



Employment Agencies and the Affordable Care Act

Section 4980H of the Internal Revenue Code (and accompanying regulations promulgated by the Internal Revenue Service) addresses the employer excise tax as it relates to the ACA. The IRS has stated that “employers may not avoid meeting the threshold through the use of staffing agencies.” For purposes of counting an “employee” under the excise tax calculation, the IRS has stated that an “employee” means a worker who is an employee of the employer under the common law test, which is often the case when an employer contracts with a staffing agency to provide temporary staff.

Calculating the Excise Tax Penalty

There are two prongs to the excise tax penalty.

First, a penalty is assessed if an employer fails to offer its full-time employees (including “common law employees”) and their dependents an opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan.

Second, a penalty is assessed if an employer offers minimum essential coverage to its full-time employees (including “common law employees”) and their dependents, but one or more of its full-time employees enrolls in an employer sponsored health plan for which an applicable premium tax credit or cost sharing reduction is allowed or paid (i.e., employer offered health coverage that was not minimally sufficient or was unaffordable).

Health Care Enrollment Process

An employer is required under the regulations to provide its employees with an “effective opportunity” to elect or decline to enroll in the coverage at least once during the plan year. An “effective opportunity” is based on all of the relevant facts and circumstances, including whether an employee is covered by an employment staffing agency that contracts with employer for staffing services.

Consequently, if a staffing agency makes an offer of coverage to an employee who is performing services for the employer, then the employer is treated as making the offer of coverage only if it pays a fee to the staffing firm that is higher than the fee it would have paid if the employee was not offered coverage by the staffing agency firm. The employer should request an invoice that identifies the

employees assigned to the employer and the costs associated with those employees of the staffing agency that are covered by the staffing agency for health care. Therefore, the employer should confirm that the invoice it pays identifies:

- each employee as part-time or full-time,
- for those employees who are full-time, that the employee was offered health coverage by the staffing agency, and
- the specific costs in the invoice that are associated with health care provided by the staffing agency and paid by employer, and
- for those full-time employees who did not select health coverage, the reason for not selecting coverage (e.g., Medicare, Medicaid, Tricare, spouse coverage etc.).

The fee the employer pays to the staffing agency employees who select health coverage must be greater than the fee paid for by employees who were offered coverage, but declined. In essence, the fees paid by the employer to the staffing agency should identify a specific cost that is associated with health coverage provided by a staffing agency for those full-time employees assigned to the employer.

In addition to the employee, an employer is required to offer coverage to each full-time employee's "dependent." For purposes of the ACA, "dependents" are defined as the employee's children under the age of 26. To clarify, "dependent" under the ACA does not include an employee's spouse. Thus, an employer is not required to offer coverage to an employee's spouse for purpose of compliance with the employer shared responsibility provisions.

Suggested Strategies for an Employer

The employer's HR Department should carefully evaluate the staffing company's credentials that it contracts with to support its operations. The staffing agency must have a plan in place to pay its full time employees' health care that is both "affordable" and "covers essential health benefits." In addition, the contract entered into between the parties and the monthly invoice must identify the amount associated with providing health coverage. For example, the invoice should state that the fee associated with health coverage is \$1.00 per hour if that is the cost to the staffing agency to provide health coverage to a full-time employee.

Also, for those staffing agencies that the employer retains to complete tasks generally within 90 days or who traditionally work less than 30 hours per week (i.e., services provided while employees are on vacation such as a receptionist, secretaries, and assistants) should be distinguished from the staffing agencies that the employer uses for longer term assignments. While an employer may use multiple staffing agencies for various tasks, the focus need only be those staffing agencies the employer tends to use for longer and more detailed assignments that take longer than 30 hours per week over a 90-day period.

In conclusion, the employer may avoid providing health coverage to its employees who are placed via a staffing agency if:

- (1) the employee works less than 30 hours per week at the employer,
- (2) the employee is temporary in that he or she works less than 90 days for the employer, and
- (3) the staffing agency offers or pays health coverage for all of its staff, including staff assigned to the employer so long as such payment is noted in the invoice as an additional charge.



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