



How Many Employees Do You Really Have?

It takes three licks to get to the center of a Tootsie Pop. If only counting your employees was that simple!

Get the facts. Know your numbers. And stay compliant.

New ACA definitions and NLRB joint employer standards can make determining headcount feel like a real guessing game.

In this eBook, you'll find:

- The ACA's "small employer" and "large employer" definitions – and how to tell which one you are,
- Simple steps for calculating full-time employees (FTEs) and full-time equivalent employees (FTEEs),
- Explanation and analysis of the NLRB's joint employer ruling,
- Common problems in co-employment and how to prevent them, and
- Where to turn for more help.

Note: the contents of this eBook are not intended as legal advice and should not be taken as such. If you have a specific legal question, consult an attorney who is licensed to practice law in your area.

Are You a Small Employer or a Large Employer?

Parts of the Affordable Care Act (ACA) apply only to “small employers,” while others apply only to “large employers.” Which one are you?

- **Small employers** have 50 or fewer full-time employees (FTEs) or full-time equivalent employees (FTEEs).
- **Large employers** have 51 or more full-time employees (FTEs) or full-time equivalent employees (FTEEs).

Watch out! If you have fewer than 50 FTEs/FTEEs but you are a member of an ownership group that has more than 50 FTEs/FTEEs, you “count” as a large employer and must follow the rules for large employers.

Calculating FTEs and FTEEs

Under the ACA, who is a full-time employee (FTE)? Who is a full-time equivalent employee (FTEE)? And how does it affect your total employee count?

Full-Time Employees (FTEs)
work at least 30 hours per week.

You can exclude seasonal employees who work fewer than 120 days in each year.

Calculating FTEs and FTEEs

Full-Time Equivalent Employees (FTEEs) include both full-time employees and part-time employees – but the math can be tricky.

Here's how to calculate your FTEEs:

1. *Calculate the total number of hours worked per month by all part-time employees.*
2. *Divide by 120.*
3. *Add this number to your number of full-time employees.*

Calculating FTEs and FTEEs

FTEEs — An Example

For example, suppose you employ 40 full-time employees and 20 part-time employees. Each part-time employee works 24 hours per week, or 96 hours per month.

1. 20 part-time employees x 96 hours per month = 1,920
2. $1,920 \div 120 = 16$ FTEs
3. 40 full-time employees + 16 FTEs = 56 FTEs

Although you only have 40 employees who work more than 30 hours per week, when you add in FTEEs, you have 56 total employees – enough to make you a “large employer” under the ACA rules.

NLRB Joint Employer Standard Ruling

The National Labor Relations Board (NLRB) recently made a big change to its “joint employment” rules. For many years, the NLRB considered an employer a “joint employer” only if it exercised “direct and immediate” control over another entity’s employees. Today, the standard is much looser – and harder to grasp.

Are We a Joint Employer?

Your business might be a joint employer if:

- You have another business's employees (for example, temporary staff) handling some of your business's work, and...
- You set the hiring criteria,
- You require drug testing or other tests the primary employer does not require,
- You control work pace and productivity standards,
- You set the timing of shifts, the need for overtime, and similar standards, and
- You have a contract preventing the primary employer from paying its employees more than your company pays your employees for comparable work.

Not only does being a joint employer affect your employee counts for ACA purposes, it may also require you to bargain collectively with the other company's workers – or to defend unfair labor practice lawsuits they bring against you.

Preventing Contract Misclassification and Other Co-Employment Problems

When you bring someone in to do a job, you'll need to know is this person an employee, a co-employee (such as a temp worker from your staffing firm), or an independent contractor? The answer affects everything from your ACA compliance to your protection from wage and hour violation lawsuits.

As a rule, the IRS assumes that if someone works for you, they are your employee. If you accidentally misclassify an employee as an independent contractor, the fines and other penalties can be steep.

Who is an Independent Contractor?

The IRS considers three groups of factors when determining whether a worker is an independent contractor:

- 1. Behavioral Control.** Does the worker control when, where, and how they work, or do you? Who trains the worker? How is their work evaluated, by whom, and on what basis?
- 2. Financial Control.** Apart from payment of deliverables, who decides how much the worker gets paid for their efforts? Do you provide tools, supplies, and work space, or does the worker?
- 3. Relationship.** Do you have a contract with the worker, and if so, what does it say? Do you cover the worker's benefits or do they pay for these? Did you bring the person in to handle one specific (even if ongoing) project, or are they available for "general daily tasks"?

These factors are all weighed together in deciding whether a worker counts as an employee or independent contractor. When in doubt, ask the IRS for a determination letter – if you rely on the letter in error, you'll have a reasonable argument in your favor if the IRS later tries to penalize you for your mistake.

How Your Staffing Firm Can Help

Full-time, part-time, full-time equivalent, joint, co-, independent, temporary... With so many categories available and so much at stake, determining how many employees you have can be an uphill battle!

Here's how your staffing firm can help you find the talent you need with fewer headaches:

- **Manage independent contractor compliance.** Your staffing partner can help make sure that the IRS's factors weigh in favor of "independent contractor" when you hire temporary employees.
- **Limit legal exposure.** As the employer of record for temporary staff, your staffing firm takes on the responsibility of providing ACA-compliant benefits, managing drug testing and certifications, and addressing items like wage and hour disputes.
- **Boost productivity – without adding FTEs.** Temporary workers can bring in the specialized skills or "extra hands" you need to complete a big project or meet the holiday rush, without adding to your healthcare costs.

Sources

“Affordable Care Act Tax Provisions for Small Employers.” IRS.gov.

<https://www.irs.gov/Affordable-Care-Act/Employers/Affordable-Care-Act-Tax-Provisions-for-Small-Employers>

“Counting Employees: The Potential Impact of the NLRB’s Joint Employer Standard.” HR.com.

http://www.hr.com/en/magazines/all_articles/counting-employees-the-potential-impact-of-the-nlr_ig3bv57w.html

“Full-Time Employee v. FTE (Full-Time Equivalent).” AFLAC.

<https://www.aflac.com/health-care-reform/key-issues/full-time-employee-v-fte-full-time-equivalent.aspx>

“Small Business Health Care Tax Credit Questions and Answers: Determining FTEs and Annual Wages.” IRS.gov.

<https://www.irs.gov/uac/Small-Business-Health-Care-Tax-Credit-Questions-and-Answers:-Determining-FTEs-and-Average-Annual-Wages>

