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Offers of Coverage Under the Affordable Care Act—Answers to Frequently Asked Questions

As staffing firms get ready for ACA implementation on Jan. 1, questions abound regarding the mechanics of offering coverage to their temporary and contract employees and the rules for enrolling them. This document addresses the most frequently asked questions on this topic.

1. What are the ACA's play or pay rules, and why are they important?

The ACA's employer shared responsibility, or play-or-pay, rules require "large employers" (i.e., in 2015 employers with 100 or more full-time and full-time equivalent employees) to *offer* group health plan coverage (i.e., "play") or face the prospect of having to pay a penalty (i.e., "pay") if at least one full-time employee is enrolled in a qualified health plan and receives a premium tax credit. For a summary of how these rules affect staffing firms, see "Countdown to ACA Compliance" in the May–June 2014 issue of *Staffing Success* magazine.

2. What are the penalties for failing to make the requisite offer of coverage?

Large employers are subject to a penalty under U.S. Internal Revenue Service Code §4980H(a)—the "a" penalty—if they fail to offer to at least 70% (in 2015) of their full-time employees (and their dependents) the opportunity to enroll in "minimum essential coverage." The "a" penalty is imposed monthly in an amount equal to $166.67 multiplied by the number of the employer's full-time employees, excluding the first 30 (80 in 2015). If the coverage offered is not "affordable" or does not provide "minimum value" under the law, then the employer is subject to penalty under IRS Code §4980H(b)—the "b" penalty—of $250 per month multiplied by the number of full-time employees getting subsidies. The amount of the "b" penalty can never exceed, in total, the amount of the "a" penalty.

3. How are "affordable" and "minimum value" defined?

Employer-provided health insurance coverage is deemed "affordable" if the premium required to be paid by the employee for self-only coverage does not exceed 9.5% of the employee's household income. Since employers have no way of knowing an employee's household income, the law provides employers three "safe harbors" for determining affordability that are based on the employee's wages, rather than household income. The safe harbor can be based on the employee's W-2 wages; the employee's "rate of pay" x 130 hours x 9.5%; or 9.5% of the federal poverty level for a single individual.

"Minimum value" is an actuarial test of the plan's generosity. To qualify as minimum value, an employer's health plan must pay for at least 60% of all plan benefits, with the balance being satisfied by cost-sharing (e.g., employee co-pays and deductibles). Final regulations establish rules for determining minimum value including the use of an online calculator.

4. What coverage must an employer offer to comply with the play or pay rules?

An employer is not treated as having offered coverage unless the coverage qualifies as "minimum essential coverage" (MEC). MEC includes coverage under an "eligible employer-sponsored plan." An "eligible employer-sponsored plan" includes "group health plans offered in the small or large group market within a state" but does not include a plan that provides only "excepted benefits" as defined under the Public Health Service Act, e.g., stand-alone vision or dental benefits, hospital and fixed indemnity plans, Medicare supplement coverage, etc.

5. Can a "skinny" health plan qualify as MEC?

Yes. Any employer group health plan that covers medical care meets the basic definition of MEC, alternatively referred to as "skinny" or MEC plans that cover only preventative and wellness services. While MEC plans generally will be affordable, they are not sufficiently generous to meet minimum value and the employer will therefore still be subject to the $250 per month "b" penalty described earlier in this document. Offering a skinny plan will, however, permit an employer to avoid the $166.67 per month "a" penalty on all full-time employees.

6. Can an employee enroll in an employer's skinny plan and also receive a subsidy to buy health coverage through a public exchange?

No. Employees who voluntarily enroll in an employer's MEC plan are not eligible for a government subsidy *even if the plan is unaffordable or doesn't provide minimum value*. As a consequence, as long as the employee is enrolled in such a plan, the employer will not be subject to either the "a" or the "b" penalty with respect those employees.

7. Can an employer avoid all penalties by requiring all employees to enroll in a skinny MEC plan as a condition of employment?

No. As noted in Q6, an employer will not be subject to penalties if an employee *voluntarily* enrolls in a MEC plan that is unaffordable or doesn't provide minimum value, but the employer can't avoid penalties by compelling all employees to enroll in such a plan—even if it is offered at no cost.

8. Can a staffing firm offer more generous benefits to its internal staff than those offered to its temporary employees?

Yes, at least for 2015. The question relates to the ACA's nondiscrimination provisions applicable to insured health plans. The IRS has deferred enforcement of those provisions until final rules are issued. There is no indication of when those rules will be issued, but when they are they will apply only to plan years beginning on or after issuance. Self-insured health plans technically remain subject to nondiscrimination testing under rules that have been in effect for decades. Those rules have rarely been enforced. But since the ACA requires that the nondiscrimination rules for fully insured plans be similar to the nondiscrimination rules that currently apply to self-insured plans, the government is expected to revisit the self-insured rules.

9. What are the rules for making offers of coverage?

The ACA does not prescribe rules regarding how offers of coverage must be made, but, along with the Employee Retirement Income Security Act of 1974 (Erisa), does require that employees be provided with certain information and notices relating to the benefits offered.

Erisa requires that the material terms of a group health plan—which would include eligibility and enrollment—be reflected in a written plan document and communicated to employees in a "summary plan description" (SPD). Erisa also subjects group health plan sponsors to fiduciary standards that require them to act for the "exclusive benefit" of plan participants. Any attempt to discourage employees from enrolling would run afoul of these rules.

Employers often communicate the terms of their plans through materials such as employee handbooks and open-enrollment information provided by carriers, which typically don't meet Erisa requirements. This has not been a major concern since Erisa does not impose separate penalties for failing to have a proper plan document or distribute a compliant SPD. To protect themselves, however, employers are encouraged to provide employees, in a timely manner, with Erisa-compliant plan documents that describe in clear, unambiguous terms what coverage is available, to whom, and at what cost—and the enrollment process should be consistent with the plan terms.

The ACA added a new notice requirement relating to group health plans referred to as the "Summary of Benefits and Coverage" (SBC). Unlike the Erisa plan document and SPD requirements, failure to provide an SBC can trigger significant penalties. But since SBC's are not required to include plan eligibility terms, they are of little or no use for purposes of documenting that an offer of coverage was made or made timely.

10. Do employers still have to provide the U.S. Department of Labor "exchange notice" to all new employees?

Yes. Beginning Oct. 1, 2013, all employers subject to the Fair Labor Standards Act were required to start notifying employees "at the time of hire" of their health insurance options. Staffing firms can satisfy this requirement with respect to new temporary and contract employees by furnishing the notice at the time an individual first applies for work. The notice must include the following information:

- The existence of the new health insurance "marketplaces," including a description of the services provided and instructions for how to contact the marketplace for assistance
- Whether the employer offers health coverage and, if the employer does not offer a 60% minimum value plan, notice that the employee may be eligible for a premium tax credit for coverage purchased from the marketplace
- That employees who buy qualified coverage from the marketplace may lose the tax-advantaged employer contribution, if any, to any health plan offered by their employer

These three essential pieces of information are contained in Part A of the model employer notice form published by the U.S. Department of Labor. Hence, all employers,

whether or not they offer a health insurance plan, can satisfy the notice requirement by providing employees with Part A only. Employers that offer health coverage are not required to furnish any of the health insurance plan information called for in Part B.

Although not legally required, Part A includes a space for naming a person whom employees can contact for information regarding the employer's coverage. If a contact name is provided, the employer could voluntarily furnish all or part of the Part B information in an effort to minimize the number of employee inquiries.

The Department of Labor has announced that there is no fine or penalty under the law for not providing the notice, but this does not mean that staffing firms should not comply. Sponsors of group health plans have certain fiduciary obligations to plan participants and beneficiaries-and employees potentially could be adversely affected by not getting the notice, which could trigger private lawsuits.

The Department of Labor notice should be given to new employees throughout the year, not just during the *healthcare.gov* (or any other) open enrollment period. Details regarding the notice requirement and copies of the notice forms can be downloaded at *dol.gov/ebsa/newsroom/tr13-02.html*.

11. Can staffing firms offer coverage to its temporary and contract employees at the time of initial application and before they actually start work?

Yes. Most individuals seeking temporary or contract employment with a staffing firm apply at a staffing firm office and, if qualified, are generally considered "hired" at that time, even though they may not actually start work (if at all) at some later time. Because applicants rarely, if ever, have occasion to return to the staffing firm's office, the firm could require applicants to make an election at the time of hire.

If the staffing firm plans to cover all full-time employees, *irrespective of their variable hour or non-variable hour status*, applicants should be informed that coverage will become effective when they actually start work (subject to any allowable waiting period) and that any employee premium contribution will be deducted from their pay at that time.

If, however, the staffing firm intends to use a look-back measurement method for determining the full-time status of new variable-hour employees, it should advise applicants that, although they are making their election at the time of application, the effective date of coverage will depend on how they are classified on their start date and that, if they are variable-hour, they may not be eligible for coverage until they work full-time over their look-back period.

12. How long will an employee's election made at the time of hire be valid?

The election form should specifically limit on how long elections are effective. While not required, it might make sense to permit affected employees to change elections at open enrollment.

Note: Under the Section 125 plan rules, plan years are not permitted to exceed 12 months, thus new elections would be required each year.

If the coverage offered is subject to a 90-day waiting period, will I be subject to penalties during the first three months?

It depends on the nature of the coverage offered. Under the so-called "non-assessment period" rules applicable to new non-variable hour employees who on their start date are reasonably expected to be full-time, employers will not be subject to the "a" penalty for any calendar month of the three-month period beginning with the first day of the first full calendar month of employment provided the employer offers at least a basic MEC plan no later than the first day of the fourth full calendar month of employment. To avoid the "b" penalty, the coverage offered must also provide minimum value.

Note: The non-assessment period and waiting period rules are not the same. Therefore, just because an employer offers coverage by the first day of the fourth calendar month under the non-assessment period rules does not necessarily mean the offer meets the 90-day maximum waiting period for plan enrollment. To ensure that the coverage offered satisfies the waiting period rules, coverage must be effective no later than the 91st day of employment.

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14. Must staffing firms obtain signed waivers from applicants who decline the employer's offer of coverage?

There is no legal requirement that employers obtain signed waivers from employees who decline the employer's offer of coverage. But staffing firms should consider it a best practice because, in case of dispute, the firm may need to document that an offer of coverage was made or made timely, and that the employee either accepted or declined coverage. In addition, insurance carriers may base participation requirements on "eligible" employees and may exclude from the eligible pool employees who opt out for certain reasons, such as enrollment in other coverage (e.g., a spouse, or government programs such as Medicare and Medicaid). Since this could make it easier to meet the participation requirements, applicants should be asked to state their reason for opting out.

15. Can a staffing firm auto-enroll applicants at the time of hire?

Yes. Nothing would prevent a staffing firm from automatically enrolling job applicants at the time of hire. Any such process would be subject to the Erisa information and notice requirements described in Q9. The terms of the automatic enrollment would have to be explained clearly and in writing. Employees must be given the opportunity to opt out unless the coverage is offered at no cost. But, as explained in Q7, auto-enrolling employees, even at no cost, will not avoid exposure to the "b" penalty.

16. Can employees who elect coverage at the time of hire later decline the coverage?

While employers are free under Erisa to design their plans to permit employees to change coverage elections at-will, the tax laws restrict their ability to do so. Specifically, where an employee is paying for all or some portion of the premiums with pretax dollars under a Section 125 cafeteria plan, pretax elections may only be changed mid-year when there is a change-in-status event (e.g., marriage, divorce, birth of a child, etc.) or a change in cost or coverage. Moreover, the right to mid-year cafeteria plan election changes must be included in the employer's cafeteria plan documents. These restrictions do not apply if benefits are paid with after-tax dollars.

17. Can applicants who elect coverage at the time of hire change their mind and opt out before going on their first assignment?

Yes, provided the plan expressly permits it. The tax considerations discussed in Q16 would not come into play in such a case since the employee will not yet have made any premium payments. Individuals should be advised in the application that they can change their election prior to accepting an assignment by notifying the staffing firm in writing (which could include an electronic communication).

18. What if an employee does not wish to make an election at the time of application?

Employers can require individuals to make an election at the time of application—*but the requirement must be clearly stated in the application form and in the Summary Plan Description*. For example, the requirement could state: "If you leave this section blank, you will be treated as having declined coverage."

Note: This question highlights the critical role that the plan documents play in the offer and enrollment process.

19. Can a staffing firm deduct an employee's share of the premium before the start of the coverage period for which the payment is owed?

Participant contributions are generally treated as "plan assets" subject to Erisa. Fiduciaries must hold plan assets for the exclusive benefit of participants and defraying the reasonable costs of plan administration. In the context of group health plans, participant contributions are typically deducted so as to facilitate the timely payment of premiums. Any attempt to collect premiums earlier than reasonably required to make timely payment could result in a violation of the Erisa fiduciary standards or plan assets

rules, both of which provide the Department of Labor and plan participants alike the right to seek redress.

20. Do staffing firms have to maintain coverage if an employee's hours drop, or their assignment ends with no immediate prospect for further employment?

The often uncertain nature of temporary work, and because insurance premiums generally must be pre-paid at the beginning of each month, means that staffing firms will inevitably face having to pay a full month's premium for employees who don't work a full month because their assignment ends or their hours drop. Staffing firms should discuss with their insurance brokers or carriers whether, in such cases, premium payments already made can be rebated on a pro-rated basis. For subsequent months, however, depending on the facts and circumstances, employers may not have to maintain coverage for employees whose hours drop or who are separated from service.

Loss of Hours: If an employee's hours drop, they will still be considered employed and the staffing firm may have to maintain coverage (unless they work no hours in the month). Employers do not, however, have to continue coverage if employees fail to timely pay their share of the premium because of the loss of hours, or for any other reason.

Separation from Service/Break in Service Rules: A staffing firm will not have to maintain coverage for an employee who is terminated or otherwise separated from service. The preamble to the final employer regulations states that "until further guidance is issued, temporary staffing firms, like all employers generally, may determine when an employee has separated from service by considering all available facts and circumstances and by using a reasonable method that is consistent with the employer's general practices for other purposes, such as the qualified plan rules, COBRA, and applicable state law." Completion of an assignment arguably would qualify as a separation from service.

Once a separation occurs, the staffing firm's obligation to reinstate coverage upon the employee's return to work will depend on how long the employee is absent. Under the break-in-service rules, if an employee has no hours of service for at least 13 consecutive weeks, the employee can be treated as a "new" employee upon his or her return. Alternatively, under a so-called "rule of parity," an employee could be treated as "new" if the break is at least four consecutive weeks and is longer than the period of employment immediately preceding the break. New employees can be subject to a new look-back period if they qualify as variable-hour.

An employee who has a period with no hours of service but has not experienced a break in service as described above, will, upon resuming service, be treated as a "continuing employee." In such cases, employers do not have to maintain coverage during the period of absence but, upon resumption of service, the employee must continue being treated as full-time and must be offered coverage "as soon as administratively practicable" (i.e., no later than the first day of the calendar month following resumption of services).

Example of coverage for "continuing" employee: Assume a staffing firm, as part of its customary practice, treats the end of an assignment (with no reasonable prospect of reassignment) as a separation from service. Employee X's assignment ends on Aug. 15, with no prospect of a new assignment by Sept. 1. The staffing firm arguably could drop coverage

for September. If X is reassigned on Sept. 15 for a period that is expected to extend into October, the staffing firm would have to offer coverage no later than Oct. 1. Because X is not a new employee, no new waiting period can be applied.

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