add 1.25 hours to each hour of classroom or teaching time.

• Would also include any other required time, such as office hours, required training, meetings, etc.

• College should document what method they are using and how they determined that it is “reasonable”.
<table>
<thead>
<tr>
<th>Class Name</th>
<th>Course Prep</th>
<th>Attendance</th>
<th>Grading</th>
<th>Student Interaction</th>
<th>Support and Admin</th>
<th>Total Minutes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employability Labs</td>
<td>0 minutes</td>
<td>5 minutes</td>
<td>0 minutes</td>
<td>5 minutes</td>
<td>5 minutes</td>
<td>15 minutes</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Recorded in system not during contact hours</td>
<td>Grading done during contact hours with students</td>
<td>Potential phone calls or questions on attendance outside of contact hours</td>
<td>Periodic and infrequent creation of new worksheets outside of contact hours</td>
<td></td>
</tr>
<tr>
<td>Law Enforcement, EMS and Fire In-Service</td>
<td>5 minutes</td>
<td>0 minutes</td>
<td>5 minutes</td>
<td>0 minutes</td>
<td>0 minutes</td>
<td>10 minutes</td>
</tr>
<tr>
<td></td>
<td>Review of established lesson plans (like OJT delivery)</td>
<td>Sign-in sheet used for attendance that is subsequently recorded by administrators</td>
<td>Minimal grading done, usually via Scantron, outside of contact hours</td>
<td>Students are instructed to call course coordinator with attendance, grading, etc.</td>
<td>Coordinator collates and assembles packages, prep materials and collects as necessary at the end of the course</td>
<td></td>
</tr>
<tr>
<td>Fire Rookie and EMS Beginner</td>
<td>10 minutes</td>
<td>0 minutes</td>
<td>5 minutes</td>
<td>0 minutes</td>
<td>0 minutes</td>
<td>15 minutes</td>
</tr>
<tr>
<td></td>
<td>Review of established lesson plans (like OJT delivery)</td>
<td>Sign-in sheet used for attendance that is subsequently recorded by administrators</td>
<td>Some grading takes place in class and others done via Scantron</td>
<td>Call-ins for absences, tardies, or other is directed to full-time administrators</td>
<td>Preparation for classes done by Directors; copies and other administrative needs done by full-time administrative staff</td>
<td></td>
</tr>
<tr>
<td>CNA, Phlebotomy</td>
<td>10 minutes</td>
<td>0 minutes</td>
<td>5 minutes</td>
<td>3 minutes</td>
<td>0 minutes</td>
<td>20 minutes</td>
</tr>
<tr>
<td></td>
<td>Class set-up</td>
<td>Attendance sheets created by administration; Attendance is taken on sheet circulated through classroom and is recorded by administrators</td>
<td>5 minutes</td>
<td>3 minutes</td>
<td>FT staff create materials for coursework and testing,</td>
<td></td>
</tr>
</tbody>
</table>

Example of a process used to determine service hours
How does this work?

• Determine how many hours an employee is expected to work (if you know this)
• Add in service hours (or use appropriate multiplier) to determine total hours expected to work
• If over 30, treat as full-time
• If you don’t know how many, you measure during the measurement period
How do you determine their total service hours?

- **Initial/Standard Measurement Period:** The period of time for which an employee’s hours are recorded and measured to determine average hours worked. This period can be 3 months but no more than 12 months from the date of hire or from the first of the month following the date of hire.

- **Administrative Period:** The time after the Standard/Initial Measurement Period that it takes to enroll an eligible employee in the health plan. This period can be no more than 90 days, and combined with the Measurement Period cannot exceed 13 months from the date of hire.

- **Stability Period:** The period of time after the Administrative Period for which health benefits are provided to eligible employees. This period can be 6 months but not more than 12 months, and cannot be shorter than the Measurement Period and cannot be longer than the Measurement period and Administrative period combined plus 1 month.
What happens after you measure them?

• Employee averages at least 30 hours or more
  – Offer coverage during the Administrative Period (should line up with annual enrollment)
  – Must provide coverage during the entire Stability Period, even if they don’t work 30 hours/week
  – Continue to measure during the next Measurement Period

• Employee averages less than 30 hours
  – Do not have to offer coverage
  – Continue to measure during the next Measurement Period
ACA Breaks in Service

• Break in Service – For employees not reasonably expected to meet the definition of an ACA full-time employee, a break in service is the period of time when an employee is not being paid and is not entitled to be paid for the performance of duties.

• Breaks in service impact how you calculate employee work hours during the measurement period

• Also determine if the employee an "on-going" employee or a "rehire/new employee"

• The rules that apply depend on the length of the break and the length of the employment prior to the break
ACA Breaks in Service

• If the break is less than 4 consecutive weeks, it is not considered an employment break period
  – Record only the hours worked (can count 0 hours for when the person does not work)
  – Continue on the same measurement period that they started on prior to the break and same stability period
ACA Breaks in Service

• If the break is more than 26 consecutive weeks, it is not considered an employment break period
  – Treat the employee as a new hire and start a new measurement period and new stability period
ACA Breaks in Service

• If the break is between 4 - 26 consecutive weeks, it depends on the length of time the person worked prior to the employment break
ACA Breaks in Service

• If the break is between 4 - 26 consecutive weeks **and break exceeds length of pre-break employment**
  – Treat the employee as a new hire and start a new measurement period and new stability period
ACA Breaks in Service

- If the break is between 4 - 26 consecutive weeks and break does not exceed length of pre-break employment
  - Is considered an employment break
    - Either use the measurement period average for each week worked before the break to determine average hours or exclude the period of the break when figuring the average
    - NOT treated as a period during which 0 hours are credited
    - Continue on the same measurement period that they started on and the same stability period
ACA Breaks in Service

break < 4 weeks = continuous employee (count break time as 0 hours)
break >26 weeks = new employee
break > work = new employee
break < work = continuous employee (do not count break time as 0 hours)

Weeks Worked  Break in Service

5  3
15  27
15  17
12  10

3/25/2016
ACA Breaks in Service

• For special unpaid leave (FMLA), USERRA, jury duty), determine hours of service by either:
  – Determining the average hours of service per week for the employee during the measurement period, excluding the special unpaid leave period, and using that average for the employee for the entire measurement period; or
  – Crediting the employee with hours of service for special unpaid leave at a rate equal to the average weekly rate at which the employee was credited during the other weeks in the measurement period.

• These methods apply only to continuing employees upon their return, but not to employees who are treated as terminated and rehired
• If in doubt, always err on the side of the employee
What happens if you get it wrong?

- Penalties
- Reporting
  - Must report on each full-time employee showing
    - Months that coverage was offered
    - Months that you provided coverage
Where to learn more:


INDEPENDENT CONTRACTOR VS EMPLOYEE
IRS Definition

• Independent Contractor:

“The general rule is that an individual is an independent contractor if the payer has the right to control or direct only the result of the work and not what will be done and how it will be done. The earnings of a person who is working as an independent contractor are subject to Self-Employment Tax.”
What difference does it make?

• Generally, you must withhold income taxes, withhold and pay Social Security and Medicare taxes, and pay unemployment tax on wages paid to an employee. You do not generally have to withhold or pay any taxes on payments to independent contractors.

• Misclassification – If you classify an employee as an independent contractor and you have no reasonable basis for doing so, you may be held liable for employment TAXES for that worker.
Factors: Independence and Control

• Behavioral: Does the company control or have the right to control what the worker does and how the worker does his or her job?
• Financial: Are the business aspects of the worker’s job controlled by the payer? (these include things like how worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.)
• Type of Relationship: Are there written contracts or employee type benefits (i.e. pension plan, insurance, vacation pay, etc.)? Will the relationship continue and is the work performed a key aspect of the business?
What is an Independent Contractor?

• If you are an independent contractor, you are self-employed.
• You are not an independent contractor if you perform services that can be controlled by an employer (what will be done and how it will be done).
• What matters is that the employer has the legal right to control the details of how the services are performed.
• If an employer-employee relationship exists (regardless of what the relationship is called) you are not an independent contractor.
How to decide?

• Businesses must weigh all these factors when determining whether a worker is an employee or independent contractor.

• Some factors may indicate that the worker is an employee, while other factors indicate that the worker is an independent contractor.

• There is no “magic” or set number of factors that “makes” the worker an employee or an independent contractor, and no one factor stands alone in making this determination.

• Also, factors which are relevant in one situation may not be relevant in another.

• The keys are to look at the entire relationship, consider the degree or extent of the right to direct and control, and finally, to document each of the factors used in coming up with the determination.
Are they more like an employee?

- Do they perform the same function as your core business?
- Do they have their own tools (computer, own email, etc.) or are you supplying it?
- Have they worked for you in the last 12 months AND provided the same or similar service?
- Can they either lose money or make money?
- Do they do the same work for others?
- How are you paying them? By the hour, Single payment for “turn-key”, complete product?
- Do you need a contract to govern the relationship?
- What is the frequency or regularity of work?
Other factors to consider:

- Instructions and training required
- Whether the employee wears an identification badge and presents themselves as part of the organization
- The nature of the occupation
- Whether/how the person’s work evaluated
- Whether the person offers the same services to others in the public
- Whether/how the person can be discharged
- The permanency (or lack thereof) of the arrangement
Consequences for Misclassification

• If you classify an employee as an independent contractor and you have no reasonable basis for doing so, you may be held liable for employment taxes for that work.

• If you have a reasonable basis for not treating a worker as an employee, you may be relieved from having to pay employment taxes for that worker. To get this relief, you must file all required federal information returns on a basis consistent with your treatment of the worker. You (or your predecessor) must not have treated any worker holding a substantially similar position as an employee for any periods beginning after 1977.

• Workers who believe they have been improperly classified as independent contractors by an employer can use Form 8919, Uncollected Social Security and Medicare Tax on Wages to figure and report the employee’s share of uncollected Social Security and Medicare taxes due on their compensation.
What you need to do:

• Document how you came to your decision and keep records
• Review annually
• When in doubt....
  – Consider them an employee unless they can show that they meet the tests in order to be treated as an independent contractor
• Do you have an internal process? An internal form?
Where to learn more:

- Video: http://www.irsvideos.gov/EmployeeOrIndependentContractorWebinar_20150312/
Proposed changes and how to prepare

FAIR LABOR STANDARDS ACT
The Fair Labor Standards Act (FLSA) is a federal law that governs whether or not employees receive overtime pay. President Obama tasked the DOL with updating the FLSA regulations in early 2014. Proposed regulations were released in 2015. Biggest proposed change is the raising the salary threshold for exemption to overtime rules. The final rule is expected in mid/late 2016 with organizations having 60 days to comply.
What may change?

<table>
<thead>
<tr>
<th>Current</th>
<th>Proposed</th>
</tr>
</thead>
<tbody>
<tr>
<td>$455/week or $23,660/year</td>
<td>$970/week or $50,440/year</td>
</tr>
<tr>
<td>Minimum Salary Threshold</td>
<td>Proposed threshold for 2016 set at 40th percentile of earnings for all full-time salaried workers</td>
</tr>
<tr>
<td>For exempt status, the employee’s primary duty must still be administrative, executive, professional or related to outside sales</td>
<td>Job Duties Test</td>
</tr>
<tr>
<td>No changes released as of July. However, discussion around potential change to limit amount of time exempt employees could perform non-exempt work</td>
<td></td>
</tr>
<tr>
<td>Exempt status at $100,000/year Must partake in office or non-manual work and perform at least one administrative or professional duty</td>
<td>Highly Compensated Workers Test</td>
</tr>
<tr>
<td>Exempt status set at $122,148 (90th percentile of weekly earnings) No changes in proposed in duties required</td>
<td></td>
</tr>
</tbody>
</table>
What does this mean?

• Many employees who are currently “exempt” may become “non-exempt” and therefore subject to overtime rules.
  – Includes requirement for overtime pay and timesheets
• May have employees in the same type of position being in different categories due to pay.
• Colleges may not have the money to increase salaries to keep exempt status.
• Colleges may not have the money to pay overtime.
What colleges should be doing now

- Make sure job descriptions are up-to-date
- Identify current exempt employees that earn salaries below the new limit
  - What would it cost to bring their salary up?
  - How much overtime do they actually work?
  - Are there wage compression issues?
- Review org structure to determine how to manage the structure of jobs, staffing levels, etc.
- Develop communication and training plans to help employees understand the changes and to ensure compliance
- Review time and attendance processes and work flows to ensure compliance
Compliance Issues

• Issues with employees changing from one status to another
  – Work schedule
    • sticking to the 9-5
    • cell phone, checking emails, etc.
  – Tracking hours (timesheets)
  – May be perceived as losing status
  – Temptation to ignore on behalf of employee and/or supervisor
Where to learn more:

• Notice of Proposed Rulemaking:  
  http://www.dol.gov/whd/overtime/NPRM2015/

• The proposed rule:  

• Fact Sheet: Exemption for Professional Employees:  
  http://www.dol.gov/whd/overtime/fs17d_professional.pdf
• Questions?

• Contact information:
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