TOPIC:

APPLYING THE AFFORDABLE CARE ACT’S EMPLOYER MANDATE RULES IN THE COLLEGE AND UNIVERSITY SETTING

AUTHOR:

Peter G. Land
Daniel R. Salemi

INTRODUCTION:

The Patient Protection and Affordable Care Act (the “Affordable Care Act” or “ACA”) has and will continue to dramatically affect the way health care coverage is provided by employers. The ACA imposes a number of new requirements on employers and their group health plans. By far the most important new requirement for colleges and universities is the “employer mandate,” also referred to as the “employer shared responsibility” or “pay or play” rules. The basic requirement under the employer mandate is fairly straightforward: employers will have to pay significant new taxes if (1) they do not offer health insurance coverage to substantially all of their full-time employees or (2) the coverage they do offer is not affordable or does not provide a certain minimum level of benefits. The employer mandate does not require employers to offer health insurance coverage, but employers whose coverage does not meet certain conditions must pay taxes and thereby subsidize the cost of employees’ coverage through a state health care exchange.

The structure of various categories of higher education employees creates unique challenges for colleges and universities under the ACA’s employer mandate. Many categories of employees have not traditionally had access to employer-offered health coverage, such as adjunct faculty, student employees, coaches, and certain other seasonal or temporary employees. But beginning in 2015, in order to avoid a new set of taxes, the employer mandate will effectively require colleges and universities to offer coverage to any employee who works an average of 30 or more hours per week. Colleges and universities that do not currently offer coverage to one or more categories of employees based solely on the individual’s employment classification will therefore need to reconsider this approach. For some employment categories, institutions will need to track hours actually worked or create a reasonable method for crediting hours worked.

In addition, determining a method for structuring adjunct faculty workloads in response to the employer mandate presents a particularly thorny challenge for colleges and universities because of the additional employment and labor relations considerations that institutions must consider. Spurred initially by union-organizing interests, the past year has witnessed legislative initiatives focused on improving adjunct working conditions at the federal, state, and local levels, accompanied by publicity in national media outlets within and even outside academia. The growing attention paid to adjuncts’ terms and conditions of employment intensified in late 2013 and early 2014. This public concern now comes up against the trend of efforts of approximately 50% of higher education institutions to restrict adjunct course assignments, in the wake of the ACA’s enactment, to avoid the added benefit-related expenses for any employee working 30 hours or more per week. Schools can continue to enforce and implement caps on
adjunct assignments, but such restrictions and communications about them should be crafted in as adjunct-friendly a manner as possible to avoid more expensive and disruptive consequences.

This NACUANOTE first explains how the employer mandate applies to colleges and universities. It then discusses the specific issues and strategies that colleges and universities may wish to consider when determining which employees should be offered coverage. Finally, this note outlines peripheral employment and labor relations issues unique to adjunct faculty that institutions should consider when deciding how to structure adjunct faculty workloads in response to the employer mandate.

**DISCUSSION:**

I. How the Employer Mandate Applies to College and University Employers Generally

The employer mandate is found in Section 4980H of the Internal Revenue Code and final IRS regulations issued in February 2014.[1] The final regulations are similar to the proposed regulations but offer further clarification on how to track hours of certain contingent workers, such as adjunct faculty and student employees. Now that the IRS has released final regulations, colleges and universities are well-advised to start planning for compliance beginning in 2015. As discussed below, the new rules leave a number of regulatory gray areas and unanswered questions, but institutions should strive to comply in good faith with the overall purpose of the rules.

The employer mandate will go into effect for most “large” employers beginning on January 1, 2015.[2] A large employer for this purpose is an employer that has 50 or more full-time employees on average during business days in the previous calendar year.[3] Employers that are part of a controlled group of related employers are considered the same employer for this purpose.[4] Because the 50 full-time employee threshold is so low, nearly all colleges and universities will be subject to the employer mandate.[5]

A large employer may have to pay one of two potential taxes under the rules—a “headcount tax” or an “individualized tax” as we refer to them below. Whether a college or university will be responsible for either tax depends on whether the institution offers coverage to all or substantially all of its full-time employees, as well as the affordability and value of the coverage offered.

A. Tax on Institutions Not Offering Minimum Essential Coverage to Substantially All Full-Time Employees (“Headcount Tax”)

If a college or university does not offer “minimum essential coverage” to “substantially all” of its full-time employees (and their dependents), and at least one full-time employee chooses to obtain subsidized coverage through a federal or state health care exchange, the institution will be subject to a tax—referred to in this note as a “headcount tax”—of $2,000 per year for each of its “full-time” employees, including any full-time employees who are actually offered minimum essential coverage from the employer.[6] There are some important clarifications to note regarding the headcount tax:

- The college or university only has to offer the coverage. Full-time employees do not need to actually enroll in the institution’s plan.

- “Minimum essential coverage” is defined simply as coverage under an employer-sponsored plan.[7] The vast majority of employer group health plans will provide minimum essential coverage. Certain types of limited coverage will not be considered minimum essential coverage, including coverage only for (i) a specified disease or illness, (ii) hospital indemnity or other fixed indemnity insurance, (iii) Medicare supplemental coverage or similar supplemental coverage, (iv) accident or disability income insurance, (v) workers’ compensation insurance, (vi) coverage for on-site medical clinics, and (vii) certain types of stand-alone dental or vision coverage.
• The term “substantially all” is defined as at least 70% of the employer’s full-time employees in 2015, and 95% of the employer’s full-time employees in 2016 and thereafter.[8]

• Coverage must also be offered to each full-time employee’s dependents. Importantly, the coverage does not need to be offered to each employee’s spouse in order to avoid the headcount tax.

• The calculation of the headcount tax amount does not include the institution’s first 30 full-time employees.[9] But the first 30 full-time employees are counted when determining if the institution has triggered the headcount tax—i.e., the first 30 full-time employees are counted in determining whether the institution has offered coverage to “substantially all” of its full-time employees.

Stated simply, a college or university will avoid the headcount tax as long as it offers minimum essential coverage to at least 70% (in 2015) or 95% (in 2016 and thereafter) of its full-time employees and their dependents. The most challenging aspect of avoiding the headcount tax lies in determining who is a full-time employee, which is discussed in more detail in Section I.C. below.

B. Tax on Institutions Offering Minimum Essential Coverage That is Unaffordable or That Does Not Provide Minimum Value (“Individualized Tax”)

If a college or university can avoid the headcount tax, it must still consider whether it may become liable for an “individualized tax.” An individualized tax may be triggered if, with respect to any individual full-time employee, the institution’s coverage (a) is “unaffordable” or (b) fails to provide “minimum value.” If either of those is true, then the institution will have to pay a tax of $3,000 per year for each such full-time employee who also does not actually elect the institution’s coverage and receives subsidized coverage under a state health care exchange.[10] As should be clear by now, the devil is in the details:

• Coverage is “unaffordable” for a particular full-time employee based upon a comparison of the employee’s premium cost to his or her income. Specifically, if the employee’s share of the premium for self-only coverage under the employer’s lowest cost plan is more than 9.5% of the employee’s W-2 (Box 1) wages, the coverage is deemed unaffordable.[11] Affordability is therefore measured based on the cost of self-only coverage, not family or other dependent coverage. In addition, affordability is measured using the employer’s lowest cost plan, but the plan that is used for this measurement must still provide minimum value (discussed below). Although affordability depends on each individual employee’s W-2 wages, the employer mandate provides certain safe harbor provisions that, if used to design a plan, guarantee that coverage will be “affordable” for every employee, regardless of actual W-2 wages. These safe harbors generally require very low employee premiums for everyone. Because the individualized tax is designed to apply only with respect to employees with incomes below a certain level (also discussed below), using a safe harbor plan design may not be a cost-effective solution for many colleges and universities.

• Coverage fails to provide “minimum value” if the plan would generally pay for less than 60% of the benefits covered by the plan.[12] There are a number of fairly simple ways to determine if an employer’s plan meets the minimum value requirement. For example, the Department of Health and Human Services has developed an online calculator for straightforward plan designs. For more complicated plan designs, institutions can obtain an actuarial certification of minimum value. Fortunately, most employer group health plans will satisfy this requirement by a fairly wide margin.

• Even if the institution’s coverage is unaffordable or fails to provide minimum value, no tax will apply unless a full-time employee opts out of the institution’s coverage and obtains subsidized coverage in a state health exchange. In other words, if a full-time employee actually chooses to enroll in unaffordable or non-minimum value coverage, a tax will not apply for that employee.
Individuals are only eligible for subsidized coverage in a state health exchange if their household income is between 100% (for 2014: $11,670 single; $23,850 family of four)[13] and 400% (for 2014: $46,680 single; $95,400 family of four) of the federal poverty level.[14] In any state where Medicaid eligibility was expanded under the Affordable Care Act, the range for subsidized coverage increases to those individuals with household income between 133% (for 2014: $15,521 single; $31,721 family of four) and 400% (for 2014: $46,680 single; $95,400 family of four) of the federal poverty level.

Employees earning income above these thresholds cannot create “individualized tax” liability for colleges or universities.

- The annual penalty is capped at the amount of the headcount tax for that institution ($2,000[15] for each full-time employee after the first 30).

Stated simply, the individualized tax risk is present only if the college or university’s coverage is either unaffordable for an employee or does not provide minimum value. Then, the tax will only apply for each employee who (i) opts out of the institution’s coverage, (ii) earns income low enough to be eligible for subsidized coverage through a state health exchange, and (iii) actually chooses to enroll in such subsidized exchange-based coverage. In nearly all cases, an institution’s total potential individualized tax will be significantly lower than the potential headcount tax.

C. Who is a Full-Time Employee?

The headcount and individualized taxes apply to full-time employees, as that term is defined in the final regulations. To avoid the headcount tax, an institution that wishes to continue offering employer-sponsored health coverage effectively must offer coverage to at least 70% (in 2015) and 95% (in 2016 and thereafter) of its full-time employees.[16] As such, identifying full-time employees for ACA purposes is probably the most important aspect of the employer mandate for colleges and universities.

1. Definition of Full-Time Employee and Counting Hours

A full-time employee under the employer mandate is defined as a common law employee who is employed an average of at least 30 hours per week.[17] Common law employees include all people performing services for pay over which the institution has a sufficient degree of control, as defined by the IRS.[18] The institution cannot rely on scheduled hours, but must generally count each hour an employee works or for which an employee is paid or is entitled to payment, including paid non-work time such as vacations, holidays, illness, disability, jury duty, or other paid leaves of absence. For salaried employees, an institution can either count actual hours worked or use hourly equivalencies of 8 hours for each day worked or 40 hours for each week worked. These hourly equivalencies cannot be used, however, if they would result in a substantial understatement of actual hours worked.[19] As discussed in more detail below in Section II, the final regulations offer some specific guidance to higher education institutions with respect to counting the hours worked by certain adjunct faculty and student workers.

2. Measuring Hours and Offering Coverage

The employer mandate includes a somewhat complex framework for measuring hours and offering coverage to employees whose hours fluctuate between full-time and part-time.[20] In general, all employers must offer coverage to all new employees who are reasonably expected to be full-time (i.e., to work an average of 30 hours per week) within 3 months of their start date. For all ongoing employees, all seasonal employees, and any new employees whose hours are reasonably expected to be variable, the institution can use a “measurement period” of 3–12 months during which the employee’s hours are counted to determine if they are “full time.” Following each measurement period, a college must use a “stability period” of 6–12 months (but not shorter than the preceding measurement period) during which each employee who worked more than 30 hours per week during the preceding measurement period must be offered coverage.[21] An employee who did not meet the 30-hour threshold during the preceding measurement period does not need to be offered coverage during the ensuing stability period, regardless
of the employee’s actual hours during the stability period.

As mentioned above, the employer mandate goes into effect for most employers on January 1, 2015. Institutions that intend to use the measurement/stability period approach for determining full-time employee status beginning on January 1, 2015, will generally need to begin measuring hours no later than July 1, 2014. Under the final regulations, an institution can use a shortened 6-month measurement period beginning July 1, 2014, to determine full-time employee status during a 12-month stability period beginning on January 1, 2015.

3. Educational Institution Break Periods

The employer mandate contains a special rule for counting hours of educational institution employees who receive extended break periods (for example, summer break). This rule provides that “employment break periods” of at least four consecutive weeks during which an employee is not working (disregarding unpaid leaves) cannot be used by the institution for the purpose of decreasing the employee’s average hours worked. In other words, employees who average 30 or more hours per week during the regular academic year but do not work at all during the summer (or other extended break) will be considered full-time employees.

4. Variable Hour and Seasonal Employees

Because schools do not need to offer coverage immediately to new variable-hour or seasonal employees, each institution should develop a method for classifying new employees in these categories, unless they intend to offer coverage regardless of classification. The final regulations provide that a seasonal employee is one who works in an industry where the customary annual employment period is less than six months. A variable-hour employee is an employee for whom the employer cannot reasonably predict as of the date of hire whether his or her hours of service will exceed 30 hours per week based on the facts and circumstances.

The classification of employees in these categories should be based on the institution’s reasonable assessment of the new employee’s expected work hours and work schedule, based on past practice with similar types of employees and the institution’s operations and business needs.

II. Considerations Regarding College and University-Specific Employment Categories

The primary categories of employees that pose challenges to colleges and universities are those that have traditionally been treated as part-time for most purposes—namely, adjunct faculty, student employees, graduate assistants, and some coaches. Many colleges and universities do not currently offer health coverage to these categories of employees. But beginning in 2015, blanket exclusions from coverage of entire categories of employees may result in significant tax liability unless it can be shown that each employee was in fact not working at least 30 hours per week for the institution. In the final regulations, the IRS offered some welcome guidance in counting the hours of adjunct faculty and student employees, which is presented in detail below. Nevertheless, some questions remain with respect to these employee categories.

A. Adjunct Faculty

The most challenging category of employee for colleges and universities under the employer mandate is adjunct faculty. Before the final regulations were issued, institutions were eager for guidance from the IRS on how to count adjunct faculty hours because of the difficulty in tracking the work these individuals perform outside of the classroom.

Specifically, adjunct faculty may be spending significant amounts of non-classroom time on class preparation, grading, office hours, student counseling, and other required departmental or institutional tasks. Indeed, adjunct faculty instructors do not typically work the same number of hours for each credit hour they teach. The workload of any single adjunct faculty member depends on a myriad of factors, including the course being taught, whether the instructor has taught the course in the past, whether the
course has a set template that the instructor must follow, the institution’s policy with regard to office hours, and the instructor’s efficiency outside of the classroom, among other factors. In short, unless an institution uses a self-reporting system, which most do not, it is exceedingly difficult to accurately track hours worked by adjunct faculty.

Fortunately, the final regulations provide some clarity for calculating adjunct faculty hours. Most importantly, the final regulations offer a “safe harbor” option of crediting adjunct faculty with 2.25 hours of service for each hour of classroom or teaching time.[27] This safe harbor equivalency approach only covers classroom time, class preparation, and grading; it does not cover additional time spent on other required administrative tasks, such as required office hours or departmental meetings.[28] The IRS has stated that it may issue further guidance on reasonable methods for tracking and crediting hours for adjunct faculty, but has also stated that the safe harbor equivalency approach will be permitted through at least 2015. The final regulations therefore give some certainty to colleges and universities that choose to implement the safe harbor method.

Before the safe harbor was announced, but after the ACA was enacted in 2010, many higher education institutions adopted a conservative formula for calculating adjunct work hours: 3 hours of work for every credit hour assigned (or 2 hours of preparation and grading for every hour of teaching each week). Such conservative approaches led many schools to limit or “cap” adjunct course loads at 9 or fewer credit hours per semester, or 27 hours of work per week, to keep their total hours worked safely below the ACA’s 30-hour threshold.[29] This also caused many adjuncts previously teaching larger course loads to receive fewer course assignments and less pay. In light of the 2.25-hour safe harbor, adjunct course loads can now be increased to anywhere from 10–12 credit hours per term without requiring the institution to offer health coverage (as long as non-course related work remains below 3 hours per week, on average).[30] In Section III, we discuss some strategic factors that might impact a decision to use the safe harbor approach.

In addition to the safe harbor approach, the final regulations permit colleges and universities to use any other reasonable method to track adjunct faculty hours for purposes of determining full-time status.[31] Aside from the safe harbor approach, the other method that is generally emerging among higher education institutions is to compare an adjunct faculty member’s course load at any given time to the normal course load for full-time non-adjunct faculty members.[32] Under this method, the institution would generally treat as part-time any adjunct faculty member whose course load is less than 75% of the typical course load of full-time non-adjunct faculty members. Because many full-time tenured faculty maintain a relatively light course load, some institutions that intend to use this method are using the typical course load of full-time non-tenured faculty members as the relevant comparison.

Whether an institution uses the safe harbor or designs its own method for crediting hours worked by adjunct faculty, the same rules apply with regard to offering coverage. That is, adjunct faculty members who are reasonably expected at the time of hire to average 30 or more hours per week while their classes are in session must generally be offered coverage within three months of their hire. Adjunct faculty members whose hours are reasonably expected to be variable, and adjunct faculty members who are only expected to teach for one discrete term or semester, likely do not need to be offered coverage upon hire. These adjunct faculty members would only need to be offered coverage if they are credited with an average of 30 or more work hours per week during their initial measurement period. Similarly, ongoing adjunct faculty members only need to be offered coverage if they are credited with an average of 30 or more work hours per week during any measurement period.

B. Student Employees, Including Graduate Assistants and Residence Hall Staff

With regard to student employees and graduate assistants, it is important to keep in mind at the outset that the employer mandate only applies with respect to common-law employees. A full discussion of how to determine who is (and who is not) a common-law employee in the college and university setting is beyond the scope of this NACUANOTE. In general, however, many categories of student workers may not be considered common-law employees, such as graduate student assistants who typically receive free tuition and stipends. Further, under the final regulations, institutions will not need to track the hours
worked by certain unpaid student workers, such as unpaid interns. The final regulations also do not require colleges or universities to track the hours of students working in a federal or state sponsored work study program.

Student employees who are not unpaid interns and are not participating in a work-study program will therefore need to be considered for purposes of the employer mandate. Typically, these student employees tend to work variable hours throughout the academic year. If it is reasonable to expect that a particular student employee will work an average of 30 hours per week throughout the academic year (or throughout the entire year, if expected to work the entire year), that individual must be treated as a full-time employee and offered coverage within three months of his or her hire date. However, most student employees will not reasonably be expected to average 30 or more hours per week. In that case, they could be treated as variable-hour employees when they are hired, and they would not need to be offered coverage unless and until they actually work an average of 30 hours per week during a measurement period.

One subcategory of student worker that presents unique issues is student residence hall staff, namely student resident assistants ("RAs"). Counting the hours worked by RAs can be difficult because many are expected to effectively be on call for many hours of the day and night. The final regulations, unfortunately, do not provide institutions specific guidance on how to track these hours but, rather, simply require that colleges and universities use a reasonable method to track RA on-call time. The IRS noted, however, that it would not be reasonable for an institution to not credit an employee for on-call time for which the student is directly paid, or for on-call time during which the employee is required to remain on the employer’s premises and which substantially restricts the employee from using the time for his or her own purposes.

Under this guidance, many RAs will likely average 30 or more hours per week during the academic year. If an RA is likely to average 30 or more hours per week and is not working as part of a federal or state sponsored work-study program, the institution may need to offer coverage. If an RA is not expected to average 30 or more hours per week, but that RA actually does work 30 or more hours per week during the RA’s initial measurement period (for example, the first academic year in which the RA works in that position), the RA may need to be offered coverage if he or she continues as an RA in the next academic year. To avoid such results, institutions may want to reduce the length of shifts or amount of on-call time assigned to RAs by hiring additional students, ensuring that each works fewer than 30 hours per week.

With regard to student employees who only work for discrete periods of time during academic breaks (for example, summer break), the employer mandate’s rule on seasonal employees may apply. That rule would arguably allow a college or university to treat such a student worker as a seasonal employee who does not need to be offered coverage unless and until the student employee averages 30 hours per week during the employee’s initial measurement period. If the student employee is only expected to work during an academic break period (and in fact only works during the break), and the initial measurement period is longer than the break, then the student employee will likely not need to be considered full-time even if the employee averages 30 or more hours per week during the break period.

C. Coaches

Coaches also present unique issues under the employer mandate, primarily because their work hours tend to be variable but ongoing throughout the year. During their particular sport’s season, coaches will likely be working an average of 30 or more hours per week. During the off-season, many coaches work far less, perhaps in other roles, or not at all. Although it is not clear in the final regulations, the employment break period rule (whereby breaks of 4 weeks or greater do not “count” for purposes of counting average hours worked) appears to be limited to academic breaks. This rule would therefore not appear to apply to coaches during an off-season period that is not an academic break. Thus, the measurement period for a coach would likely include any off-season period (except for academic breaks) during which the coach works reduced or zero hours. For some coaches, this means that the entire off-season (except for academic breaks) may be included in the measurement of their average hours worked, which will necessarily bring their average down. This appears to be a reasonable approach
under the final regulations, even though the effect of this approach will be that many coaches will average less than 30 hours per week and can therefore be excluded from health plan coverage.

Otherwise, coaches are subject to the same rules that apply to other employees. That is, coaches who are reasonably expected at the time of hire to average 30 or more hours per week during periods in which they will be working must be offered coverage within 3 months of their hire. Coaches whose hours are reasonably expected to be variable and coaches who are only expected to work for one discrete season likely do not need to be offered coverage upon hire. These coaches only need to be offered coverage if they are credited with an average of 30 or more hours per week during a measurement period.

III. Employment and Labor Relations Issues to Consider When Determining the Full-Time Status of Adjunct Faculty

In addition to the technical concerns discussed so far, higher education institutions should be aware that the ACA’s application to adjunct faculty members has become a political battleground for much broader employment issues. Unions and other advocacy groups on a national level, including members of the United States Congress, have used ACA-related concerns as a vehicle for articulating arguments as part of a debate about adjuncts’ general working conditions. In light of these developments, and to avoid attracting attention from such political forces, institutions may want to avoid or reconsider applying the most fiscally-conservative approach of capping course assignments for all adjuncts to avoid exceeding the ACA’s 30-hour threshold. Policies can still be adopted to avoid rendering adjuncts eligible for benefits, but they should be carefully crafted and communicated to all campus constituents as favorably as possible towards adjuncts to avoid spurring larger problems.

A. Adjuncts’ Evolving Role on Campus

Over the past several decades, many higher education institutions have decreasingly relied on tenured or tenure-track faculty and increasingly turned to contingent adjunct faculty. Adjuncts have grown over the past 40 years from 20% to approximately 50% of all higher education faculty, now totaling more than 1 million employees across the nation.[39] Instead of teaching a few courses to supplement other employment, more adjuncts now rely on such work for their entire livelihood by teaching part-time at multiple schools.[40] Yet, the fundamental employment terms for these positions (pay, benefits, and rank within the hierarchy of institutional shared-governance roles) has remained largely unchanged, leading to growing bitterness and unrest.[41]

B. Recent Public Advocacy for Improving Adjuncts’ Working Conditions

Responding to such sentiment in recent years, unions have waged organizing campaigns targeting several metro areas (including Washington D.C., Boston, Philadelphia, Seattle and Los Angeles) and publicly announced plans to expand to additional locations (e.g., Baltimore, New York City, San Francisco, St. Louis, and Minneapolis-St. Paul).[42] Unions are seeking higher pay, access to benefits, and an institutional voice for adjuncts.[43] In at least one city (Philadelphia), union leaders have sought to organize adjunct faculty at multiple schools into one bargaining unit.[44] These efforts have not always convinced adjunct faculty to unionize, but several schools have been forced to adjust to the formation of these new unions.[45]

The public debate regarding adjunct working conditions intensified and garnered national media attention recently, sparked by congressional proceedings in the United States House of Representatives. After a hearing and extensive online survey, a congressional committee issued a January 2014 report chronicling difficulties reported by adjuncts from across the country and recommended passage of a year-old bill that would extend the ACA employer mandate to part-time employees.[46] At least one state legislative body has proposed a bill aimed at equalizing adjuncts’ basic employment terms to full-time faculty members’ salary and benefits on a pro-rata basis.[47] Local governments have also expressed support for changing adjunct compensation and working conditions.[48] There are even proposals to include treatment of adjuncts as a criterion in accreditation standards, given the perceived connection between adjuncts’ working conditions, the quality of instruction, and the resulting student learning outcomes.[49]
Although none of these efforts has yet resulted in statutorily-mandated or accreditor-required adjustments in adjunct faculty pay or benefits, they reflect a growing trend of support for the argument that traditional approaches to structuring adjunct-faculty employment relationships are no longer fair or desirable from a public policy perspective. Indeed, the various voices advocating for improved working conditions for adjuncts expressly emphasize the highly qualified nature of adjuncts, the critical importance of their role in educating the nation’s post-secondary students, and the need to adjust compensation terms to ensure that students at the nation’s colleges and universities receive as high quality an education as possible. [50]

C. Considerations for Adjunct Faculty Policies Adjusting to the ACA

The academy’s need to determine an ACA-compliant structure for adjunct faculty course assignments, combined with the trend of institutions reducing adjunct course assignments to avoid offering health insurance, has provided a ripe forum for the broader debate described above. That was particularly true when the rules for counting adjunct hours were so unclear that many institutions capped adjunct course assignments at conservatively low levels to avoid any risk of having to pay for health insurance coverage for this large group of employees. [51] The end result was often a reduction in adjunct pay, instead of adding new benefits. Now that the IRS’s final employer mandate regulations have offered a “safe harbor,” colleges and universities have an opportunity to adjust previous course load limitations or adopt standards to comply with the safe harbor. Any institution planning to do so should prepare for potential pressure from forces both inside and outside of the campus community challenging the impact of such restrictions on adjuncts’ compensation, which may complicate the existing institution-adjunct relationship.

To counter such risks, without risking the financial burden of becoming obligated to offer benefits to hundreds or even thousands of adjunct instructors, institutions have several options to consider, including the following:

- **Cap adjunct course loads to avoid having to offer health coverage to adjuncts under the ACA.** Given the more lenient “safe harbor” established by the final regulations, institutions could consider increasing the cap (or establishing a cap if one was not previously in place) at the higher end of the ACA-compliant range. For instance, caps could be increased from 9 credits to 12 credits per term because, at the 2.25 hour safe harbor equivalency, the total weekly hours would be 27. As long as policies and practices exist to keep non-course related work (such as office hours and meetings) below 3 hours per week, adjuncts would remain below the 30-hour weekly threshold.

- **Accompany course-load cap with broad-based communication to adjuncts.** Explain that the institution is attempting to provide as much income-earning opportunity for adjuncts as possible, while remaining fiscally responsible in light of the ACA’s new taxes.

- **Adjust compensation levels offered to adjunct faculty who remain ineligible for benefits in a manner that more closely approximates compensation structures applied to full-time faculty.** For example, instead of a flat rate for each course regardless of an adjunct’s prior history at a particular school, the per-course stipend could be scaled to increase as an adjunct accumulates the equivalent of each year of a full-time instructor’s course load. Or, part-time instructors could be afforded the opportunity to earn the right to become full-time instructors, with full benefits, by teaching a set number of accumulated courses over a period of years. Assuming only instructors with favorable performance would be invited to return often enough to accumulate enough courses, such an arrangement could offer adjuncts hope of improved working conditions while also increasing the institution’s ability to retain quality instructors. [52]

- **Adjust various non-monetary working conditions.** Such changes could help part-time faculty feel more assimilated into the campus community and thus less interested in joining a collective effort to challenge or seek to change such conditions. [53] Examples include: permitting adjunct faculty some role and voting interest in various shared-governance procedures and practices;
allowing adjuncts who have proven themselves as quality teachers over time some type of priority
to course assignments vis-à-vis other candidates; assigning a point person to care for adjuncts’
administrative needs; and offering adjuncts meaningful opportunities for feedback on curricular
issues relating to their classes.

- **Train administrators.** Emphasize the importance of making conscious efforts to acknowledge
the professional dignity and interests of adjunct faculty to contain any groundswell of frustration or
disenfranchisement within adjunct faculty populations that could fuel collective-employee action
on their classes.

**CONCLUSION:**

The ACA employer mandate’s sheer complexity, coupled with the significant financial impact of failing to
comply, makes it one of the most important issues facing higher education in 2014 and beyond. Beginning on January 1, 2015, in order to avoid the employer mandate’s significant new “headcount tax,”
institutions will need to offer employer-based health coverage to nearly all employees who work an
average of 30 or more hours per week, including many employees (such as adjunct faculty, student
workers, and seasonal coaches) who were previously excluded from coverage because of their
employment category. And for those employees whose compensation is between 100% and 400% of the
federal poverty level, institutions will also need to consider whether to make the employee’s cost for
coverage “affordable,” so as to avoid the employer mandate’s “individualized tax.” To be ready on
January 1, 2015, institutions must start planning now.

Complicating matters further is the recent wave of lobbying, criticism, and general attention to the
perceived plight of adjunct faculty, who will be at the core of most institutions’ strategy in dealing with the
employer mandate. Every institution with adjunct faculty should consider that its treatment of adjunct
faculty for purposes of the employer mandate may have additional ramifications beyond complying with
(and avoiding taxes under) the Affordable Care Act.

**AUTHORS:**

Peter G. Land, Franczek Radelet P.C., Chicago, Illinois. Pete is a partner in the Higher Education and
Labor and Employment Practice Groups at Franczek Radelet P.C., a boutique labor, employment, and
education law firm in Chicago. He has focused on representing private and public higher education
institutions for 20 years in a wide array of litigation and counseling matters, with an emphasis on
employment law. Pete regularly advocates on behalf of institutions in court and agency proceedings,
mediations, and arbitrations, as well as counseling on employment, faculty, and student disputes, policy
drafting, training, and government investigations. He has counseled institutions on tenure matters,
accommodation and leave requests, privacy issues and compliance with FERPA, academic program
closures and institutional affiliations, reductions in force, compliance with Title IX gender-equity
standards, accreditation issues, and sensitive internal investigations. He received his B.A. from DePauw
University and his J.D. from Northwestern University School of Law.

Daniel R. Salemi, Franczek Radelet P.C., Chicago, Illinois. Dan is a partner in the Employee Benefits
Practice Group at Franczek Radelet P.C., a boutique labor, employment, and education law firm in
Chicago. He represents clients in all areas of employee benefits, executive compensation, and benefits-
related tax law. Primarily, he counsels employers and plan sponsors on the design, administration, and
funding of health, retirement, fringe benefit and deferred compensation arrangements. A significant
portion of Dan’s clients are large non-profit and public-sector employers, including colleges, universities,
K-12 school districts, charitable organizations, endowments, and governmental employers. He received
his B.A. from the University of Dayton and his J.D. from the University of Notre Dame.
ENDNOTES:


[2] On July 2, 2013, the Treasury Department delayed the enforcement of the employer mandate rules until January 1, 2015 for applicable employers. The final regulations further delay the employer mandate until January 1, 2016 for employers with between 50 and 99 employees (as long as certain other conditions are met). See Preamble to Treas. Reg. § 54.4980H, 79 Fed. Reg. 8544 at 8574. For a college or university whose plan year is not the calendar year, the rules will generally go into effect at the end of the plan year that ends in 2015.

[3] The hours of part-time employees are also counted here (solely for purposes of determining whether an employer has 50 or more full-time employees) by including each part-time employee’s full-time equivalency. Treas. Reg. § 54.4980H-2(c), 79 Fed. Reg. 8544 at 8583.

[4] All related employers in a common controlled group must be aggregated in determining whether any one member of the group is a large employer. Treas. Reg. § 54.4980H-2(d), 79 Fed. Reg. 8544 at 8583. If the controlled group as a whole is a large employer, then each individual employer in the group is a large employer.

[5] Entities that are affiliated with a higher education institution, such as medical centers and foundations, may be part of the higher education institution’s controlled group, depending on how the affiliated entity is structured and controlled. Thus, small affiliated entities (i.e., those with less than 50 full-time employees) may, under certain circumstances, be part of the institution’s controlled group and thus be subject to the employer mandate.

[6] I.R.C. § 4980H(a). The tax is technically assessed on the basis of months in a year during which the employer does not offer the required coverage; this $2,000 figure is the annualized amount if the employer fails to offer such coverage for all 12 months in a year. The amount of the tax will be adjusted for inflation after 2014.


[8] Treas. Reg. § 54.4980H-4(a), 79 Fed. Reg. 8544 at 8597. The 95% threshold that applies in 2016 and thereafter reflects the IRS’s belief that an employer who intends to offer coverage to 100% of its full-time employees will likely make some mistakes, but that those mistakes will in any event not result in a failure to offer coverage to more than 5% of such employees. This rule is therefore not intended to encourage employers to selectively choose which 5% of its full-time employees can be excluded from coverage, although this could be done if the employer is confident that it will successfully offer coverage to all remaining full-time employees.


[10] Treas. Reg. § 4980H-5(a), 79 Fed. Reg. 8544 at 8598–99. As with the headcount tax, this is the annualized amount, which will be adjusted for inflation after 2014.

[11] The final regulations offer an affordability safe harbor, see the preamble to Treas. Reg. § 54.4980H, 79 Fed. Reg. 8544 at 8565 for a discussion of the various approaches that employers may use to satisfy the affordability requirement.


[13] These numbers reflect 2014 federal poverty levels, which typically increase each year.


[16] An institution could, of course, stop offering health coverage altogether and simply pay the headcount tax, which is likely far less expensive than continuing to offer employer-sponsored coverage. There are many reasons, however, that employers are not yet choosing this approach, including talent retention and attraction.
The final regulations consider the monthly equivalent of 30 hours per week to be 130 hours in a calendar month, as long as the employer applies this monthly equivalency on a reasonable and consistent basis. See Treas. Reg. § 54.4980H-1(a)(21), 79 Fed. Reg. 8544 at 8579.

This does not include properly classified independent contractors or other “leased” workers.

For example, an 8-hour per day equivalency cannot be used for an employee who works three 10-hour shifts, because the equivalency of 8 hours per day would result in that employee being treated as always working 24 hours in a week, substantially less than the employee’s actual, consistent 30-hour workweek.

Note that there are a number of technical details regarding the permissible structure of measurement and stability periods, a full discussion of which is beyond the scope of this NACUANOTE.

A college can also use an “administrative period” of up to 90 days between measurement and stability periods, during which the institution can (1) determine who was full-time during the preceding measurement period and (2) offer coverage for the upcoming stability period. See Treas. Reg. § 54.4980H-1(a)(1), 79 Fed. Reg. 8544 at 8578.

See supra note 2 and accompanying text.


The final regulations clarify that in determining whether an employee is reasonably expected to average 30 hours a week of service, an employer should consider whether (1) the employee is replacing another employee who was a variable-hour employee, (2) other employees in similar positions are considered variable-hour employees, and (3) the job was advertised as requiring less than 30 hours a week of service. See Treas. Reg. § 54.4980H-1(a)(49)(ii), 79 Fed. Reg. 8544 at 8581–82.

See Preamble to Treas. Reg. § 54.4980H, 79 Fed. Reg. 8544 at 8551. This approach is a “safe harbor” because it will be deemed by the IRS to be reasonable under all circumstances.

See id. at 8552 (explaining that institutions should credit adjuncts with an additional hour of service per week for each hour they spend on required tasks such as attending department meetings or holding office hours).


The credit-hour limitations discussed here assume that one credit hour equals one hour of classroom teaching per week. Institutions that use a different credit hour calculation method would need to adjust their course load limitations to ensure teaching hours assigned do not exceed 27 hours per week (assuming non-course related work remains below 3 hours per week, on average).


Id.

Id. at 8550.

Id.

Institutions should keep in mind, however, than many student employees will have coverage under a parent’s employer-sponsored plan, such that many student employees will not choose to enroll in the institution’s employer coverage or in subsidized coverage through a state health care exchange. As a result, many (if not most) student employees will not trigger taxes for institutions, as long as the institution simply offers them the opportunity to enroll in the institution’s employer coverage.

As discussed above, if an employee is not working during a break period of at least 4 weeks, the break period cannot be used to reduce the employee’s average hours worked.
Additional guidance from the IRS on this and other related issues unique to college and university employees would be welcome and the preamble to the final regulations hints that more guidance may be coming. See, e.g., Preamble to Treas. Reg. § 54.4980H, 79 Fed. Reg. 8544 at 8551.


STAFF OF H. COMM. ON EDUC. AND THE WORKFORCE, 113TH CONGRESS, THE JUST-IN-TIME PROFESSOR: A STAFF REPORT SUMMARIZING EFORUM RESPONSES ON THE WORKING CONDITIONS OF CONTINGENT FACULTY IN HIGHER EDUCATION 1


Id. at 6.


Flaherty, supra note 42.

Id.

“THE JUST-IN-TIME PROFESSOR,” supra note 39 (recommending passage of the Part-Time Workers’ Bill of Rights Act of 2013, H.R. 675 that proposes extending the employer mandate to part-time employees).


Peter Schmidt, Municipal Endorsements Emerge as New Tactic for Adjunct Organizers, CHRON. HIGHER EDUC., January 15, 2014 (referencing resolutions approved in Cambridge, Massachusetts and Los Angeles, California).

An Examination of the Changing Faculty: Ensuring Institutional Quality and Achieving Desired Student Learning Outcomes, COUNCIL FOR HIGHER EDUC. ACCREDITATION (January 2014).

Flaherty, supra note 42.

Colleen Flaherty, Caps Untouched, INSIDE HIGHER ED, February 25, 2014; Kenneth J. Cooper, Institutions Grapple With Costs of Health Insurance for Adjunct Faculty, DIVERSE ISSUES IN HIGHER EDUC., September 3, 2013.

Employer Changes to Adjunct Faculty Workloads and the Affordable Care Act, supra note 29 (noting examples of schools that are already converting subsets of adjunct faculty to full-time status with higher course loads and commensurate benefits, likely a result of the need to reduce course assignments for most other adjunct faculty).

See, e.g., Sydni Dunn, An “Alarming Snapshot” of Adjunct Labor, CHRON. HIGHER EDUC., January 24, 2014; Tamar Lewin, More College Adjuncts See Strength in Union Numbers, N. Y. TIMES, December 3, 2013; Audrey Williams, Adjuncts Gain Traction with Congressional Attention, CHRON. HIGHER EDUC., February 4, 2014. These media reports focus on non-pecuniary factors that lead adjuncts to feeling disrespected or forgotten, including (1) the lack of opportunity to influence curricular adjustments in any way, (2) difficulty securing copies of required textbooks, (3) a pattern of last-minute course assignments (days before a semester begins), (4) exclusion from departmental meetings, or (5) denial of access to institutional offices/facilities after hours.

Permitted Uses of NACUANOTES Copyright and Disclaimer Notice

View this document in Word

NACUANOTES Issues | Contact Us | NACUA Home Page

"To advance the effective practice of higher education attorneys for the benefit of the colleges and universities they serve."