

## **GENERAL SUMMARY OF AFFORDABLE CARE ACT AND INTERNAL REVENUE CODE RULES REGARDING COVERAGE FOR COMMON LAW EMPLOYEES**

The Affordable Care Act (ACA) requires applicable large employers (generally those with 50 or more full-time employees) to offer health care coverage that is affordable and that provides minimum value to substantially all (70% in 2015, 95% thereafter) of its full-time employees. Applicable large employers who choose not to offer coverage or who offer coverage that is not affordable or that does not provide minimum value could be liable for significant penalties for each month it fails to offer coverage or does not offer affordable or minimum value coverage.

The ACA defines a full-time employee as a common law employee of the applicable large employer who the employer reasonably believes will perform 30 or more hours of service on date of hire or who performs, on average, 30 or more hours of service per week over a selected measurement period. Therefore, to decide whether an individual must be offered coverage, it is necessary to determine if the individual is a common law employee and also if the individual is a full-time employee (i.e. he performs 30 or more hours of service). Both issues are discussed below.

This common law analysis should be conducted with respect to any individual who performs services for an employer but who is not issued a Form W-2. Even if an individual is providing services through a temporary staffing agency, he may still be considered a common law employee of the employer.

### **Part 1: Common Law Employee Analysis.**

To determine whether or not a worker is a common law employee, the relationship between the worker and the business for which services are performed must be examined. In conducting such an analysis, all information that provides evidence of the degree of control and the degree of independence must be considered. Facts that provide evidence of the degree of control and independence fall into three categories: Behavioral Control, Financial Control and Relationship of the Parties.

***Behavioral Control.*** Behavioral control considers whether the business for which services are performed has the right to control and direct the worker who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. (It is not necessary that the business actually direct or control the manner in which the services are performed; it is sufficient that the business has the right to do so.) The following are some facts considered in determining behavioral control:

- Who trains or instructs the worker
- How the worker receives his assignment
- Who determines the methods by which the assignments are performed
- What types of reports are required by the worker
- What is the worker's daily routine
- Whether the worker is required to attend any meetings and any penalties for not attending

- Who the worker is required to contact if problems or complaints arise and who is responsible for their resolution
- Location of performance of services (at worker's home or on business' premises)
- Whether worker is required to provide the services personally or if he can use substitutes or helpers
- Who hires helpers or substitutes, if needed, and who pays them
- Whether approval is required before hiring helpers or substitutes

**Financial Control.** Financial control considers facts that show whether the business has a right to control the business aspect of the worker's job. Some facts to consider include:

- Who provides the supplies, equipment or materials necessary to perform the services
- Whether the worker is reimbursed for business expenses
- Whether the worker leases the equipment or space
- The type of pay the worker receives (salary, piece work, lump sum)
- Whether worker is allowed a drawing account for advances
- Who provides workers' compensation insurance for the worker
- Whether the worker is paid or another entity is paid for the services
- Whether the worker can incur an economic loss beyond the normal loss of salary
- Whether the worker establishes the level of pay for services

**Relationship of the Parties.** Some facts that show the parties' type of relationship include:

- Whether a written contract describes the relationship the parties intended to create
- Who provides the worker's benefits (vacation and sick pay, health insurance, bonus, pension)
- The permanency of the relationship (Does it continue indefinitely or is it finite?)
- Whether relationship can be terminated without incurring liability or penalty
- Whether the worker performs similar services for other businesses
- Whether there is any agreement prohibiting competition between the worker and the business while the worker is performing services or during any later period
- Whether the worker is a union member
- Whether the worker advertises his services
- How is the worker represented by the business

If the analysis reveals that the facts weigh in favor of treating the worker as an employee of the business, the worker should be treated as the business' common law employee. The analysis is very subjective, so it is not possible to predict whether the IRS will reach the same conclusion. Therefore, in a close case, it is better to err on the side of finding the worker to be a common law employee.

## **Part 2: Full-Time Employee Analysis.**

To avoid a penalty for failure to offer substantially all full-time employees coverage, it is first necessary to identify all full-time employees of an employer. It is also necessary to identify the

number of full-time employees to determine the penalty (which is based on the number of full-time employees in a month).

The ACA regulations define a full-time employee as an employee who performs, on average, at least 30 hours of service per week. There are two methods for determining full-time employee status—the monthly measurement method and the look-back measurement method. There are special rules regarding re-hires, leaves of absence, changes in employment status, etc. and exceptions to the rules that apply when using either method for calculating hours of service. These special rules and exceptions are not addressed in this summary. This summary is intended only to provide a *very* general description of these two measurement methods.

***Monthly Measurement Method.*** In general, under the monthly measurement method full-time employees are identified based on the hours of service they perform each calendar month. If the employee performs 30 hours of service per week during the month, he must be offered coverage for that month. Because this method is difficult to administer, it is not used frequently.

***Look-Back Measurement Method.*** In general, under the look-back measurement method an employer determines an employee's full-time status by averaging the number of hours of service performed by the employee over a defined measurement period. If the employee averages 30 or more hours of service per week over the measurement period, the employer must offer the employee coverage for the following stability period. (Often the measurement period and the stability period will be 12 months long, but not always.)

Once an employer identifies all full-time employees, it must offer substantially all of these employees coverage to avoid a penalty. Substantially all means all but 30% of full-time employees (for the 2015 plan year) and all but 5% of full-time employees (beginning with the 2016 plan year).

***Offer of Coverage.*** In general, an employer will be considered to have offered coverage if the employee is given an effective opportunity to enroll in (or decline to enroll in) coverage at least once per plan year. Whether an employee has an effective opportunity to enroll in coverage is based on all the relevant facts and circumstances, including adequacy of notice of the availability of the offer of coverage, the period of time during which acceptance of the offer of coverage may be made, and any other conditions of the offer.

***Offer of coverage to individual performing services through a staffing agency.*** Where a business contracts with a staffing agency to provide individuals to perform services for the client business and one or more of these individuals are determined to be common law employees of the client business, the client business generally must offer coverage to these common law employees. The client business has three options: (1) offer the individuals coverage under its group health plan; (2) compel the staffing agency to offer the individuals coverage under the staffing agency's plan and pay the staffing agency an additional fee for coverage (a fee that is higher than the fee the client business would pay for the same individual if that individual did not enroll in the staffing agency's health plan); or (3) not offer coverage and include the individuals in the percentage of full-time employees that do not have to be offered coverage (30% in 2015 and 5% thereafter).

### **Part 3: Consequences.**

An employer may be subject to a substantial penalty if it fails to offer coverage to a sufficient percentage of its full-time, common law employees and at least one full-time employee obtains subsidized coverage through the marketplace. (The monthly penalty for failure to offer coverage is \$166.67 multiplied by the number of full-time employees minus 30. If an employer has 500 employees, for example, the monthly penalty is \$78,335.) Therefore, it is important to conduct this analysis with respect to all individuals who perform services for an employer but who are not issued a Form W-2 to determine if they should be classified as full-time employees and offered coverage.