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Q&A FROM ASSUREX GLOBAL WEBINAR

MAKING SENSE OF THE EMPLOYEE CLASSIFICATION PUZZLE

APRIL 28, 2016

Q. 95% of employees or FTE's?

A. Penalties under §4980H(a) apply if an applicable large employer - 50 or more full-time equivalents (FTEs) - fails to offer coverage to 95% of full-time employees (those averaging 30 or more hours of service per week).

Q. A full-time employee for the purpose of medical and other benefits is an employee who works a minimum of thirty hours per week. If a part-time employee works more than 30 hours or a full-time employee who works more than 30 hours. How do you determine benefits eligibility? Please clarify.

A. Under § 4980H, which applies to applicable large employers - those that average 50 or more full-time equivalents (FTEs) in the previous calendar year - full-time is defined as averaging 30 or more hours of service per week (or 130 or more per month). An employer may use the monthly measurement method or the look-back measurement method to determine full-time status.

Q. Does offer of coverage need to be made for Temporary full time employee with short, predetermined employment period?

A. Assuming you are asking on behalf of an applicable large employer (50 or more FTEs) subject to §4980H offer of coverage requirements… In general, there are no special rules/exemptions for short-term or temporary employees. A temporary employee who works full-time hours needs to be treated just like any other full-time employee and offered coverage accordingly to avoid potential penalties under §4980H. This is the case unless the temporary employee may be categorized as "seasonal" and the employer is using the look-back measurement method.

Seasonal employee" is defined as an employee in a position for which the customary annual employment is six months or less. The reference to customary means that by the nature of the position an employee in this position typically works for a period of six months or less, and that period should begin each calendar year in approximately the same part of the year, such as summer or winter.

If the employer is using the look-back measurement method and these employees meet the definition of seasonal, they will be considered part-time and no offer of coverage is required.

However, if the position does not fit the definition of seasonal, or the employer uses the monthly measurement method, then generally the employee is considered full-time in any month the employee achieves 130 or more hours of service and coverage would need to be offered after the plan waiting period to avoid potential penalties.

Keep in mind that offering to 95% of full-time employees avoids the bigger penalty under §4980H(a). So if these temporary employees make up a small percentage (2-3%) of the total full-time employee count, the employer could choose not to offer coverage and take a risk of penalty under §4980H(b) for any that are enrolled through a public Exchange and receiving a tax subsidy ($270/month for 2016).

Q. For a temporary employee hire in a nonprofit agency and is under a probationary period for 6 months... Would agency have to make offer for insurance before the 90 day period?

A. The waiting period rules generally require that any employees that meet the plan eligibility rules must be offered coverage no later than the 91st calendar day unless the employer is using an initial measurement period, 1-month orientation period or cumulative hours of service requirement (which can't exceed 1200 hours of service). The only way to get around this if the employee meets the plan eligibility rules is to exclude temporary employees/interns from eligibility completely.

NOTE - in order to ensure compliance with both §4980H rules (for applicable large employers) and the waiting period rules, if an employee meets the plan eligibility rules, the client should make sure coverage is effective no later than 1st of the 4th month following the date of hire for those hired as full-time.

Q. Hello: regarding FMLA, the law states the employer must have at least 50 employees to be able to offer the FMLA benefit. We are at 44 employees but are part of a much larger group which goes with a different name, In addition we have subsidiaries all over the world. With this information, this office (44 employees) qualify to provide the FMLA benefit?

A. The FMLA does not specifically refer to §414 rules or apply any controlled group-type concept; however, DOL guidance indicates that separate entities will be deemed to be part of a single employer if they are considered to be "joint employers" or "successors in interest". There is also another standard called "integrated employer". Both standards are somewhat subjective, but for the purpose of determining if the employer is subject to FMLA, the integrated employer test is most important (and therefore employees aggregated in determining the 50 threshold).

A determination of whether or not separate entities are an integrated employer is not determined by reviewing the entire relationship in its totality. Factors considered in determining whether two or more entities are an integrated employer include:

- Common management;
- Interrelation between operations;
- Centralized control of labor relations; and
- Degree of common ownership/financial control.

We typically advise employers to have the company structure reviewed by an employment law attorney experienced in FMLA to determine if the companies need to be treated as a single employer.

Q. How are things handled when a staffing agency or temp agency is involved?

A. "The common law employer is required to make an offer of coverage under §4980H and handle reporting for full-time employees. The determination of who is the common law employer can be difficult between a staffing agency and a contracting company. It is possible the contract between the employer and the staffing agency will designate who is considered the common law employer, but if not, it will be necessary to discuss and potentially get some advice from an employment law attorney based on the circumstances.

COMMON LAW EMPLOYER – CONTRACTING COMPANY

If the contracting company is the common law employer (rather than the staffing agency), the contracting company must track hours of service in the same way it does for any other employees and is responsible for offering coverage if the employee is full-time. However, one possible way to satisfy the requirement for an offer of coverage is to have it offered through the staffing agency on behalf of the contracting company; and the fee paid for the employee must be increased accordingly. See the language from the final rules below:

"...an offer of coverage to an employee performing services for an employer that is a client of a professional employer organization or other staffing firm (in the typical case in which the professional employer organization or staffing firm is not the common law employer of the individual) (referred to in this section IX.B of the preamble as a "staffing firm") made by the staffing firm on behalf of the client employer under a plan established or maintained by the staffing firm, is treated as an offer of coverage made by the client employer for purposes of §4980H. For this purpose, an offer of coverage is treated as made on behalf of a client employer only if the fee the client employer would pay to the staffing firm for an employee enrolled in health coverage under the plan is higher than the fee the client employer would pay to the staffing firm for the same employee if the employee did not enroll in health coverage under the plan."

Ultimately, if coverage is not offered that meets §4980H requirements, it would be the contracting company, not the staffing agency, that would be on the hook for any potential penalties. And regardless, it would be the contracting company that is on the hook for reporting via Form 1095-C for such employee.

COMMON LAW EMPLOYER – STAFFING AGENCY

If the staffing agency is the common law employer (rather than the contracting company), then the staffing agency is responsible for tracking hours of service and offering coverage if the employee is full-time. Generally, the same rules apply to staffing agencies as to any other employers when tracking hours of service on either a monthly basis or using the look-back measurement method and offering coverage to those employees determined to be full-time.

Q. Is the ACA the greatest catalyst for the recent change in this focus on employee status?

A. In general, employers (of any size) are not obligated to offer benefits to independent contractors. But we warn employers to be careful as there is often misclassification in this area. Unfortunately, the ultimate distinction between "employee" and "independent contractor" is far from black or white. It would be advisable to work with an employment law attorney if there is any question as to the relationship. Both the Fair Labor Standards Act (FLSA) and IRS rules contain requirements and restrictions as to who can be treated as an independent contractor versus an employee...One of the main considerations is who "controls" the individual's actions. We are aware that the IRS and DOL are in the middle of a massive effort to identify employers who misclassify individuals as independent contractors when they should actually be treated as employees. This initiative has nothing to do with the ACA, as it was launched a prior to the ACA's implementation; however, the ACA gives employers one more reason to be careful about who they call an independent contractor, because if misclassified, the employer may owe penalties under the shared responsibility rules for employers on top of the risk for paying back wages, tax penalties and fines under FLSA and IRS rules. Common law employee status is critical for several purposes beyond the ACA.

Q. My company has less than 50 FTEs. Am I required to offer benefits to our FTEs?

A. Employers averaging less than 50 full-time equivalents (FTEs) in the previous calendar year are not required to offer coverage to full-time employees as required under §4980H. So unless applicable state law requires otherwise, small employers (less than 50 FTEs) are not required to offer coverage.

Q. So 1099 employees would be considered counted for ACA reasons and over 50 employees need to be offered minimal credible coverage that meets the 9.5% income test.

A. No. If an individual is correctly labeled as an independent contractor (receives a 1099), the individual is not counted for purposes of §4980H and would not require an offer of coverage to avoid potential penalties.

Q. Would you say the word "contractor" and "temporary" are interchangeable for the purposes of this conversation? Or is there a difference?

A. Temporary, short-term, intern, contractor…the terms are all used broadly and sometimes interchangeably for a variety of different positions. What's important is whether the individual needs to be treated as an employee for a variety of purposes, including ACA compliance.

Q. Just finished listening to the webinar and have one question. We have employees labeled as substitutes and they work the hours that they want to work and it may be 10 hours per week and it could be 50 hours per week. Are we required to offer them insurance? If we offer them insurance and they don't work the full hours to be able to deduct their insurance premium, it could be a bookkeeping nightmare to try to collect the premiums from them if they don't work for a full pay period.

A. If this involves an applicable large employer (50 or more FTEs), §4980H rules require an offer of coverage for any employee that is considered full-time (averages 30 or more hours of service per week). The employer may measure full-time status either on a monthly basis or using the look-back measurement method. For a variable hour position such as the one described, depending upon how many there are, it may be beneficial to use the look-back measurement method, which would allow the hours to be averaged over up to 12 months. Ultimately, if the employee is considered full-time, coverage would need to be offered to avoid potential penalties.

If an offer of coverage is required to an employee that is not actively at work or receiving a paycheck (or doesn't have enough in the paycheck to cover the employee contribution), it will be necessary to have a process for obtaining the employee contribution. The employer really has flexibility in how it ultimately decides to handle this process, but should put a process in place so that it can be properly communicated and enforced on a uniform basis. Ultimately, if the employee fails to make the employee contribution in accordance with the employer's policy, there is no requirement to continue to offer coverage. And further, if coverage is terminated due to nonpayment, there is generally no right to COBRA continuation coverage.

Q. What does "common law" employee mean?

A. Specifically for purposes of §4980H, an employee does not include a sole proprietor, partner in a partnership, a 2% or more shareholder in an S-Corp or a leased employee (independent contractor).

Q. If we do a 12 month look back and our teacher aides are employed for 6.5 hpd for the school year, can we average their hours over a 42 week year. The are off all summer and two other weeks during the school year?

A. There are special rules for educational organizations using the look-back measurement method which require the employer to either exclude the employment break period (i.e. period of 4 or more weeks with no hours of service) or impute hours of service when measuring to prevent those employees that generally work full-time hours during the school year to be considered part-time. And for any employees that average full-time hours during the measurement period, they would be considered full-time for the entire stability period (e.g. plan year), even during summer months when they may have a reduction in hours or no hours at all.


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