



American Payroll Association

Government Relations • Washington, DC

CC:PA:LPD:PR (REG-138006-12)
Internal Revenue Service
Room 5303
POB 7604
Ben Franklin Station
Washington, DC 20044

March 19, 2013

Re: REG 138006-12 (Shared Responsibility for Employers Regarding Health Coverage)

Ladies and Gentlemen:

The American Payroll Association (APA) would like to thank the Service for issuing proposed regulations relating to section 4980H of the Internal Revenue Code with respect to the shared responsibility for employers regarding health coverage and the opportunity to comment on REG-138006-12. As the country's leading private sector advocate for payroll and information reporting issues, we applaud the Service and the Treasury Department for developing proposed regulations which provide much needed clarification on many issues regarding Section 4980H.

Applicable Large Employer Status - Calculation of Number of FTEs

The APA recommends the regulations provide specificity as to rounding rules in calculating the number of full-time equivalent employees (FTE) for each calendar month. We suggest the interim calculation results be carried out to the nearest one-hundredth.

The proposed regulations provide that "[i]n determining the number of FTEs for each calendar month, fractions are taken into account." However, the proposed regulations do not provide rounding rules. Although the degree of rounding should not change the ultimate results, it is our experience that employers prefer clarity and specificity regarding required calculations, including rounding.

Definition of Hours of Service

The APA believes that guidance is needed to define which hours employees are paid or entitled to be paid when no duties are performed due to incapacity, layoff, military or leave of absence for an employee categorized as hourly.

The proposed regulations define hours of service as "(1) Each hour for which an employee is paid, or entitled to payment, for the performance of duties for the employer; and (2) each hour for which an employee is paid, or entitled to payment by the employer on account of 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.”

Employee hours identified as vacation, holiday, illness and jury duty are easily identifiable because company policy typically limits the amount of hours allotted to an employee. Alternatively, identifying which hours an employee would be entitled to payment because of a layoff, military leave, or unpaid leave of absence are not as easily identifiable. Guidance is needed on a method of computing hours for those types of leave that are not based upon policy or allotment.

Some possible examples include: (1) Using an average of actual hours worked based upon a specified look back period (i.e. 3 months, 6 months, 1 year). This method would give employers an ability to review prior work history to gauge how many hours an employee may work during the unpaid leave; (2) Using an average of actual hours worked and non-worked hours paid (vacation, sick holiday, personal) based upon a specified look back period (i.e. 3 months, 6 months, 1 year). This method would be more in line with the original “hours of service” definition, adding in those non-worked hours to the average calculation; (3) Using an employee’s scheduled work hours based upon a specified look back period. This method would not include any non-worked hours.

Hours of Service Rules

The APA requests further explanation regarding what hours are included in the calculation depending on the type of paid leave provided to an employee.

According to the proposed regulations “A number of commenters on Notice 2011-36 requested that the 160-hour limit be removed because they viewed it as restrictive, and expressed concern about the potential negative impact on employees who are on longer paid leaves, such as maternity or paternity leave. In response, these proposed regulations remove the 160-hour limit on paid leave, so that all periods of paid leave must be taken into account.”

Disability leave may be paid by the employer under an illness plan or it may also be paid by a third party. Is the pay received from the third party considered to be paid leave? Also, how should an employer determine the hours associated with the third party payment?

The same situation arises with workers’ compensation. Both disability payments and workers’ compensation are based upon dollars earned and not hours worked. Clarification is needed as how an employer should convert the dollars earned to hours for inclusion in the hours of service determination.

Educational Organizations

The APA believes that the regulations should include examples illustrating the two alternative methods for determining the average hours of service for an employee of an educational organization.

The proposed regulations currently allow an educational institution to choose between (1) determining the employee's average hours of service for the measurement period by computing the average after excluding any employment break period during that measurement period and by using that average as the average for the entire measurement period or (2) choosing to treat the employee as credited with hours of service for any employment break period during the measurement period at a rate equal to the average weekly rate at which the employee was credited with hours of service during the weeks in the measurement period that are not part of the employment break period.

However, it would be helpful for the regulations to provide examples that demonstrate how an educational institution can use either method to produce different results.

Again, we thank you for the opportunity to comment. Please feel free to contact us if you have any questions or wish to discuss these comments further.

Sincerely yours,



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