



Affordable Care Act (ACA): Understanding Hours of Service

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HOURS OF SERVICE

Overview

“Hours” of service are generally determined based on hours for which an individual is entitled to payment. This can include hours actually worked, along with other paid hours (e.g., vacation).

The IRS standard is:

- (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 for 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.

The following types of service are excluded from the definition of “hours” of service:

- hours of service performed as a bona fide volunteer,
- hours of service for service performed as part of a Federal Work-Study Program (or a substantially similar program), or
- hours of service for certain services performed outside the United States.

On-Call Hours

According to the IRS, it is not reasonable for an employer to fail to credit an employee with hours of service for on-call hours if (1) payment is made or due for the on-call hours, (2) the employee is required to remain on the employer’s premises during the on-call hours, or (3) the employee’s activities while on call are subject to substantial restrictions that prevent the employee from using the on-call hours for the employee’s own purposes.

Thus, if an employee is paid for on-call hours, or the on-call hours must be served on the employer’s premises or are otherwise subject to substantial restrictions, the on-call hours should be treated as “hours of service.”

How to Count Hours of Service

An employer generally will use its records of hours worked and hours for which payment is made or due in determining hours of service. This should be relatively easy for employees paid on an hourly basis. But what about non-hourly (e.g., salaried) employees? For these employees an employer calculates hours of service by using one of these methods:

- Actual hours of service from records of hours worked and hours for which payment is due or made. Note that an employer may not have any such records with respect to salaried employees;
 - Using a days-worked equivalency whereby the employee is credited with eight hours of service for each day for which the employee would be required to be credited with at least one hour of service; or
 - Using a weeks-worked equivalency whereby the employee is credited with 40 hours of service for each week for which the employee would be required to be credited with at least one hour of service.
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An employer is not required to use the same method for all non-hourly employees. An employer may apply different methods for different categories of non-hourly employees, provided the categories are “reasonable and consistently applied.” Each applicable large employer member may select its own method regardless of what another applicable large employer member has selected. However, it appears that an employer may only change its chosen method of calculating hours of service for non-hourly employees (or a category of non-hourly employees) once each calendar year.

LEAVES OF ABSENCES

Overview - Paid Leaves of Absence

As described above, an “hour of service” includes each hour for which an employee is paid, or entitled to payment by the employer for 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.

We have received many questions about paid disability leaves in particular. If an employee is on a short-term or long-term disability leave and the employee receives pay during that leave from an insurer under an insured employer-sponsored disability leave plan or from the employer under a self-insured employer-sponsored disability leave plan, the employee must be credited with hours of service for that disability leave until the employee either stops receiving disability pay or is terminated from employment.

The IRS has not clarified how many hours an employer must count during an employee's short-term or long-term disability leave.

Overview - Unpaid Leaves of Absence

There are two types of unpaid leaves of absence: regular unpaid leaves and “special” unpaid leaves. A special unpaid leave is an unpaid leave subject to FMLA or USERRA or an unpaid leave due to jury duty. A regular unpaid leave is any unpaid leave that is not a “special” unpaid leave. Educational institutions have an additional type of unpaid leave, called an employment break period, but this summary does not discuss the rules for employment break periods.

The Pay or Pay Rules contain favorable treatment for special unpaid leaves that are fewer than 13 consecutive weeks. These special rules only apply for employers using the look-back method and only apply for purposes of averaging hours over a measurement period. These rules are described further below.

IMPORTANT: The Pay or Play Rules do not clarify how an employee on an unpaid leave of absence must be treated during a stability period. If an employee goes on an unpaid leave of absence during a stability period during which the employee is treated as full-time, the employee presumably should continue to be treated as a full-time employee during the unpaid leave until the earliest of the following events:

- the employer terminates the employee’s employment, or

- a new stability period begins and the employee is not treated as full-time for that stability period based upon the employee's hours during the applicable look-back measurement period.

Unpaid Regular Leave Of Any Length

An employee who takes a regular (i.e., not "special") unpaid leave is treated as having no hours of service during the employee's leave.

By way of example, let us assume the following:

- An employer's measurement period is 12 months long, or 52.14 weeks ($365 / 7 = 52.14$).
- The employee takes an unpaid regular leave during the measurement period. The unpaid regular leave is 10 weeks long.
- During the remaining 42.14 weeks during the year, the employee works 1,475 hours (approximately 35 hours per week)
- The employee has no other periods of no service during the measurement period.

The 10 week unpaid regular leave is ignored in the numerator of the ratio used to calculate the employee's average hours of service per week during the measurement period. Thus, the numerator would be 1,475 hours of service, and the denominator would be 52.14 weeks. 1,475 divided by 52.14 equals an average weekly rate of 28.3 hours of service. This employee would not be treated as "full-time" for the subsequent stability period because the employee is treated as averaging 28.3 hours of service per week during the measurement period.

Unpaid Special Leave (i.e., FMLA, USERRA, Jury Duty) Less Than 13 Consecutive Weeks

For an employer who uses the look-back measurement method, special rules apply for an employee's "unpaid special leave" that is less than 13 consecutive weeks. The period of unpaid special leave must be handled using one of two methods described below.

1. Under the first method, the period of unpaid special leave is ignored in both the numerator and denominator of the ratio used to calculate the employee's average hours of service per week during the measurement period. (The ratio's numerator includes the employee's total hours of service, and the denominator includes the number of weeks in the measurement period). This is the easier of the two methods and has the same result as the second method.
2. The second method has two primary steps. First, the employee's average hours of service for a measurement period are computed *after excluding* the unpaid special leave. Then, the resulting average is credited to the employee for each week during the unpaid special leave.

These rules might best be explained by an example. Let's assume the following for this example:

- The employer's measurement period is 12 months long, or 52.14 weeks ($365 / 7 = 52.14$).
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- The employee takes an unpaid FMLA leave during the measurement period. The unpaid FMLA leave is 10 weeks long.
- During the remaining 42.14 weeks during the year, the employee works 1,475 hours (approximately 35 hours per week)
- The employee has no other periods of no service during the measurement period.

The two methods apply to this fact scenario as follows:

1. Under the first method, the 10 week unpaid special leave is ignored in both the numerator and denominator of the ratio used to calculate the employee's average hours of service per week during the measurement period. Thus, the numerator would be 1,475 hours of service, and the denominator would be 42.14 weeks. 1,475 divided by 42.14 equals an average weekly rate of 35 hours of service. This employee would be "full-time" for the subsequent stability period because the employee is treated as averaging 35 hours of service per week during the measurement period.
2. Under the second method, the employee's average weekly rate of hours of service for weeks in the measurement period that are *not* in the unpaid special leave is 35 hours per week. Thus, in addition to the employee's 1,475 hours of service, the employee is "credited" with another 35 hours per week during the 10 week unpaid special leave, or 350 hours (35 hours of service x 10 weeks). The employee is treated as having 1,825 hours of service during the measurement period (1,475 + 350). To calculate the employee's average weekly hours of service over the entire measurement period, 1,825 hours of service are divided by 52.14 weeks. The employee's average weekly hours of service are 35 hours of service per week. The employee is "full-time" for the subsequent stability period because the employee is treated as averaging 35 hours of service per week during the measurement period.

Unpaid Special Leave (i.e., FMLA, USERRA, Jury Duty) of 13 Consecutive Weeks or Longer

For an employer who uses the look-back measurement method, an employee's "unpaid special leave" that is 13 consecutive weeks may be handled in one of two ways:

1. The more generous method would be to use the same method as the employer must use for unpaid special leaves of less than 13 consecutive weeks. See description above.
 2. Another permissible method is to treat the employee as "new" upon the employee's return to active employment. This means that the employee's hours during the prior measurement period can be disregarded. The employee's status upon return would be determined in the same manner as any other new employee.
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