A Union of Professionals
AFT Center for Collective Bargaining

UPDATE ON AFFORDABLE HEALTHCARE

Update on Affordable Care Act Proposed Rules

This document has been updated to reflect the one-year delay in employer penalties announced on July 2, 2013. While the information below reflects our understanding of the proposed rules as of this writing, the subject matter is complex and subject to frequent changes and updates. We will work to update this information as implementation continues.

Background

Starting in 2015, the Affordable Care Act levies penalties against large employers (those who have at least 50 employees) who do not offer affordable health coverage to their full-time employees. Employers only have to offer affordable coverage to avoid the penalty; they do not necessarily have to pay any portion of the premium. The law defines a full-time employee as one who works at least 30 hours per week on average. ***Note that the Affordable Care Act does not supersede collectively bargained language, including contract language on benefits eligibility.***

On January 2, 2013, Treasury issued proposed rules regarding the determination of full-time status for the purpose of the employer penalty. Even though these are proposed rules, employers can rely on them unless or until final rules are issued. You can read the full text of the proposed rule as published in the *Federal Register here*: http://www.gpo.gov/fdsys/pkg/FR-2013-01-02/pdf/2012-31269.pdf.

The AFT previously commented on this issue and encouraged federal regulators to recognize the special circumstances of employees who have nonstandard work schedules. Read AFT's comments at https://leadernet.aft.org/cbr/ACA/aft-comments. While the proposed rules are long and detailed, below is a summary of some points that may be of special interest to members and bargainers.

Calculating 30 hours per week: Look-back and stability method

The Act defines a "full-time" employee as one who is employed on average at least 30 hours per week. As mentioned in previous guidance, employers can either determine employees' full-time status on a monthly basis, or they can choose a "look-back" measurement method. Federal regulators expect many employers to use the "look-back" method.

Under the "look-back" method, employers choose a measurement period of between 3 months and 12 months. If the employee works an average of 30 hours per week during that time, the employee is considered full-time for purposes of the employer penalty during a subsequent "stability period." Conversely, if the employee is part-time during the measurement period, he or she is considered part-time during the stability period. The stability period would generally be the greater of six months or the length of the measurement period. All hours of work done for a single employer will count towards determining the employee's full-time status.

Paid time off counts as time worked

The regulations specify that when calculating hours worked, the employer must include all hours "for which an employee is paid or entitled to payment even when no work is performed." This includes all paid time off.

Employment break period for educational employers: Measurement period cannot be June, July and August

The AFT had been concerned that employers would choose a look-back period that included the summer months and conclude that teachers and other school-year employees were not full-time employees. Fortunately, Treasury heeded the concerns raised in comments and took some steps in the right direction.

For ongoing employees of educational organizations who have an "employment break period" of at least four weeks (such as during the summer), employers using the "look-back" method must either:

- calculate their average hours worked per week excluding the break period, or
- treat the employee as having worked their average weekly hours during the "employment break" period (even though the employee did not in fact work during the break period).

The employment break period has to be at least four weeks long and so this provision does not apply to unpaid winter, spring or other short breaks.

The proposed rule also includes an anti-abuse clause: if the employer requires someone to report to work for the purpose of interrupting what would otherwise be a four-week or longer "employment break," the employee will be considered as having an employment break.

Employees who are rehired after termination or who resume service after another absence

There is a 90 day waiting period during which employers do not face penalties for failing to insure new full-time employees. Employers also do not face penalties for failing to insure new variable-hour employees during the initial look-back measurement period. Therefore, it is important to know which employees are considered new hires.

Special rules would apply when the "look-back" method safe harbor is applied to rehired employees or employees who come back after absences. An employee can be treated as terminated and rehired for the purpose of calculating full-time status if:

- the employee does not work for an employer for at least 26 consecutive weeks, OR
- an employee's break in service was at least 4 weeks long (but less than 26 weeks) AND was longer than the previous period of employment.

The employer chooses which method to use. This means that employees could not be considered new employees for the purpose of the employer penalty if their breaks in service are less than 26 weeks long and are not longer than their previous periods of employment.

Continuing employees returning after FMLA, jury duty or Uniformed Services Employment and Reemployment Rights Act leave

If a continuing employee comes back to work after unpaid FMLA, jury duty or Uniformed Services Employment and Reemployment Rights Act leave, an employer using the look-back method must not include the leave period when calculating hours of service. Alternatively, the employer could credit the employee with working the employee's average weekly hours during the leave period. In other words, a full-time employee cannot be considered part-time because unpaid FMLA, jury duty or military leave brings down their average hours worked per week.

Contingent faculty

The proposed rules mention adjunct faculty, but do not resolve the question of how their full-time status should be determined. The proposed rules do, however, require employers to use a "reasonable method" for crediting hours of service for adjuncts. They state that "it would not be a reasonable method of crediting hours…to take into account only classroom or other instruction time and not other hours that are necessary to perform the employee's duties, such as class preparation time" (*Federal Register*, p. 225).

Affordability

Most people with an offer of employer-sponsored coverage will not be eligible for subsidized coverage in the exchange. However, if the employee's premium contribution for self-only coverage in the employer's lowest-cost plan exceeds 9.5% of the employee's household income, then the coverage is considered "unaffordable" and the employee can seek subsidized coverage in the exchange (if the employee's household income is at or below 400% of the federal poverty level). The proposed rule reiterates this affordability test.

A separate final rule issued on January 30th gave the disappointing news that family members of an employee who is offered affordable self-only coverage at work will not be eligible for exchange subsidies, even though the employer's family coverage is unaffordable. AFT had previously commented on this issue. AFT's comments can be found at: https://leadernet.aft.org/cbr/ACA/aft-comments. Full text of the final rule: http://www.irs.gov/PUP/newsroom/TD%209611.pdf.

Penalties for failing to cover dependent children

Starting in 2014, the Affordable Care Act levies penalties against large employers who do not offer affordable health coverage to their full-time employees. The proposed regulations clarify that large employers are also liable for penalties if they do not offer coverage to full-time employees' dependent children up to age 26. However, there is no penalty for employers who fail to offer coverage to spouses of full-time employees.

Update: Employer penalty delayed until 2015

On July 2, 2013, the federal government announced a one-year delay in the Affordable Care Act penalties on large employers who fail to offer affordable, adequate insurance to their full-time employees. Also delayed are the requirements for employers and insurance companies to report on the coverage offered to employees. The U.S. Department of Treasury maintains that this decision does not affect any other aspect of the Affordable Care Act, including employees' access to the subsidies available through the exchanges.

Conclusion

The implementation of the Affordable Care Act is a complicated, ongoing process. The AFT will continue to track ACA implementation and provide support to bargainers. If you have questions, please do not hesitate to contact Amy Clary (aclary@aft.org) or Lynne Mingarelli (lmingare@aft.org) of the AFT Center for Collective Bargaining.

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