ASA Legal Analysis

ACA Update: Who Will Staffing Firms Have to Cover Starting Jan. 1, 2015?

American Staffing Association **(11/01/13) Edward A. Lenz, Esq., and Alden J. Bianchi, Esq.**

The Obama administration's July 2013 announcement, delaying enforcement of the employer mandate under the Affordable Care Act by one year, has affected not only when employees must be offered health insurance coverage but also the period for determining who a full-time employee is for purposes of that obligation. This article explores how the delay affected those determinations.

The ACA employer shared responsibility provisions (also called the "play-or-pay" rules) provide that, after Dec. 31, employers must offer to their full-time employees (and employees' dependents) the opportunity to enroll in "minimum essential coverage" (MEC) on the effective date[1]. "Opportunity to enroll" does not mean employees must actually be enrolled in coverage. Rather, an employer need only make an offer of coverage. Employers generally have up to 90 days from the time of offer in which to enroll employees[2].

Staffing firms have faced significant insurance carrier resistance and pricing uncertainty regarding health insurance coverage for temporary employees—with the exception of higher-paid, longer-term information technology specialists and other professional employees for whom health insurance coverage has traditionally been available. Nonetheless, ASA surveys show that, by substantial majorities, staffing firms of all sizes intend to offer MEC plans that meet both the affordability and the minimum value requirements. Recent insurance market developments suggest that such coverage generally will be available by 2015.

This article discusses the different categories of employees to whom staffing firms must offer health insurance coverage—if they elect to "play"—beginning Jan. 1, 2015[3].

Background

Perhaps the single most significant regulatory development affecting staffing firms under the play-or-pay rules is the "look-back" measurement period method for determining which employees are full-time for the purpose of offering benefits or paying penalties. The look-back rules were negotiated by ASA and its partners in the Employers for Flexibility in Health Care (E-Flex) coalition to lessen the burden of compliance in cases where an employee's full-time status cannot reasonably be determined on his or her start date[4].

The look-back approach involves two categories of employees—"ongoing" employees and "new" employees. New employees are further divided between new "variable-hour" employees and new "nonvariable-hour" employees.

Ongoing Employees

The proposed regulations under Internal Revenue Code §4980(H) allow employers to use a "standard measurement period" of up to 12 consecutive months to determine their full-time ongoing employees on Jan. 1, 2015[5]. Employers with calendar-year health insurance plans can elect to synchronize their standard measurement period with the start of their 2015 plan year by using a fiscal-year standard measurement period—for example Oct. 15, 2013, through Oct. 14, 2014[6]. This would give the employer a substantial "administrative period," within the maximum allowable 90-days, to determine who worked full-time during the period and enroll those employees in the plan by Jan 1, 2015

This would let the employer use the maximum allowable 90-day "administrative period" to determine who worked full-time during the period and enroll those employees in the plan by Jan 1, 2015[7].

The rules also contemplate use of a calendar-year standard measurement period[8]. Use of a calendar year would appear to allow health insurance enrollment to be deferred to as late as April 1, 2015, assuming a maximum 90-day waiting period. Given the one-year delay of the employer mandate, however, it is unclear whether the government would approve any further delay in enrollment beyond Jan. 1, 2015, even though it is arguably consistent with §2708 of the Public Health Service Act, which makes clear that plan waiting periods commence after an employee is determined to be "otherwise eligible" (i.e., has achieved full-time status) for coverage. The Obama administration might issue further guidance on this point.

New Employees

The proposed §4980(H) regulations define a new employee as any employee who has been employed for less than one complete standard measurement period[9]. Thus, by definition, any employee starting work before Jan. 1, 2015, who on that date has not worked a full standard measurement period will be considered a new employee.

Before the one-year delay, ASA took the position that employers had no legal obligation to determine the full time status of new employees who started work before Jan. 1, 2014—i.e., before the statutory effective date of the employer mandate. Thus, the association asserted, staffing firms could wait until Jan. 1, 2014, to determine the status of those employees and—for an employee who was still working then and was properly classified as variable hour—could apply a look-back period of up to 12 months from that date to determine whether the employee had worked full-time.

The one-year delay of the employer mandate effectively removes the rationale for this position. Even though enforcement of the mandate has been delayed until 2015, it technically becomes the law of the land on Jan. 1, 2014. The government is therefore unlikely to see any basis for relieving employers from making full-time status decisions with respect to employees starting work on or after that date.

Which Employees Must Be Offered Coverage on Jan. 1, 2015?

Based on the forgoing discussion, the following is the association's view of the rules governing who must be offered health insurance coverage as of Jan. 1, 2015.

Ongoing employees—Employees who have worked full-time during at least one standard measurement period will be considered ongoing and must be enrolled by Jan. 1, 2015, if the staffing firm uses a measurement or administrative period designed to synchronize with a Jan. 1, 2015, plan year. As previously discussed, it is unclear whether employers can use a calendar-year period that results in enrollment after Jan. 1, 2015.

New *variable-hour* employees—Employees starting work on and after Jan. 1, 2014, must be tracked against their 12-month anniversary (assuming the staffing firm chooses a 12-month look-back period) and must be offered coverage upon reaching full-time status (1,560 hours of service) during that period[10]. Full-time variable-hour employees must be enrolled in coverage no later than the last day of the first calendar month beginning on or after the employee's one-year anniversary (totaling at most 13 months plus a fraction of a month)[11].

New *nonvariable-hour* employees—Employees starting work in 2014 who do not qualify as variable hour must be enrolled by Jan. 1, 2015—unless they started after Oct. 1, 2014, in which case they must be enrolled within 90 days of their start date.

Transition Relief for Fiscal-Year Plans

The proposed §4980(H) regulations included transition rules for fiscal-year plans in 2014. On Sept. 26, speaking at the American Bar Association Joint Committee on Employee Benefits Annual Health and Welfare Benefit Plans National Institute in Arlington, VA, a U.S. Internal Revenue Service official said the government was considering whether to extend transition relief for fiscal-year plans for 2015. At this writing, no decisions have been made. Possible options might be to simply apply the play-or-pay rules based on the fiscal-plan year or to extend the current transition period by one year. Staffing firms should consult with expert benefits counsel regarding possible treatment of fiscal-year plans.

Footnotes

1. ACA §1513.
2. Public Health Service Act §2708.
3. The one-year suspension of enforcement of the employer mandate does not change the statutory effective date of Jan. 1, 2014. As discussed, this has implications as to when full-time status determinations must be made and who must be offered coverage on Jan. 1, 2015.
4. The E-Flex coalition represents leading companies and trade associations in the retail, restaurant, hospitality, construction, temporary staffing, supermarket, and other service-related industries. Coalition members employ approximately 30 million Americans each year.
5. 78 Fed. Reg. 218 (Jan. 2, 2013) at 226.

6. 78 Fed. Reg. 218 (Jan. 2, 2013) at 244.
7. Note that the administrative period allowed under the look-back measurement period rules, in effect, coincides or merges with the 90-day maximum waiting period for plan enrollment allowed under §2708 of the Public Health Service Act.
8. 78 Fed. Reg. 218 (Jan. 2, 2013) at 244.
9. 78 Fed. Reg. 218 (Jan. 2, 2013) at 241.
10. For an in-depth discussion of variable-hour employees, see "Temporary and Contract Workers: Who Is a 'Variable Hour' Employee Under the Affordable Care Act?"
11. See 78 Fed. Reg. 218 (Jan. 2, 2013) at 227.

This article is not intended, and should not be relied upon, as legal advice. Staffing firms are strongly urged to consult with qualified ACA experts with respect to the issues discussed and how they affect their firms.

Ed Lenz is senior counsel of the American Staffing Association and led the staffing industry's discussions with the Obama administration regarding application of the employer regulations to staffing firms. He recently testified on behalf of the E-Flex coalition about the ACA's effect on employers at a hearing of the Health Subcommittee of the U.S. House of Representatives' Energy and Commerce Committee.

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