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Tackling the Complexities of the ACA Look-Back Rules

The final employer regulations under the Affordable Care Act allow employers to use a look-back measurement method to determine the full-time status of new employees. Here are the details your company needs to avoid employer penalties under the law.

By Edward A. Lenz, Esq.

The latest ACA information for staffing companies focuses on the complexities of the legislation's look-back rules—and how firms can ensure compliance with the rules and avoid employer penalties. (For a refresher on how the look-back rules work, see the sidebar on page 32.)

The employer mandate under the ACA requires that health coverage be offered to "full-time" employees, defined as an individual working on average at least 30 hours per week (or, alternatively, 130 hours per month). Staffing firms were concerned about how this definition would apply to employees whose work hours fluctuate unpredictably throughout the year and how they would manage a group health insurance plan for those employees. To accommodate those concerns, the final employer regulations, at ASA's urging, included provisions allowing employers to use the look-back measurement method to determine the full-time status of new employees who, on their start date, can be classified as "part-time, seasonal, or variable-hour."

For new employees classified as part-time, seasonal, or variable-hour, a staffing firm can apply an "initial measurement period" of up to 12 months to determine their full-time status. If an employee works full time during that period (e.g., 1,560 hours in 12 months), coverage must be offered no later than one month (plus potentially a fraction of a month, depending on when the period began) following the end of the period to avoid penalties. For new employees reasonably expected at the start to be full-time (and who don't meet the criteria for classification as part-time, seasonal, or variable-hour), coverage must be offered no later than the first day of the fourth month following their start date.

Staffing firms that elect to use the look-back measurement method get the benefit of what is called a "limited nonassessment period"—a period that corresponds with a new, full-time employee's initial three months of employment or the initial measurement period of a new part-time, seasonal, or variable-hour employee. During this time, the employer will

Your ACA Go-To Resource

Ever since the Affordable Care Act surfaced as a major issue for the industry, ASA has delivered dozens of news articles, issue papers, event presentations, webinars, and other resources designed to keep staffing companies ahead of compliance issues. An ACA-focused microsite has been updated with the latest, most useful information. Go to *americanstaffing.net/ACA.*

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not be subject to tax penalties, provided that it offers the employee a health plan within the timeframes described above and meets certain other conditions described below.

No Health Plan, No Look-Back

To qualify for limited nonassessment period protection for any month in the initial three months of employment, or in the months of an initial measurement period, not only must the employer offer health coverage at the end of the period as described previously, but the employee must have been "otherwise eligible" for the coverage in the month.

Thus, a staffing firm that does not maintain a plan for its temporary or contract employees in the first three- or 12-month period of employment (and who therefore would not have been otherwise eligible for coverage) will be subject to penalties for any calendar month during the period (excluding the month employees start work, unless they started on the first of the month) in which an employee worked full time and received a subsidy from an ACA exchange—even if the employee separates from service before completing the period or averages less than 130 hours of service per month during the period.

The policy rationale for requiring employers to maintain a group health plan as a condition of limited nonassessment period protection is not explicitly stated in the final regulations, but it is clearly evidenced in the regulatory history. Early discussion of the look-back approach showed that regulators recognized that it would be onerous and impractical to require employers to enroll, drop, and re-enroll in coverage employees who typically work intermittently, generally for short periods of time, and whose full-time status cannot be reasonably determined on their start date.

No thought was given to relieving employers from tax penalties if they did not maintain a plan. Bottom line: Employers that do not maintain plans cannot use look-back periods to determine full-time status or avoid penalties.

Employer Penalties Under the Rules

Exposure of employers to ACA penalties can differ dramatically depending on whether and what type of health coverage is offered.

A staffing firm that does not offer a basic (i.e., nonminimum value) minimum essential coverage (MEC) plan to at least 95% of its full-time employees will be subject to the "a" penalty on every employee (excluding the first 30) that works full time in a month, irrespective of how the employee is classified, provided at least one employee receives a subsidy in the month. Even if such a plan is offered, if it is offered to new employees classified as part-time, seasonal, or variable-hour only after they work full time during a look-back period, the firm incurs a potential risk of failing the "95% offer" requirement if the Internal Revenue Service later determines that a substantial number of those employees were misclassified and should have been treated as full-time at the start. In that case, the employer will likewise be subject to the "a" penalty on employees that work full time in a month.

To avoid "a" penalties, the best practice for staffing firms, in ASA's view, is to offer at least a basic

ACA Look-Back Rules—At-a-Glance

Here's a quick refresher on the ACA look-back rules. For more ACA background documents, go to *americanstaffing.net/ACA.*

The ACA requires employers with 50 or more full-time employees to offer those employees (and their dependents) the opportunity to enroll in "minimum essential coverage" or be subject to tax penalties for those working full time. Recognizing that it can be hard to identify which employees are full-time, the final employer regulations provide two methods for making those decisions: the "monthly measurement method" and the "look-back measurement method." The latter method was specifically developed for staffing firms and other employers whose employee work patterns are variable and uncertain.

Under the look-back measurement method, employers may use a look-back period to defer offers of health insurance coverage to certain new employees. For example, employers can take up to 12 months before offering coverage to new "variable-hour" employees—those whose work patterns are expected to be uncertain and unpredictable. If those employees work full time during the period (at least 1,560 hours) the employer must offer coverage—generally within 30 days—after the end of the period. If it does offer coverage, the employer will not be assessed penalties for the prior 12 months, provided it had a health plan in place that it could have offered the employees had they not been in a look-back period.

Employers that do not have health plans that they could

MEC plan to all new, full-time employees at the time of application, at the start of an assignment, or after a short waiting period (e.g., 60 days) after the assignment starts—even if they could be classified as variable-hour and subject to a 12-month look-back. In fact, because basic MEC plans are inexpensive, and to avoid tracking hours, some staffing firms simply offer the plan to all new employees, even if they are not expected to work full-time hours.

The ACA's reporting requirements reflect the provisions discussed above. For example, if a staffing firm offers no coverage, that will be reflected in Part III, Column (b) of the Form 1094-C authoritative transmittal, thus signaling to the IRS that any employee working at least 130 hours in a month is full time. If the firm maintains at least a basic MEC plan, that also will be reflected in Part III, Column (b) of Form 1094-C, but the employees will not be considered full-time during their initial measurement periods (up to 13 months), thus protecting the employer against the "a" penalty during such periods. But if the plan is not minimum value, the employer cannot enter code "2D"—the "4980H(b) limited nonassessment period" code—on Line 16 of Form 1095-C, thus signaling that the employer is subject to the "b" penalty during such periods.

How to Estimate the "b" Penalty

As discussed above, to get limited nonassessment period protection against the "b" penalty, the staffing firm must maintain an MEC plan that provides minimum value. Because of low employee participation rates, and the potential for unlimited claims liability, many insurance carriers have been unable to underwrite separate minimum value coverage for temporary and contract employees at a reasonable cost—or at all. Staffing firms facing this situation will have little choice but to pay the monthly "b" penalty on full-time employees getting subsidies.

As the issue went to press, ASA members had just begun receiving the first batch of notices from the U.S. Department of Health and Human Services informing them of the employees who received subsidies "for at least one month during 2016" in one of the 37 health care exchanges operated by the federal government. As reported on *staffingtoday.net* in the July 1 issue, early indications are that the number of temporary employees getting subsidies, and thus staffing firm exposure to the "b" penalty, is low. Moreover, in estimating their "b" penalties, staffing firms that offer a basic MEC plan to at least 95% of their full-time employees (and their dependents) can exclude certain employees—those who did not work full time in the month, those who enrolled in the MEC plan, and those enrolled in a state Medicaid program—which could substantially reduce their liability. ■

Edward A. Lenz, Esq., is senior counsel for the American Staffing Association. He will moderate a session on the latest ACA developments at Staffing World® in October. Go to *staffingworld.net* for details. Send feedback on this article to success@americanstaffing.net. Follow ASA on Twitter @StaffingTweets.

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have offered during the look-back period will be subject to penalties for any month during the period in which an employee worked full time (i.e., at least 130 hours)—even if the employee doesn't work the entire period or averages less than 1,560 hours over the period. The reason is that the look-back provisions were designed to allow employers that maintain health plans to avoid the disruption of having to enroll, drop, and re-enroll employees who come and go unpredictably. They were not intended to allow employers to avoid penalties if they do not have plans to offer.

The great majority of staffing firms should have no difficulty complying with these requirements. Virtually all offer at least basic MEC coverage to new employees right away, or after a short waiting period, and thus have no exposure to the so-called "a" penalty on all full-time employees. Staffing firms that maintain minimum value plans, but defer offering such coverage to variable-hour employees, can avoid the "b" penalty during the look-back period on employees getting subsidies (assuming the employees are properly classified at the start) if they offer the coverage on a timely basis as previously noted. But firms that do not have minimum value plans cannot use a look-back period to avoid "b" penalties.

Have additional questions?
Connect with ASA senior counsel Ed Lenz on ASA Central, *asacentral.americanstaffing.net*.