

insights

TYPES NOT MAPPED YET February 01, 2016 | TTR not mapped yet | Lori W. Jones

Staffing agency workers and ACA offers of coverage

Reprinted with permission from Employee Benefit Plan Review - November 2015

The final regulations on the Affordable Care Act's (ACA) "pay or play" rules were released on Feb. 10, 2014. Under the rules, there are potential penalties imposed on large employers that do not offer substantially all full-time employees coverage that qualifies as affordable and minimum value. In determining who is a full-time employee of an employer under the ACA rules, the IRS has indicated that it intends to use a fact-based "common law" definition of employee. Thus, an employer must be careful to analyze the facts and determine who is an employee for IRS purposes in order to be certain to make an appropriate offer of coverage and thereby avoid potential penalties. Where an employer uses a staffing agency to supply workers, making the determination as to who is a common law employee becomes potentially more complex. However, the final rules allow for some relief for an employer who might otherwise incur the "pay-or-play" penalties with respect to workers hired through staffing agencies that are reclassified by the IRS as common law employees of the client employer. The requirements for obtaining this relief are addressed below.

Common law employee determination

Under the "play-or-pay" rules of the ACA, an employer who fails to make an offer of coverage to 95 percent of its full-time employees in 2016 will be liable for a penalty if a single one of its employees obtains coverage on the exchange and receives a premium subsidy. The amount of the penalty for the year can be significant - \$2,084 multiplied by the total number of full-time employees (after a reduction of up to 30 employees). An employer who offers coverage to the required percentage of employees may owe a penalty if the coverage offered is either not affordable or fails to provide sufficient value. The amount is \$3,126 for each employee who obtains coverage from the exchange and receives a premium subsidy. Given these potential stakes, it has become even more important to determine who is an employee.

For IRS purposes, an "employee" means a common law employee of the employer. Generally, a worker providing services to an employer is a common law employee if the employer has the authority to direct and control the manner in which services will be performed. The IRS states on its website:

Under common-law rules, anyone who performs services for you is your employee ***if you can control what will be done and how it will be done***. This is so even when you give the employee freedom of action. What matters is that you have the right to control the details of how the services are performed.

The IRS sets forth three main categories of facts that it will consider to determine whether a person providing services is a common law employee or an independent contractor. These three categories are (i) behavioral control, (ii) financial control and (iii) facts about the relationship. No one factor is determinative, nor is there a set number of facts that will cause an automatic determination as to employee or contractor status. In light of this, a company should, when making a determination, look at the full relationship, the degree or extent of control and direction and should be certain to document the facts used to support it arriving at a conclusion.

Staffing agency use

Many companies contract with staffing agencies to provide workers in a variety of situations. In many of these contracts, the workers are often characterized as employees of the staffing agency or jointly employed by the staffing agency and the company client. The IRS has indicated the terms used by the parties to such a contract are only one of many facts that will be examined to determine who is the common law employer for ACA purposes.

ACA staffing agency rules-offers of coverage

An employer who has authority over workers supplied by a staffing agency may be at risk for having those workers characterized as its employees for purposes of the “play-or-pay” rules. Because employers do not offer health coverage to workers supplied by staffing agencies, classification of these workers as common law employees could trigger liability for the ACA penalties. For example, an employer who offers coverage to 96 out of 100 full-time employees would not owe a penalty under the 95 percent rule. But if five workers provided by a staffing agency are later determined to actually be common law employees of the employer, the employer could owe a penalty of \$156,300 (\$2,084 multiplied by 75 - the number of full-time employees less 30).

The final regulations under the “pay-or-play” rules permit an employer to take credit for an offer of coverage made by a staffing agency, but only if the employer pays the staffing agency more for a worker who accepts the offer of coverage than the employer would pay if the worker did not accept the offer of coverage. The typical staffing agency contract prior to the enactment of the final regulations contained no such provision for distinguishing offers of coverage. The contracts were considered to spread the cost of any benefits among all the workers used under the contract, as opposed to distinguishing them. Since this is a new provision for many contracts, it is important to make certain your contracting team understands the importance of providing for a distinct coverage line item.

ACA reporting considerations for staffing agency offers

While the rules allow an employer to take credit for an offer of coverage from a staffing agency for purposes of avoiding the ACA “pay-or-play” penalties, there may still be potential concerns under the reporting requirements if the workers are recharacterized. While a third party can fill out the forms for an employer, if an individual turns out to be an employee of a client there will potentially be Forms 1094 and 1095 that are incorrect. There may be penalties associated with filing such incorrect Forms.

Conclusion

Employers who make use of staffing agencies will want to carefully consider the risk that workers provided by staffing agencies could be characterized as the employer’s common law employees. If there is a risk, the employer will want to consider how many staffing agency workers are typically part of the workforce to determine whether ACA penalties may be triggered. Finally, an employer at risk will want to review and, if necessary, amend its agreements with staffing agencies to take advantage of the protection offered by the final regulations.

If you have any questions about this topic, please contact Employee Benefits chair [Lori Jones](#).

authorsTest

lori

Lori W. Jones