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Affordable Care Act Basics

The Affordable Care Act imposes major legal obligations on employers, including new taxes, which has increased the cost of supplying temporary and contract workers. These answers to frequently asked questions are designed to help staffing professionals understand the basic ACA requirements and discuss them with their clients.

1. How does the ACA affect staffing firms?

The ACA's employer shared responsibility" ("play or pay") requirements apply to all "large" employers—defined as those with 50 or more full-time and full-time equivalent employees in a calendar year. The great majority of staffing firms qualify as large employers. Large employers are subject to a non-deductible excise tax if at least one full-time employee qualifies for subsidized coverage from a public health insurance exchange:

Pay option
Employers that do not offer "minimum essential coverage" to at least 95% of full-time employees and their dependent children under age 26 will be assessed a monthly excise tax. For 2017, the tax is $188.33 per month (up to $2,260 annually) multiplied by the number of full-time employees (over the first 30) in the month.

Play option
Employers that do offer minimum essential coverage as described above will not be subject to excise taxes unless the plan is either "unaffordable" to the employee or does not provide "minimum value," in which case, for 2017, the employer will be assessed an excise tax of $282.50 per month (up to $3,390 annually) for any full-time employee who qualifies for a government subsidy to buy coverage in a public health insurance exchange.

Minimum essential coverage: Any employer group health insurance plan that covers medical care, which the law defines as "amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or amounts paid for the purpose of affecting any structure or function of the body."

Affordability: For 2017, an employer's plan will be considered affordable if the employee's share of the premium of a single-only plan does not exceed 9.69% of the employee's wages. For plan years beginning *after* 2017, it will go down to 9.56%.

Minimum value: The actuarial value of the plan's share of cost of benefits must be at least 60%. For plan years beginning after Mar. 1, 2015 a plan must provide substantial coverage of inpatient hospital or physician services to be considered minimum value.

2. Are staffing firms offering health insurance coverage to their temporary employees?

Yes. ASA surveys show that the great majority of staffing firms are offering their full-time temporary employees at least minimum essential coverage. The high-turnover and relatively low plan participation in most segments of the temporary workforce has made it hard for many staffing firms to find affordable minimum value coverage. In such cases, the firm may be subject to an excise tax for employees getting subsidies to buy coverage on a government healthcare exchange.

Most staffing firms will incur significant new costs relating to the ACA. Costs will vary depending on the type of work their employees perform, their full-time status and tenure, their wage rates, the type of health insurance plan offered and rate of participation, and the cost of complying with the law's new and complex record keeping and reporting requirements.

3. Are staffing firms subject to tax on all temporary employees?

No. The ACA provides that employers are subject to tax penalties only with respect to "full-time" employees. For this purpose, the ACA defines full time as an average of at least 30 hours per week or 130 hours per month.

The government recognized that offering health insurance coverage or determining employer tax obligations on a monthly basis would not be practical for employers with employees who work on a part-time or intermittent basis and whose hours are variable or otherwise uncertain. To address those concerns, the law allows employers to use a "look-back" period of up to 12 consecutive months to determine an employee's full-time status for purposes of benefits eligibility.

Employers can use the look-back method to determine the full-time status of both "ongoing" employees (those who in the past worked a full "standard" measurement period) and new part-time, seasonal, or "variable-hour" employees. Variable-hour employees are those whose work patterns, on their start date, are expected to be variable and uncertain.

The final employer rules describe several factors employers must take into account in determining whether a worker is a new variable hour employee subject to the look-back rules. General factors include

- Whether the employee is replacing an employee who is full-time or variable-hour
- The extent to which the hours of service of employees in similar positions vary above and below 30 hours, and whether the work hours were communicated to the employee

Additional factors apply in determining whether temporary staffing firm employees are variable-hour:

- Whether other employees of the staffing firm in the same position retain the right to reject assignments; whether they typically have periods during which no assignments are offered; whether they typically are offered assignments for different periods of time, and whether the assignments offered typically do not extend beyond 13 weeks

If an employer chooses a 12-month look-back period, an employee who qualifies as variable-hour must work at least 1,560 hours over that initial measurement period to be considered full-time.

In addition to excluding employees who have not achieved full-time status, staffing firms also can exclude for penalty purposes the following individuals, provided the staffing firm offers a plan that provides minimum essential coverage to at least 95% of its full-time employees (and their dependents):

- Employees who opt out of the staffing firm's plan for reasons other than plan unaffordability or failure to provide minimum value—e.g., they are covered by a spouse's or parent's plan
- Employees who enroll in an employer plan that provides minimum essential coverage even if it is "unaffordable" or does not provide minimum value
- Employees enrolled in a state Medicaid program

4. Will clients have employer responsibilities for staffing firm employees under the ACA?

Generally, no. "Employer" under the ACA has the same meaning as under the Employee Retirement Income Security Act (Erisa). The U.S. Supreme Court has ruled that whether an entity is an employer under Erisa is determined by the common law multifactor test.[1]

Staffing firms generally should be viewed as common law employers because they recruit, screen, and hire the employees; pay employees' wages and benefits; withhold and pay employment taxes; and have the right to terminate or reassign employees. They generally also retain the right to control and direct how the employees perform their work, although the law doesn't require that they actually exercise such control.

Court rulings that have examined the employer status of staffing firms have upheld their status as common law employers based on facts and circumstances that are typical of most staffing arrangements.[2] ASA lawyers have published an article that reviews the historical basis for staffing firms' common law employer status.

If a client is determined to be the common law employer, a special rule provides that the staffing firm can offer of coverage on behalf of the client, provided the staffing firm charges the client a higher fee for employees that enroll in the staffing firm's plan. See ASA Issue Paper on how this special rule works. In addition to the higher fee language, staffing firms also can address client concerns regarding potential ACA liability by offering a carefully limited indemnity against such risk.

ASA's model general staffing agreement contains suggested language specifically designed to address the ACA issues discussed above.

5. What if the staffing arrangement causes a client's headcount to fall below 50?

There are no bright-line answers to this question, but employer regulations, suggest that the answer will depend on whether the primary purpose of the staffing arrangement is to avoid the ACA employer coverage or tax obligations.

[1] Nationwide Ins. v. Darden, 503 U.S. 318 (1992).
[2] See, e.g., Burrey v. Pac. Gas & Elec. Co., 1999 U.S. Dist. Lexis 22619 (N.D. Cal. May 12, 1999) and Blue Lake Rancheria v. U.S., 653 F. 3d 1112 (Ninth Cir. 2011) upholding the common law employer status of temporary staffing and employee leasing firms.

Businesses have a right to decide whether and when to outsource portions of their workforce—or how many full-time employees they need—based on legitimate business and economic reasons: for example, meeting fluctuating demand for goods and services, staffing special projects, and managing high-turnover operations.

Staffing services used by clients for such reasons should generally be ACA- compliant even if the client's headcount is incidentally affected. But if the primary purpose is to avoid the ACA employer coverage or tax obligations, the arrangement may come under scrutiny and the client held to be the responsible employer.

6. **Can staffing firms help clients reduce costs by supplying part-time employees?**

The ACA applies only to full-time employees, defined as those working, on average, at least 30 hours per week. Many businesses rely on part-time employees, and staffing firms can supply them if needed. But this will not necessarily result in lower staffing costs. Staffing firms strive to maximize their temporary employees' work hours by employing them full-time during any given workweek. So even if a client asks a staffing firm to supply an employee for part of a week, the employee generally will work the rest of the week for another staffing firm client; and to the extent the employee is enrolled in the staffing firm's health insurance plan, it will affect the cost of service.

Of course, it could be considered an abuse if an employee's weekly hours are split between a staffing firm and its client, or with another staffing firm, ostensibly to keep the employee below full time. The government has explicitly cautioned against arrangements that artificially divide an employee's tenure into one or more short-term positions to avoid the employer responsibility rules.

7. **Can temporary employees be terminated or refused reassignment to prevent them from reaching full-time status under the ACA?**

Terminating or refusing to reassign temporary employees prior to the employee achieving full-time status would likely be viewed as abusive if the primary purpose is to avoid the ACA employer coverage or tax obligations; such action may also violate Erisa if the primary purpose is to deny benefits. See ASA Issue Paper explaining the risks.