

Spotlight On...

Counting Hours of Service for Primary and Secondary Education Employers under PPACA

The Patient Protection and Affordable Care Act (“PPACA”) inundated employers with new mandates and requirements, resulting in additional complexities for employers offering coverage to employees. The true scope of the level of complexity faced by academic employers, as they work to implement PPACA, is further impacted by the nature of their workforce and the academic calendar. This article from Arthur J. Gallagher & Co. spotlights the most significant considerations faced by primary and secondary education employers to help them comply with counting hours of service requirements in light of special rules applicable to them.

Significant Issues Introduced by PPACA

Two special rules apply to academic employers when using the look-back method to determine full-time status of employees. The first rule addresses how to handle employment breaks and special unpaid leave. An employment break occurs when an employee does not receive at least one hour of service credit for four consecutive weeks or more. Special unpaid leave is defined as unpaid leave for FMLA, USERRA, and jury duty. The second rule relates to how academic employers are allowed to treat employees who suffer a “break in service” – which occurs when an employee has an employment break that is so lengthy that the employer is allowed to treat that employee as a re-hired employee. These rules primarily impact variable hour employees such as substitute teachers and seasonal employees such as athletic coaches. The unique challenges associated with these special rules are highlighted below.

Calculating hours of service for variable hour employees may be tricky. Academic organizations generally function on an academic year basis, during which there are extended periods of time when the organization is not in session. When using the look-back method to determine who is a full-time employee, education employers must develop processes to account for breaks in employment and special unpaid leave. Academic organizations must credit hours of service for employment break periods of at least four consecutive weeks using one of the methods that apply to special unpaid leave.

An academic organization must either determine an employee’s average hours of service for a measurement period when using the look-back method by: (1) choosing to treat the employee as credited with hours of service for any periods of break in employment (or special unpaid leave) during that 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 a break in employment (or a period of special unpaid leave), or (2) computing the average after excluding any break in employment (or special unpaid leave), such as a summer break, during that measurement period and by

using that average as the average for the entire measurement period. However, the academic institution employer is not required to exclude (or credit) more than 501 hours of service for employment breaks.

Below are two examples of how these rules apply to a substitute teacher who has a break in employment. In both examples, the school district has a plan year beginning July 1 and a standard measurement period for ongoing employees beginning on April 12 and ending on April 11. The chart below shows her actual hours worked for each week of the standard measurement period. This information will be used as background information for the first two examples.

**Cumulative Hours of Service for
Substitute Teacher with Employment Breaks
Plan Year/Stability Period Beginning July 1
Standard Measurement Period 4/12/15 – 4/11/16**

| Week | Dates | Actual Hours | Notes |
|------|-------------------|--------------|--|
| 1 | Apr. 12 – 18 | 24 | Beginning of Standard Measurement Period |
| 2 | Apr. 19 – 25 | 40 | |
| 3 | Apr. 26- May 2 | 8 | |
| 4 | May 3 – 9 | 0 | |
| 5 | May 10 – 16 | 0 | |
| 6 | May 17 – 23 | 0 | End of year |
| 7 | May 24 – May 30 | 0 | Summer Break |
| 8 | May 31 – June 6 | 0 | Summer Break |
| 9 | June 7 – 13 | 0 | Summer Break |
| 10 | June 14 – 20 | 0 | Summer Break |
| 11 | June 21 – 27 | 0 | Summer Break |
| 12 | June 28 – July 4 | 0 | Summer Break |
| 13 | July 5 – 11 | 0 | Summer Break |
| 14 | July 12 – 18 | 0 | Summer Break |
| 15 | July 19 – 25 | 0 | Summer Break |
| 16 | July 26 – Aug. 1 | 0 | Summer Break |
| 17 | Aug. 2 – 8 | 0 | Summer Break |
| 18 | Aug. 9 – 15 | 0 | Summer Break |
| 19 | Aug. 17 – 23 | 0 | Beginning of new year |
| 20 | Aug. 24 – Aug. 30 | 0 | |
| 21 | Aug. 31 – Sept. 6 | 24 | |
| 22 | Sept. 7 – 13 | 32 | |

| Week | Dates | Actual Hours | Notes |
|------|-------------------|--------------|------------------------------------|
| 23 | Sept. 14 – 20 | 16 | |
| 24 | Sept. 21 – 27 | 0 | |
| 25 | Sept. 28 – Oct. 4 | 40 | |
| 26 | Oct. 5 – 11 | 40 | |
| 27 | Oct. 12 – 18 | 16 | |
| 28 | Oct. 19 – 25 | 32 | |
| 29 | Oct. 26 – Nov. 1 | 24 | |
| 30 | Nov. 2 – 8 | 8 | |
| 31 | Nov. 9 – 15 | 8 | |
| 32 | Nov. 16 – 22 | 40 | |
| 33 | Nov. 23 – 29 | 0 | Thanksgiving Break |
| 34 | Nov. 30 – Dec. 6 | 40 | |
| 35 | Dec. 7 – 13 | 16 | |
| 36 | Dec. 14 – 20 | 8 | |
| 37 | Dec. 21 – 27 | 16 | |
| 38 | Dec. 28 – Jan. 3 | 0 | Winter Break |
| 39 | Jan. 4 – 10 | 0 | Winter Break |
| 40 | Jan. 11 – 17 | 0 | |
| 41 | Jan. 18 – 24 | 16 | |
| 42 | Jan. 25 – 31 | 40 | |
| 43 | Feb. 1 – 7 | 32 | |
| 44 | Feb. 8 – 14 | 32 | |
| 45 | Feb. 15 – 21 | 16 | |
| 46 | Feb. 22 – 28 | 40 | |
| 47 | Mar. 1 – 7 | 0 | |
| 48 | Mar. 8 – 14 | 0 | Spring Break |
| 49 | Mar. 15 – 21 | 16 | |
| 50 | Mar. 22 – 28 | 24 | |
| 51 | Mar. 29 – Apr. 4 | 24 | |
| 52 | Apr. 5 – 11 | 32 | End of Standard Measurement Period |

Example #1: Determination Using Credits for Employment Break

After documenting all of the hours of service during the measurement period and accounting for periods without credit for hours of service, the next step is determining which method to use to calculate the overall average number of hours worked. The first method is to credit hours of service for employment breaks.

To credit hours of service for employment breaks, total the numbers of actual hours of service for weeks outside of the employment break and divide that number by the number of weeks not included in the employment break. Note that the employment break begins May 3 and ends August 30, for a total of 17 weeks. This is less than 26 weeks; thus, it is not treated as a break in service.

| | |
|---|-------------------------------------|
| A. Actual hours of service earned | 704 hours |
| B. Number of weeks during which actual hours of service earned | 35 weeks |
| C. Average hours of service per week (A ÷ B = C) | 704/35 = 20.11 hours per week |
| D. Length of employment break | 17 weeks |
| E. Hours of service to “credit” for employment break (C x D = E) | 20.11 x 17 = 341.87 hours per week |
| F. Is number of hours to be credited greater than 501 hour cap? | No. 341.87 < 501. |
| G. Total hours of service for 12-month measurement period (A + (C x D) = G) | 704 + (20.11 x 17) = 1045.87 hours |
| H. Average hours of service (G ÷ 52 weeks) | 1045.87 ÷ 52 = 20.11 hours per week |

| Week | Dates | Actual Hours | Treatment | Cumulative Hours |
|------|---------------------------|--------------|--------------|------------------|
| 1 | Apr. 12 – 18 | 24 | | 24 |
| 2 | Apr. 19 – 25 | 40 | | 64 |
| 3 | Apr. 26- May 2 | 8 | | 72 |
| 4 | May 3 – 9 | 0 | Credit 20.11 | 92.11 |
| 5 | May 10 – 16 | 0 | Credit 20.11 | 112.22 |
| 6 | May 17 – 23 (end of year) | 0 | Credit 20.11 | 132.33 |
| 7 | May 24 – May 30 | 0 | Credit 20.11 | 152.44 |
| 8 | May 31 – June 6 | 0 | Credit 20.11 | 172.55 |
| 9 | June 7 – 13 | 0 | Credit 20.11 | 192.66 |
| 10 | June 14 – 20 | 0 | Credit 20.11 | 212.77 |
| 11 | June 21 – 27 | 0 | Credit 20.11 | 232.88 |

| Week | Dates | Actual Hours | Treatment | Cumulative Hours |
|-------------|--------------------------|---------------------|------------------|-------------------------|
| 12 | June 28 – July 4 | 0 | Credit 20.11 | 252.99 |
| 13 | July 5 – 11 | 0 | Credit 20.11 | 273.10 |
| 14 | July 12 – 18 | 0 | Credit 20.11 | 293.21 |
| 15 | July 19 – 25 | 0 | Credit 20.11 | 313.32 |
| 16 | July 26 – Aug. 1 | 0 | Credit 20.11 | 333.43 |
| 17 | Aug. 2 – 8 | 0 | Credit 20.11 | 353.54 |
| 18 | Aug. 9 – 15 | 0 | Credit 20.11 | 373.65 |
| 19 | Aug. 17 – 23 (new year) | 0 | Credit 20.11 | 393.76 |
| 20 | Aug. 24 – Aug. 30 | 0 | Credit 20.11 | 413.87 |
| 21 | Aug. 31 – Sept. 6 | 24 | | 437.87 |
| 22 | Sept. 7 – 13 | 32 | | 469.87 |
| 23 | Sept. 14 – 20 | 16 | | 485.87 |
| 24 | Sept. 21 – 27 | 0 | | 485.87 |
| 25 | Sept. 28 – Oct. 4 | 40 | | 525.87 |
| 26 | Oct. 5 – 11 | 40 | | 565.87 |
| 27 | Oct. 12 – 18 | 16 | | 581.87 |
| 28 | Oct. 19 – 25 | 32 | | 613.87 |
| 29 | Oct. 26 – Nov. 1 | 24 | | 637.87 |
| 30 | Nov. 2 – 8 | 8 | | 645.87 |
| 31 | Nov. 9 – 15 | 8 | | 653.87 |
| 32 | Nov. 16 – 22 | 40 | | 693.87 |
| 33 | Nov. 23 – 29 (Break) | 0 | | 693.87 |
| 34 | Nov. 30 – Dec. 6 | 40 | | 733.87 |
| 35 | Dec. 7 – 13 | 16 | | 749.87 |
| 36 | Dec. 14 – 20 | 8 | | 757.87 |
| 37 | Dec. 21 – 27 | 16 | | 773.87 |
| 38 | Dec. 28 – Jan. 3 (Break) | 0 | | 773.87 |
| 39 | Jan. 4 – 10 (Break) | 0 | | 773.87 |
| 40 | Jan. 11 – 17 | 0 | | 773.87 |
| 41 | Jan. 18 – 24 | 16 | | 789.87 |

| Week | Dates | Actual Hours | Treatment | Cumulative Hours |
|---------|---------------------|--------------|-----------|------------------|
| 42 | Jan. 25 – 31 | 40 | | 829.87 |
| 43 | Feb. 1 – 7 | 32 | | 861.87 |
| 44 | Feb. 8 – 14 | 32 | | 893.87 |
| 45 | Feb. 15 – 21 | 16 | | 909.87 |
| 46 | Feb. 22 – 28 | 40 | | 949.87 |
| 47 | Mar. 1 – 7 | 0 | | 949.87 |
| 48 | Mar. 8 – 14 (Break) | 0 | | 949.87 |
| 49 | Mar. 15 – 21 | 16 | | 965.87 |
| 50 | Mar. 22 – 28 | 24 | | 989.87 |
| 51 | Mar. 29 – Apr. 4 | 24 | | 1013.87 |
| 52 | Apr. 5 – 11 | 32 | | 1045.87 |
| Totals: | | 704 | | 1045.87 |

Conclusion: The substitute teacher is not a full-time employee for stability period beginning 7/1/16 and ending 6/30/17 because her average number of hours of service is 20.11 hours per week, which is less than 30 hours per week standard under PPACA.

Example #2: Determination Disregarding Employment Break

The second method involves excluding the period of time during the employment break from the calculation. To determine hours of service under this method, first add together the actual hours of service earned and then divide that sum by the number of weeks those hours were earned – excluding the weeks of the employment break. This average is considered to be the overall average for the entire measurement period.

| | |
|---|---------------------------------|
| A. Hours of service earned | 704 hours |
| B. Number of weeks during which hours of service earned | 35 weeks |
| C. Average hours of service per week (A ÷ B = C) | 704/35 = 20.11 |
| D. Length of employment break | 17 weeks |
| E. Hours of service to “exclude” for employment break (C x D = E) | 20.11 x 17 = 341.87 |
| F. Is number of hours to be excluded greater than 501 hour cap? | No. 341.87 < 501. |
| G. Total hours of service for 12-month measurement period (A = G) | 704 hours |
| H. Average hours of service (G ÷ 35 weeks) | 704 ÷ 35 = 20.11 hours per week |

| Week | Dates | Actual Hours | Actual Cumulative Hours |
|-------------|--------------------------|---------------------|--------------------------------|
| 1 | Apr. 12 – 18 | 24 | 24 |
| 2 | Apr. 19 – 25 | 40 | 64 |
| 3 | Apr. 26- May 2 | 8 | 72 |
| 4 | Aug. 31 – Sept. 6 | 24 | 96 |
| 5 | Sept. 7 – 13 | 32 | 128 |
| 6 | Sept. 14 – 20 | 16 | 144 |
| 7 | Sept. 21 – 27 | 0 | 144 |
| 8 | Sept. 28 – Oct. 4 | 40 | 184 |
| 9 | Oct. 5 – 11 | 40 | 224 |
| 10 | Oct. 12 – 18 | 16 | 240 |
| 11 | Oct. 19 – 25 | 32 | 272 |
| 12 | Oct. 26 – Nov. 1 | 24 | 296 |
| 13 | Nov. 2 – 8 | 8 | 304 |
| 14 | Nov. 9 – 15 | 8 | 312 |
| 15 | Nov. 16 – 22 | 40 | 352 |
| 16 | Nov. 23 – 29 (Break) | 0 | 352 |
| 17 | Nov. 30 – Dec. 6 | 40 | 392 |
| 18 | Dec. 7 – 13 | 16 | 408 |
| 19 | Dec. 14 – 20 | 8 | 416 |
| 20 | Dec. 21 – 27 | 16 | 432 |
| 21 | Dec. 28 – Jan. 3 (Break) | 0 | 432 |
| 22 | Jan. 4 – 10 (Break) | 0 | 432 |
| 23 | Jan. 11 – 17 | 0 | 432 |
| 24 | Jan. 18 – 24 | 16 | 448 |
| 25 | Jan. 25 – 31 | 40 | 488 |
| 26 | Feb. 1 – 7 | 32 | 520 |
| 27 | Feb. 8 – 14 | 32 | 552 |
| 28 | Feb. 15 – 21 | 16 | 568 |
| 29 | Feb. 22 – 28 | 40 | 608 |
| 30 | Mar. 1 – 7 | 0 | 608 |
| 31 | Mar. 8 – 14 (Break) | 0 | 608 |

| Week | Dates | Actual Hours | Actual Cumulative Hours |
|------|------------------|--------------|-------------------------|
| 32 | Mar. 15 – 21 | 16 | 624 |
| 33 | Mar. 22 – 28 | 24 | 648 |
| 34 | Mar. 29 – Apr. 4 | 24 | 672 |
| 35 | Apr. 5 – 11 | 32 | 704 |

Conclusion : The substitute teacher is not a full-time employee for stability period beginning 7/1/16 and ending 6/30/17 because her average number of hours of service is 20.11 hours per week, which is less than 30 hours per week standard under PPACA.

Determining hours of service for a variable hour employee with both a break in service and a special unpaid leave can be difficult. As noted above, an academic organization must either determine an employee's average hours of service for a measurement period when using the look-back method by: either excluding the period of time without hours of services or crediting hours of service for that time.

Below is an example of how these rules apply to a substitute teacher who has a break in employment and an unpaid FMLA leave. In this example, the school district has a plan year beginning July 1 and a standard measurement period for ongoing employees beginning on April 15 and ending on April 14.

Example:

Cumulative Hours of Service
Example for Substitute Teacher with Employment Break and unpaid FMLA leave
Plan Year/Stability Period Beginning July 1
Standard Measurement Period 4/15/15 – 4/14/16

The calculation is further complicated if the employee takes a special unpaid leave. Below is an example of how these rules apply to a substitute teacher who *does* take special unpaid leave in the form of FMLA leave. In this example, the school district has a plan year beginning July 1 and a standard measurement period for ongoing employees beginning on April 15 and ending on April 14. The chart below shows her actual hours worked for each week of the standard measurement period. Employment breaks are highlighted in **red** numbers, and her period of FMLA leave is highlighted in **green**. Hours are illustrated on a monthly basis instead of a weekly basis as in the examples above.

In the calculations below, the employer has chosen to credit hours of service for employment breaks and special unpaid leave.

| | |
|--|--------------------------------------|
| A. Hours of service earned | 536 hours |
| B. Number of months during which hours of service earned | 7 months |
| C. Average hours of service per week (A ÷ B = C) | $536 \div 7 = 76.57$ hours per month |
| D. Length of employment break | 4 months (less than 26 weeks) |

| | |
|--|------------------------------------|
| E. Hours of service to “credit” for employment break (C x D = E) | 76.57 x 4 = 306.28 hours |
| F. Length of unpaid FMLA leave | 1 month |
| G. Hours of service to “credit for unpaid FMLA leave | 76.57 x 1 = 76.57 hours |
| H. Number of hours of service to “credit” for employment break and unpaid FMLA leave (E + G = H) | 306.28 + 76.57 = 382.85 |
| I. Is number of hours to be credited for employment break greater than 501 hour cap? | No. 306.28 < 501 |
| J. Total hours of service for 12-month measurement period (A + H = J) | 536 + 382.85 = 918.85 hours |
| H. Average hours of service (J ÷ 52 weeks) | 918.85 ÷ 52 = 17.67 hours per week |

| Month | Dates | Actual Hours | Notes |
|-------|---------------|--------------|--|
| 1 | Apr. 15 – 30 | 72 | Beginning of Standard Measurement Period |
| 2 | May 1 - 31 | 0 | End of Year |
| 3 | June 1 - 30 | 0 | Summer Break |
| 4 | July 1 - 31 | 0 | Summer Break |
| 5 | August 1 - 31 | 0 | Summer Break/Beginning of Academic Year |
| 6 | Sept. 1 - 30 | 72 | Academic Year |
| 7 | Oct. 1 – 31 | 152 | |
| 8 | Nov. 1 – 30 | 56 | Thanksgiving Break |
| 9 | Dec. 1 – 31 | 0 | FMLA leave |
| 10 | Jan. 1 – 31 | 56 | Winter Break |
| 11 | Feb. 1 – 28 | 32 | |
| 12 | Mar. 1 – 31 | 64 | Spring Break |
| | Apr. 5 – 14 | 32 | End of Standard Measurement Period |
| Total | | 536 | |

Conclusion: The substitute teacher is not a full-time employee for stability period beginning 7/1/16 and ending 6/30/17 because her average number of hours of service is 17.67 hours per week, which is less than 30 hours per week standard under PPACA.

Breaks in service for academic employees can ease compliance. Under the final regulations, if an employee has a period of at least 13 weeks (26 weeks for an employee of an academic institution) during which no hours of service were credited for that employee, then that employee may be treated as an employee whose employment was terminated and who is a rehired employee – rather than a continuing employee - upon resuming services for the employer. This means, for example, that seasonal employees such as athletic coaches may be treated as rehired employees rather than ongoing employees if the coach has a period of at least 26 weeks without any credit for an hour of service.

Example:

Cumulative Hours of Service
Example for Football Coach with Eight Month Break in Service
Initial Measurement Period 8/1/15 – 7/30/16
Initial Stability Period 9/1/16 – 8/31/17

To determine the hours of service for a seasonal employee, an employer will treat that employee as a newly hired employee and track that employee's hours of service during an initial measurement period. Even if the employee works 130 or more hours per month during an initial measurement period, so long as the employee is treated as terminated and rehired during a subsequent measurement period, the employee will nonetheless not be considered to be a full-time employee under PPACA. Below is an example of how to calculate the hours of service for a seasonal employee, which in this example is a football coach who is only actively employed for four months.

Note: The football coach in this example is paid on a stipend basis and is not otherwise employed by the school district. Employers may track hours of service for non-hourly paid employees only using one of three methods: (1) actual hours worked; (2) days-worked equivalency (crediting eight hours of service for any day in which one hour of service is earned); or (3) weeks-worked equivalency (crediting 40 hours of service for any week in which one hour of service is earned). If using one of the equivalency methods, employers may not credit fewer hours of service than actually worked. For this reason, it is likely that athletic coaches, who are often paid on a stipend basis, but work more than 8 hours per day or 40 hours per week during an athletic season, will be tracked based upon actual hours worked.

| Month | Dates | Actual Hours | Notes |
|-------|---------------|--------------|--|
| 1 | Apr. 15 – 30 | 0 | Beginning of Standard Measurement Period |
| 2 | May 1 - 31 | 0 | End of Year |
| 3 | June 1 - 30 | 0 | Summer Break |
| 4 | July 1 - 31 | 0 | Summer Break |
| 5 | August 1 - 31 | 148 | End of Summer Break/Beginning of Football Training/ Beginning of Initial Measurement Period |
| 6 | Sept. 1 - 30 | 145 | Academic Year/Football Season |

| | | | |
|-------|-------------|-----|------------------------------------|
| 7 | Oct. 1 – 31 | 152 | |
| 8 | Nov. 1 – 30 | 140 | Last football game on November 8 |
| 9 | Dec. 1 – 31 | 0 | |
| 10 | Jan. 1 – 31 | 0 | Winter Break |
| 11 | Feb. 1 – 28 | 0 | |
| 12 | Mar. 1 – 31 | 0 | Spring Break |
| | Apr. 5 – 14 | 0 | End of Standard Measurement Period |
| Total | | 585 | |

In the example above, the football coach clearly averages more than 130 hours per month for the months of August through November and would otherwise be considered a full-time employee under PPACA if he were not subject to the look-back method safe harbor as a seasonal employee. He can be classified as a seasonal employee because his term of employment is less than six months (i.e., four months), and he is hired at the same time each year in conjunction with the football season. Because he has a break in service of eight months, which is more than 26 weeks, he may be treated as terminated as of the end of November and rehired when he returns to service in August of 2016.

Conclusion: Because he is treated as not employed for an entire initial measurement period, he did not attain status as a full-time employee under PPACA during his initial measurement period from August 1, 2015 through July 30, 2016 and thus is not required to be treated as a full-time employee for the initial stability period that otherwise would begin on September 1, 2016 and extend through August 31, 2017. If he returns to work for the school district in August 2017, he will once again be treated as a newly hired seasonal employee and will be subject to a new initial measurement period.

Action Steps

- Develop process to track hours of service for variable hour employees such as substitute teachers.
- Develop process to track actual hours of service earned by seasonal or stipend employees such as athletic coaches.
- If using look-back method, determine measurement and stability periods.
- Determine whether to credit hours of service for employment breaks (periods of greater than four weeks but less than twenty-six weeks during which no hours of service are earned) or exclude those periods of time from full-time employment status determination.
- Determine whether to credit hours of service for special unpaid leave (unpaid FMLA, USERRA, or jury duty leave) or exclude those periods of time from full-time employment status determination.
- Establish processes to determine whether an employee has experienced a break in service allowing that employee to be treated as a rehired employee rather than an ongoing employee.
- Stay tuned for more.

Employers should carefully evaluate their health and welfare plans to determine if they are in compliance with both federal and state law. If you have any questions about information contained in this Spotlight or would like additional information, please contact your Gallagher Consultant or account team member.

The intent of this analysis is to provide you with general information. It does not necessarily fully address all your organization's specific issues. It should not be construed as, nor is it intended to provide, legal advice. Questions regarding specific issues should be addressed by your organization's general counsel or an attorney who specializes in this practice area.