



Handling Hours of Service, Special Leaves of Absence and COBRA under the ACA

Presented by Laura Kerekes
ThinkHR

August 2016

The information herein should not be construed as legal or tax advice in any way. Regulations, guidance and legal opinions continue to change. The preparer has gathered public information and has attempted to present it in an easily readable and understandable format. Situations vary, technical corrections and future guidance may vary from what is discussed in the presentation.

This is meant for informational content only. The presenter makes no warranty of any kind concerning this information. You should seek the advice of your attorney or tax consultant for additional or specific information.

This presentation is not to be duplicated or distributed.

TODAY'S PRESENTER

Laura Kerekes Chief Knowledge Officer, ThinkHR



- Leads ThinkHR content knowledge and human resources service delivery teams; oversees ThinkHR's body of HR knowledge, including human resources, benefits and compliance programs
- Before ThinkHR: Held executive human resources officer positions for large multinational companies in banking, manufacturing and high tech industries
- Credentials:
 - Education: MBA., B. S. in Business Administration (Labor Relations concentration), Stanford University Executive Human Resources Management program
 - Certifications: Senior Professional in HR certifications from both the national Human Resources Certification Institute (HRCI) and the Society for Human Resource Management (SHRM).
- Regularly writes articles, presents webinars and lectures, and is quoted as an expert on benefits compliance, leadership and human resources. Has a regular column called "The Innovative Workplace" in Rough Notes Magazine. This month's (August) edition is entitled "Special COBRA Issues Explained".

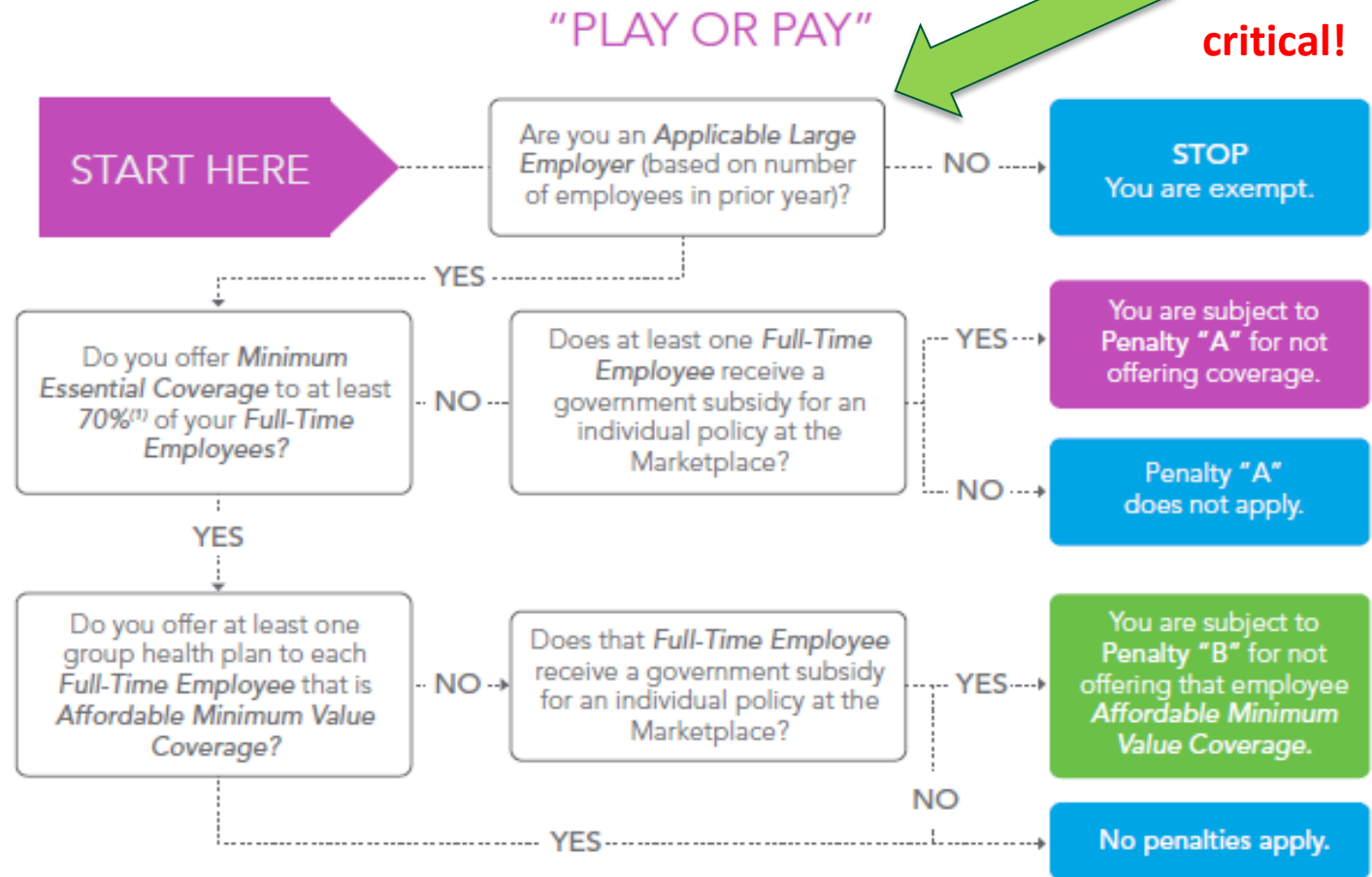
About ThinkHR: ThinkHR partners with over 650 leading insurance brokers to provide an HR knowledge platform that enables their clients to obtain quick answers to urgent risk and liability questions, protecting clients from loss and legal action. ThinkHR offers a cloud-based platform supported by live HR experts who help employers and HR professionals ensure compliance and resolve people-related issues quickly and efficiently. ThinkHR serves seven out of 10 of the largest insurance brokerage firms in the USA, providing expert HR content and training services to nearly 100,000 companies employing millions of people.

AGENDA

- Overview of ACA “Play or Pay” rules and measurement methods
- Hours of service requirements
- Paid and unpaid leaves of absence
- Unpaid special leaves for FMLA, USERRA and Jury Duty
- COBRA offers and coverage
- Resources

“Play or Pay” basics

Counting hours is critical!



⁽¹⁾ For 2015. For 2016 and later years, replace 70% with 95%.

Every employee must be measured

- Full-time employee (FTE): An employee who works an average of at least 30 hours of service per week (or 130 hours per month)
- Must be measured under either:
 1. Monthly Measurement Method: Hours of service counted each month
 2. Look-Back Measurement Method: Hours of service are tracked over a period of time from 3 to 12 months, called the Measurement Period
 - This determines whether the employee will be considered a FTE for the subsequent period, called the Stability Period
- Both methods include break-in-service rules

Monthly Measurement Method

- Employee status as full time determined month-to-month
- Best suited to employers/industries with stable workforces and low turnover
- Easier to administer
- Administration can be challenging if employees have fluctuating work hours or unpredictable schedules

Look-Back Measurement Method

- Employee status as full time is tracked over a period of time from 3 – 12 months (Measurement Period) to determine FT for the subsequent period (Stability Period)
- Allows employers to avoid penalties by offering coverage only to employees working full time over a period of time
- Once the employee meets the FT average over the Measurement Period, the employee is eligible for coverage throughout the Stability Period – even if the employee's hours reduce

What counts as an hour of service?



- Hours when an employee works and is paid
- Hours for which an employee is paid but doesn't work
- Combined if employee works for related employers belonging to the same controlled group or affiliated service group

Exclusions from hours of service

- Volunteers
- Student employees (federal work study programs and unpaid student interns)
- Members of religious orders (subject to a avow of poverty)

Rules regarding paid hours

Type of Hours	Credited?
Any Paid Hours Worked	Yes
• Back pay hours	Not specifically required
• On call hours	Yes
• Commissioned employees	Yes – required to use a reasonable method for crediting hours of service, including accounting for travel time for traveling salespersons
• H-2A & H-2B Visa holders	Yes – considered seasonal employees for employer mandate
• Non-US inpatients working in the US	Unclear – don't assume hours worked in the US will not count
• US expatriates working outside the US	Not required

Rules regarding paid hours

Type of Hours	Credited?
Hours Paid, Not Worked	
• Vacation	Yes
• Holiday	Yes
• Illness	Yes
• “Incapacity” (including disability)	Yes, as long as employee remains an “employee” UNLESS the employer did not directly – or indirectly – contribute to the disability payments
• Layoff	Yes
• Jury Duty	Yes
• Military Duty	Yes
• Leave of Absence	Yes
• FMLA Leave	Yes
• Workers’ Compensation Leave	Not required*
• Unemployment Compensation	Not required

Check source of disability payments

- IRS Notice 2015-87, FAQ #14:

*“Accordingly, periods during which an individual is not performing services but is receiving payments due to short-term disability or long-term disability result in hours of service for any part of the period during which the recipient retains status as an employee of the employer, **unless the payments are made from an arrangement to which the employer did not contribute directly or indirectly.** For this purpose, a disability arrangement for which the employee paid with after-tax contributions (so that the benefits received under the arrangement are excluded from income under § 104(a)(3)) would be treated as an arrangement to which the employer did not contribute, and payments from the arrangement would not give rise to hours of service. **Periods during which the employee is not performing services but is receiving payments in the form of workers compensation wage replacement benefits under a program provided by the state or local government do not result in hours of service.**”*

Note of caution for workers' compensation



Unpaid leaves of absence

- Two types of unpaid leaves:
 - Regular
 - “Special”
- Educational institutions have additional type of unpaid leave – “employment break period”
- Favorable treatment for special unpaid leaves of less than 13 consecutive weeks (26 weeks for educational institutions)
- Applies only for employers using look-back method and only for averaging hours over a measurement period

Rules regarding unpaid leaves

Unpaid Leaves of Absence	Credited?
• Regular unpaid leave	No
• Maternity Leave	Yes if also FMLA leave, use special rule*
• Paternity Leave	Yes if also FMLA leave, use special rule*
• Military Leaves under USERRA	Special rule applies*
• FMLA	Special rule applies*
• Jury Duty	Special rule applies*

Special rule: Under the look-back method, non-academic institution employers may either:

1. Determine an employee's average hours of service after excluding any special UNPAID leave for FMLA, USERRA or jury duty during that measurement period and using that average for the entire measurement period, or
2. Choose to treat the employee as credited with hours of service for those unpaid periods at a rate equal to the employee's average weekly rate during the measurement period

Special rule does not apply under the monthly measurement period.

Example calculations



A chalkboard with the equation $2 + 2 = 5$ written on it in white chalk. The chalkboard is rectangular and has a slightly textured surface. The equation is written in a simple, hand-drawn style.

$$2 + 2 = 5$$

Regular unpaid leave hours

- Measurement period is 12 months long (365 days/7 weeks = 52.14 weeks)
- Employee takes an 8 week unpaid leave and works the remainder of the year on his regular schedule of 35 hours per week ($52.14 - 8 = 44.14$ weeks \times 35 hours = 1544.9 hours)
- Average weekly hours of service: 1544.90 divided by the full 52.14 weeks = 29.63 average hours per week
- Employee would NOT be considered FT for the stability period

Unpaid special leave (FMLA,USERRA, Jury Duty)

- Leave less than 13 consecutive weeks
- Employee takes a 12 week unpaid FMLA leave
- Using look-back measurement method, 12 month measurement period (52.14 weeks)
- During the remaining 40.14 weeks, the employee works 1404 hours (35 hours per week x 40.14 = 1404 hours)
- Two methods:
 1. Period of special leave is ignored in the numerator and denominator of the calculation (1404 divided by 40.14 = 35 hours per week)
 2. Calculation has 2 steps – (1) Average hours for the measurement period are calculated after excluding the unpaid special leave; and (2) the resulting average is credited back to the employee for each week of the leave

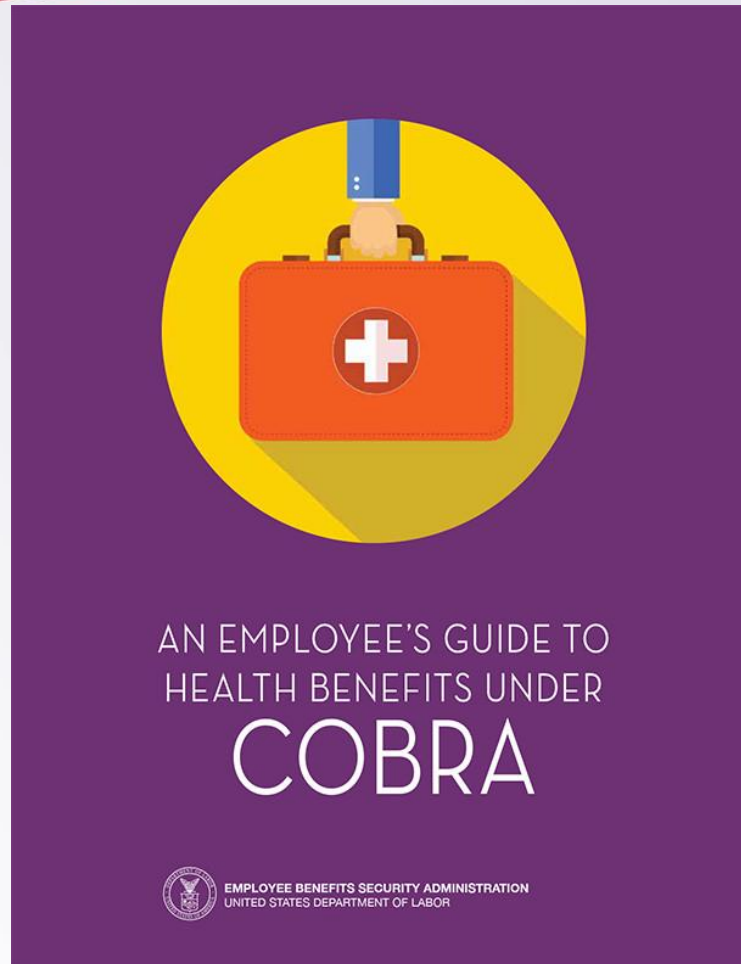
Second method calculation (<13 weeks)

- In addition to the 1404 hours, the employee is “credited” with another 35 hours per week during the 12 weeks of unpaid special leave, or 420 hours ($35 \times 12 = 420$)
- The employee then has 1824 hours ($1404 + 420$).
- 1824 hours are then divided by the 52.14 weeks = 35 weeks
- Employee is full time for the subsequent stability period

Unpaid special leaves more than 13 weeks

- For look-back method, leaves of more than 13 weeks may be handled in one of two ways:
 - Generous method – handled like the <13-week leaves
 - Treat the employee as “new” upon return to active work

Managing COBRA with leaves



Qualifying events triggering COBRA

- Termination of employment
- Reduction in the number of hours of employment causing loss of eligibility

COBRA and leaves of absence

- FMLA – health coverage continues for up to 12 weeks under same conditions as if the employee was actively at work
- USERRA:
 - Service less than 31 days – health coverage continues as if servicemember actively employed
 - Longer service -- health coverage may continue for up to 24 months (premiums charged up to 102% of full cost)

COBRA due to reduction in hours

- When an employee loses coverage due to reduction in hours, COBRA triggered
- For ACA reporting, COBRA offers of coverage should be reported on the 1095-C
- Not dependent on whether coverage is elected

Get ready for this year's reporting

- Proposed rules for this year's reporting published in the Federal Register on August 2

<https://www.federalregister.gov/articles/2016/08/02/2016-18100/information-reporting-of-catastrophic-health-coverage-and-other-issues-under-section-6055>

RESOURCES

ThinkHR handouts available for download:

- ACA Checklist for 2016
- Play or Pay Guidebook
- Book 3 – Defining Full-time Employees Using Measurement Methods
- Employer Guide – COBRA:
<https://www.dol.gov/ebsa/publications/cobraemployee.html>

QUESTIONS?

You may ask your question in the questions box at any time. Any questions that we do not answer during the webinar will be posted on the compliance corner webpage in the coming weeks.

NAHU Resources

- ***Washington Update and NAHU Newswire***
- Compliance Corner
 - Resource Pages
 - Webinars
 - *Compliance Cornered* – blog
 - Individual responses to compliance questions for members
 - FAQs
- FFM Certification Course
- PPACA Certification Course
- Self-Funded Certification Course
- Technology Solutions





Thank You!

Presented By:

Laura Kerekes

ThinkHR

lkerekes@thinkhr.com