

# Applying Pay or Play to Special Employees

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American Benefits Council  
P4P... “Preparing for PPACA” Webinar

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# Fundamentals

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- General Rule of Thumb: Count “hours of service” for common law employees!!!!
  - Is individual a common law employee?
    - If no, STOP - do not have to count their hours of service
    - If yes, then must count hours of service unless an exclusion applies
- Exclusion “Buckets” (i.e. hours of service in these positions or in these circumstances not counted as 4980H Hours of Service):
  - Bona fide volunteers
  - Students in a Federal/state work study program
  - Certain members of a religious order
  - Section 3508 Employees (certain real estate agents and direct sellers)
  - Certain services performed by employees outside the United States
  - Leased Employees (as defined in 414(n))

# “Difficult Employees”

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- Tracking hours of service for some categories of employees or work will prove difficult due to nature of employment/work
  - Adjunct Faculty
  - Commissioned salespeople
  - Employees subject to a layover
  - Employees on call
  - Other similar categories/work?
- With respect to such employees, employers must use a reasonable method of crediting hours of service that is consistent with Section 4980H
  - A method is NOT reasonable if it takes into account only a portion of the employee’s hours of service such that it re-characterizes as non-full-time an employee in a position that traditionally averages 30 hours of service or more per week
  - Final regulations identify reasonable methods for:
    - Adjunct Faculty
    - Employees subject to layover
    - Employees on call

# Others?

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- Employees of educational organizations
- Employees with H2-A/B visas
- Statutory employees (e.g. life insurance salesman)
- Temporary employees
- High turnover employees
- Leased employees (Code Section 414(n))

# Exclusion Buckets

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- Bona Fide Volunteer
  - ANY volunteer who is an employee of a government entity or 501(c) organization
  - Whose ONLY compensation is in the form of:
    - Reimbursement for reasonable expenses incurred as a volunteer *or*
    - Reasonable benefits (e.g. length of service awards) and nominal fees customarily paid similar entities
- Definition based on Code Section 457(e)(11) rules BUT not limited to firefighters and EMT
  - Do same 457(e)(11) length of service award limitations apply?

# Exclusion Buckets

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- Students in a federal/state work study program
  - Hours of service performed by students in a position subsidized through the federal work study or substantially similar State/political subdivision program not counted as 4980H Hours of Service
- **NO GENERAL EXCEPTION FOR STUDENTS NOT OTHERWISE IN A FEDERAL/STATE WORK STUDY PROGRAM**
- Paid interns? Hours of service counted
- Cooperative? If common law employee and paid, hours of service counted
- Unpaid Interns? Hours of service NOT counted for 4980H purposes

# Exclusion Buckets

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- Members of a religious order
  - Work performed by an individual under a vow of poverty as a member of the order IF the work is a task usually required (and to the extent usually required) of an active member of that order
- What is a “religious order”?
  - See Rev. Proc. 91-20
- Good rule of thumb: Services for Order vs. Services Outside Order

# Example: Member of Religious Order

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Pat Brown and Chris Green are members of a religious order and have taken vows of poverty. They renounce all claims to their earnings. The earnings belong to the order. Pat is a licensed attorney. The superiors of the order instructed her to get a job with a law firm. Pat joined a law firm as an employee and, as she requested, the firm made the salary payments directly to the order. Pat's services are not tasks usually required of an active member of the order. Consequently, hours of service performed by Pat for the law firm would constitute hours of service for the law firm.

Chris is a secretary. The superiors of the order instructed him to accept a job with the business office of the church that supervises the order. Chris took the job and gave all his earnings to the order. Chris' services are tasks usually required of an active member of the order.

# Exclusions Bucket

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- Section 3508 Employees
  - Who is a section 3508 employee? (see Publication 15-A , “statutory non-employees”)
    - Licensed real estate agents
    - “Direct Sellers”
    - Companion sitters
- Services performed outside the U.S.
  - Do NOT treat hours of service performed outside the united states as 4980H hours of service if compensation for such services is considered income from a source “without the United States”
    - Generally pay for services performed outside the U.S. is considered income from sources without the U.S.
    - Don’t confuse with income tax rules as U.S. Citizens are taxed on income within and without the U.S.
  - U.S. is the 50 states and D.C.
    - Territories and possessions are NOT considered the U.S. for this purpose

# Exclusions Bucket

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- Leased employees as defined in Code Section 414(n)
  - An individual is a leased employee if:
    - Not an employee of recipient
    - Performs services for recipient pursuant to an agreement between leasing organization and recipient
    - The individual has performed services for the recipient on a substantially full-time basis for at least 1 year
    - Such services are performed under primary direction and control of recipient
  - Typically a “leased employee” is treated as an employee of recipient for certain limited purposes; however, this alone doesn’t translate to common law employee status

# Difficult Employees

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- Adjunct Professors
  - IRS method: 2.25+ rule
    - Multiply each hour teaching by 2.25
      - This accounts for not only time in class but an additional 1.25 hours preparing for class
    - Add any additional hours performing duties outside the classroom that faculty member is required to perform
      - Required office hours
      - Staff meetings
  - Not only method that might be considered reasonable
  - Is IRS rule a safe harbor?
  - May be relied on at least through 2015

# Example: Adjunct Professor

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- Professor Perretta teaches a 2 hour class 3 nights a week at Benefits University. Prof. Perretta is also required to spend 5 hours per week in his office and he must attend the weekly staff meeting that is typically 2 hours in duration.
- How many hours of service per week does Prof. Perretta have?
  - $2.25 \times 6$  hours of class time=13.5
  - 5 hours of office time
  - 2 hour staff meeting
  - 20.5 hours!!!!

# Difficult Employees

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- Employees subject to a layover (e.g. airline employees)
  - Must credit layover hours IF:
    - Employee receives compensation for the layover hour beyond the compensation received w/o regard to layover OR
    - Layover hour is counted towards required hours of service for the employee to earn his/her regular compensation
  - Otherwise, if neither of the above apply, it would be deemed reasonable for an employer to credit 8 hours of service for each day in an overnight stay *unless that substantially understates actual hours of service*
- Not limited to airline employees
  - Over the road drivers
  - Others?

# Example: Layover Employees

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- Bob is a flight attendant for ABC Airlines. On Monday, Bob works three 3-hour flights during a day and then stays overnight. Bob is compensated for 3 additional hours for the layover. On Tuesday, Bob again works the same three 3-hour flights—returning home after the last flight.
- ABC airlines credits Bob with 8 hours for Monday and 8 hours on Tuesday. Is that sufficient?

# Difficult Employees

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- On Call Employees
  - Must count hours of service for:
    - Time required to stay on premises
    - Hours during which activities while on call are subject to substantial restrictions
      - The “Kill Your Weekend” rule

# Others

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- Employees of educational organizations
  - Who is an educational organization?
    - Primary function is formal instruction
    - Normally maintains a regular faculty
    - Normally maintains a regular curriculum
    - Has a regularly enrolled body of pupils in attendance at the place where activities carried on
  - EVERY unpaid, break in service (other than special unpaid leave) 4 weeks or longer is presumably an “employment break”
    - Not limited to summer breaks
  - Either allocate hours to employment break or disregard weeks
    - Limited to 501 hours
  - No longer “continuous” if leave is longer than 26 weeks (as opposed to 13 weeks for all others)

# Others

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- Statutory employees (e.g. life insurance salesmen)
  - Yes, but only if common law employee under common law employee test
- Statutory 530 employees
  - Yes, if a common law employee under common law employee test
- Temporary employees
  - Yes, if a common law employee (but may be able to avoid taxes with respect to such employees if employment is 3 months or less)
- High turnover positions
  - Yes, if a common law employee

# Others

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- Employees with H2 visas
  - Yes, if common law employee
  - Will they qualify for a premium subsidy in the Marketplace? They could!!!!
- Seasonal Worker vs. Seasonal Employee
  - Is seasonal “worker” the same as a seasonal “employee”?
    - No, not necessarily.
    - Seasonal worker (relevant for ALE determination only) may typically work more than 6 months
      - Defined by reference to 29 C.F.R. 500.20(s)(1); also includes retail workers employed during holiday seasons
      - May use reasonable good faith interpretation (including application by analogy to other workers)
    - Seasonal employee (relevant for variable treatment in look back measurement period method) defined as employees whose customary employment is 6 months or less