



Office of Government & Public Affairs

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March 18, 2013

Internal Revenue Service
CC:PA:LPD:PR (REG-138006-12)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Shared Responsibility for Employers Regarding Health Coverage (REG-138006-12)

Dear Sir or Madam:

On behalf of the American Council on Education (“ACE”) and the undersigned higher education associations, I am writing to comment on the Notice of Proposed Rulemaking issued by the Department of the Treasury and the Internal Revenue Service (collectively, the “Department”) regarding section 4980H of the Internal Revenue Code (“Code”), which addresses the shared responsibility for employers regarding employee health coverage, 78 Fed. Reg. 218 (Jan. 2, 2013) (“NPRM 4980H”).

Together, we represent approximately 4,300 two- and four-year non-profit public and private colleges and universities. We work to address the toughest higher education challenges, with a focus on improving access and preparing every student to succeed. We strive for implementation of the Affordable Care Act (“ACA”) in a manner that works best for students, institutions, and employees in higher education. The goal of these comments is to ensure that federal regulations provide appropriate coverage for students who work on campus and adjunct faculty members who are truly full-time employees. Specifically, we write in support of safe harbors for students who work on campus and adjunct faculty in order to more accurately account for their employment status.

Higher education plays a unique role in American society and fulfills many needs, including undergraduate education, graduate and professional training, basic research, and public service. Colleges and universities also foster unique opportunities for temporary and variable-hour staff positions, such as those held by students working on campus and adjunct faculty members. These institutions face extraordinary challenges in providing students with access to affordable higher education. Higher education officials are particularly concerned about potential increased costs for health coverage. Students face many unintended consequences from these increased costs, such as the likelihood of increased tuition and reduced educational services.

We urge the Department to carefully consider the consequences of NPRM 4980H as applied to certain college and university temporary and variable-hour workers. As described below, NPRM 4980H as applied to these workers is incompatible with the goals of ACA's shared responsibility provisions, which are designed to cover full-time employees. The Department must strive to adopt policies that accurately reflect higher education's unique employment arrangements, as in the following safe harbor proposals for determining the hours of students who work on campus and adjunct faculty.

Safe Harbor Proposal for Students Who Work on Campus. The core of the employer responsibility provisions under ACA is an obligation for an employer to either (1) offer its full-time employees the ability to access minimum essential coverage under an eligible employer-sponsored plan or (2) make so-called shared responsibility payments to the federal government to the extent the employer elects (a) not to offer coverage at all or (b) to provide coverage deemed inadequate under the Act. ACA § 1513. For this purpose, "minimum essential coverage" is insurance coverage offered through a group health plan, a governmental plan, Medicaid, Medicare, any other plan or coverage offered in the small or large group market within a state, or any coverage deemed as such by the Department of Health and Human Services ("HHS"). ACA § 1501(b). It should be noted that it is ultimately the employees' responsibility to obtain minimum essential coverage. *Id.* In that respect, the employer responsibility provisions of ACA are meant to support individual employees in their quest to fulfill their individual mandate under ACA.

Students who work on campus do not share the same status as typical employees. There is little risk such students will lack meaningful health coverage. Indeed, many students will be covered by the employer-provided group health plans of their parents inasmuch as 4980H NPRM requires an employer to offer its full-time employees and their dependents the opportunity to enroll in minimum essential coverage. For this purpose, a "dependent" is defined as the employee's child who is under age 26. Additionally, according to the federal government, approximately 1.1–1.5 million students receive health coverage under student health plans. See 77 Fed. Reg. 16,453 (issued Mar. 21, 2012). Moreover, HHS issued final regulations bolstering the coverage offered through these plans by applying many of ACA's coverage mandates to them. *Id.* Significantly, a rule proposed by HHS designates self-funded student health plans as minimum essential coverage, meaning that a student who is covered by such a plan meets his or her individual mandate under ACA. 78 Fed. Reg. 7348 (Feb. 1, 2013).

Setting aside the fact that the federal statutory and regulatory schemes favor coverage for adult children up to age 26, student employment in most cases complements the students' overall educational program. For this reason, students who work on campus retain a special status under applicable labor law. The type and amount of work students perform can affect whether they are considered "employees" for purposes of the Fair Labor Standards Act, the National Labor Relations Act, or other employment-related laws. Generally, under the Fair Labor Standards Act, students who are employed as part of their overall educational programs are not considered to be "employees," regardless of effort expended. For example, for purposes of the Fair Labor Standards Act, the U.S. Department of Labor ("DOL") notes that graduate research assistantships are a form of subsidy that both allows the graduate research assistants to continue their studies and prepares them directly for their future careers. See *DOL Field Operations Handbook* at section 10b18. It should be noted that the standard for determining the employer-employee relationship is generally broader under the Fair Labor Standards Act than the common law, meaning it is more likely under a given set of facts that the employer-employee relationship will be found for purposes of the Fair Labor Standards Act than under the common law. *Id.* at section 10b01. Yet, in exempting certain employed students from the definition of employee under the

Fair Labor Standards Act, the DOL acknowledges the reality that such students and the nature of the functions they perform significantly differ from typical employees so that they warrant special treatment (e.g., the functions are deemed not to be “work” or the student is deemed not to be an “employee”). *Id.* at sections 10b03(e), 10b11, 10b14, 10b18, and 10b24. Similarly, other authorities, such as federal courts and the National Labor Relations Board (“NLRB”), issue determinations from time to time on whether a particular set of students working on campus are considered “employees” for purposes of employment-related laws using facts and circumstances tests that are substantially similar to those set forth in the cited DOL *Field Operations Handbook*.

- ***Nature of Work Safe Harbor***

Accordingly, an appropriate safe harbor would track the existing rules and guidance on employed students for purposes of the Fair Labor Standards Act as reflected in the DOL’s *Field Operations Handbook* at sections 10b03(e), 10b11, 10b14, 10b18, and 10b24, considering whether the student works as part of his or her overall educational program, and would also consider any other rulings on the status of particular groups of students from a federal court, the DOL, or the NLRB. We request that the Department issue guidance clarifying that, for purposes of calculating a student’s hours under ACA Section 4980H, institutions of higher education may apply the standards set forth in the DOL’s *Field Operations Handbook* at sections 10b03(e), 10b11, 10b14, 10b18, and 10b24. To the extent a student works more than one job (either for the college or university or as part of a work-study program), each job should be evaluated independently to determine whether it meets the DOL standards. We also request that the Department issue guidance clarifying that an individual college or university that receives a ruling or determination specific to that institution with respect to the status of a particular group of students may rely on that specific ruling.

- ***Work-Study Safe Harbor***

Other students whose work is separate from their educational programs typically take on such campus roles as a form of financial aid under work-study programs in order to remain enrolled and make progress toward their degree. Such campus roles are not typically considered to be job paths for students as much as a way to support their continued educational progress. As such, these campus roles do not necessarily fit within the “nature of work” safe harbor set forth above. Nevertheless, these positions are a key component of the strategic arsenal of federal student aid programs created to expand opportunities for students who would not otherwise have the financial resources to attend college. Students who participate in work-study programs are afforded access to student health insurance programs by the institutions they attend. Treating students who hold these work-study positions as “employees” for purposes of ACA Section 4980H places an economic burden on a program that is meant to provide individuals with financial need meaningful access to higher education. It would be an odd result, indeed, to apply 4980H in a manner that would strain institutions’ ability to provide access to higher education to such students, which would include access to student health plan coverage in many instances. We therefore recommend that the Department issue guidance clarifying that, for purposes of calculating the hours worked by a student for purposes of ACA Section 4980H, an institution of higher education may exclude the hours worked by a student who is enrolled in classes at least half-time at the institution and who receives a wage as part of a job under a work-study program.

Safe Harbor Proposals for Adjunct Faculty. In the 4980H NPRM, the Department acknowledges that adjunct faculty present difficulties in terms of categorization s as full-time versus part-time employees for purposes of ACA Section 4980H. As the Department points out, the adjunct faculty members’ compensation is usually based on the number and type of courses they teach.

Compensation may vary not only by course credit but also by whether the course is entry-level or advanced in content, or the number of students enrolled in the course, or by whether the course content is inherently stable or rapidly-changing from year to year. For this reason, institutions of higher education typically do not track the hours worked by adjunct faculty; rather, they pay the instructor based on the instructional deliverables required by the specific course, including course preparation time, in-class instruction, and student feedback and grading. This reality complicates the requirement under the 4980H NPRM that employers must calculate the hours of adjunct faculty members pursuant to a “reasonable method for crediting hours of service that is consistent with the purposes of section 4980H.” Accordingly, we support the safe harbor provisions outlined below.

- ***Safe Harbor Based on Percentage of Full-Time Course Load***

Adjunct faculty should be classified as full-time employees if the course load they teach meets or exceeds three-quarters of the course load for a full-time, non-tenure-track (NTT) teaching faculty member in that academic department. Since most full-time tenured and tenure-track faculty engage in duties beyond instruction as part of their work commitments (including student advising, departmental administration, and institutional service), full-time faculty may teach less than what would be considered a full-time course load for an NTT teaching faculty member (although some adjunct faculty also have these additional responsibilities). This approach is predictable and a fairly accurate reflection of the circumstances of a particular campus. We urge the Department to adopt rules clarifying that institutions of higher education may classify adjunct faculty as full-time employees if the course load they teach meets or exceeds three-quarters of the course load for a full-time NTT teaching faculty member in a particular department. We also request that the Department issue guidance clarifying that, in order to avail itself of this safe harbor, an institution of higher education must adopt in writing a uniform definition of “full-time NTT teaching faculty member” tailored specifically to each academic department prior to the beginning of an academic year. In the alternative, this definition could be made for the institution as a whole rather than specifically for each academic department. This approach comports with the section 4980H NPRM, which permits colleges and universities to adopt a “reasonable method for crediting hours of service that is consistent with the purposes of section 4980H.” 78 Fed. Reg. 218, 225 (Jan. 2, 2013). We believe that such an approach, particularly if implemented at the institution level, would provide the requisite transparency and predictability necessary to ensure compliance with the ACA.

- ***Safe Harbor Based on One-to-One Ratio of Hours Teaching to Non-Classroom Work.***

A second method of calculating the total hours worked by adjunct faculty would be to credit adjunct faculty members with one hour of work outside the classroom for each hour teaching in the classroom. Although this approach could in some cases misrepresent actual hours worked, depending on the specifics of the given course, it provides a reasonable approximation as well as predictability and ease of administration, and is supported by at least one self-reporting study.¹ A one-to-one ratio of outside classroom work to teaching hours is the most accurate estimate, because it reflects assumptions, practices, and data found at many institutions of higher education.²

1 *Digest of Education Statistics*, “Percentage distribution of part-time faculty and instructional staff in degree-granting institutions, by level and control of institution, selected instruction activities, and number of classes taught for credit: Fall 2003,” http://nces.ed.gov/programs/digest/d11/tables/dt11_266.asp.

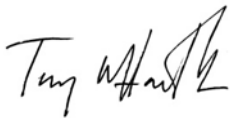
2 A typical example at a community college is Brookdale College in New Jersey. Full-time teaching faculty are exempt employees who are considered to have a workweek obligation of thirty-five hours: five three-hour courses for a total of

Community colleges employ most of the adjunct faculty in higher education institutions, and where their employment contracts account for out-of-classroom efforts, a 1:1 ratio is often assumed. Although some organizations propose assuming two hours of out-of-class work for each contact or teaching hour, this approach is inconsistent with institutional practice and the principles under which faculty generally are categorized and compensated. For example, under such a formula, a community college adjunct faculty member who taught two three-credit courses and one four-credit course (many regular courses are four credits; some lab courses are six credits), would qualify as a full-time employee. With full-time faculty generally teaching five courses at community colleges, and having related administrative, academic counseling, and other campus responsibilities as described above, it is not reasonable to treat as full-time an adjunct faculty member who carries fewer than four courses per semester.

As such, we request that the Department issue guidance clarifying that, for purposes of determining whether an adjunct faculty member is a part-time or full-time employee under ACA Section 4980H, institutions of higher education may credit adjunct faculty members with one hour of non-classroom work for every hour in class teaching.

Thank you for considering our comments to the Section 4980H NPRM. If you have any questions or would like to discuss these comments further, please do not hesitate to contact me.

Sincerely,



Terry W. Hartle
Senior Vice President

On behalf of:

American Association of Community Colleges
American Association of State Colleges and Universities
American Council on Education
Association of American Universities
Association of Public and Land-grant Universities
College and University Professional Association for Human Resources
National Association of College and University Business Officers
National Association of Independent Colleges and Universities
National Association of Student Financial Aid Administrators
NASPA: Student Affairs Administrators in Higher Education

fifteen contact hours; fifteen hours of college obligations including but not limited to participation in governance, department meetings, curriculum development, and prep time; and, in addition, five office hours per week, one for each course taught.