Q&A from Assurex Global Webinar:

"ACA Issues When Using a Staffing Firm"

Q: What's a MEWA?	A: MEWA stands for Multiple Employer Welfare Arrangement. This is when multiple employers (who are separate and not part of an aggregated group of employers as defined by Code §414) offer benefits to their employees under a single plan. There are special rules regarding MEWAs.
Q: How do we know if someone receives a subsidy from the exchange?	A: The ACA requires Exchanges to notify employers when it is aware that an employee is receiving a subsidy. Some state-based Exchanges have started doing this. The Federal Marketplace will begin notifying employers in 2016. If a notification is not provided, which will not always occur depending upon the Exchange and/or whether the employee lists the employer on the application, the employer may not find out until after employer reporting occurs and reconciliation takes place.
Q: Based on this example, then the A penalty applies to all employees even those that are offered coverage?	A: Correct. The §4980H(a) penalty applies to all full-time employees not counting the first 30 (80 in 2015), even those that have coverage.
Q: Can the employer give the staffing agency employee a memo that says if you apply for insurance out in the marketplace you are to list the staffing agency as the employer?	A: Such a memo, or the individual stating that to an Exchange, would not change which employer would ultimately be liable for the individual. That determination would be made on the particular facts of the employment situation, not on the individual representation to the Exchange.
Q: If we have "leased employees" from staffing firms and independent contractors (not our employees, we don't pay them), do we need to include them in 1095C Forms?	A: The term "leased employee" is problematic. Reporting responsibility lies with the common law employer no matter what the arrangement is called. There are also specific IRS and DOL rules that determine when an individual can be considered an independent contractor instead of an employee. If an individual is truly an independent contractor, then the employer does not need to provide a 1095 unless the individual is covered by an employer's self-funded plan.

Q: Does it make a difference if the staffing agency themselves offer benefits? If you are contracted with a staffing firm that has guaranteed, in the staffing contract with ABC company, that they will offer MEC to employees placed by them, is the ABC employer then no longer liable for the A penalty?

A: ACA shared responsibility rules contain provisions that if a staffing firm makes an offer of coverage, it may be considered an offer by the client employer if certain conditions are met. One of the most important conditions is that the staffing firm must charge the client employer a higher fee for employees who enroll in coverage than those who do not.

Q: If the staffing firm has contractual language conferring their ultimate right to control the temporary employee's activites at the worksite (with the tacit understanding that the staffing firm will rarely exercise that right), is that enough to safely consider them the Common Law Employee of the staffing firm? Or if the employer treats the employee like any other employee (directs and controls for all practical purposes) can this contractual language be "undone"?

What if there was no existing contract with the staffing firm?

A: The contractual language is not the only factor considered, but it is a very important one. Employers who use a staffing firm should review existing contracts and consider adding language to better define employer responsibilities if necessary.

Q: If you are already an ALE (have 200+ employees), does it matter how many temps or independent contractors you have under ACA?

A: Once an employer determines that they are an ALE, they must offer coverage to 95% of all full-time employees (70% in 2015). So it is critical that the employer properly classify individuals. If an employer improperly classifies individuals as independent contractors, or as temps who are not offered coverage, the employer may miss the 95% threshold and be liable for significant penalties under §4980H(a).

Q: We received many questions asking if a particular situation represented a common law employee/employer relationship.

A: The determination of employee status is very fact specific, and there is no single test or rule that applies to every situation, so we cannot comment on individual cases. Both IRS regulations, and ERISA (examples included below) contain some general guidance on this determination. Employers are advised to seek legal counsel to determine common law employment status for individuals where the relationship is not clear.

- Treas. Regs. §31.3401(c)-1(b) "Generally the relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual 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. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is not an employee."

- In ERISA §3(5) employer is defined as ''any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan...'

Q: What are best practices for ensuring Independent Contractors are not common law employees?

A: As is the case with common law employee determination, independent contractor status is totally dependent upon the specific facts and circumstance. Worker classification initiatives have been a top priority for the IRS, the Department of Labor, and state agencies.

The IRS applies a "right to control test" which considers the nature of the working relationship. They highlight three general aspects of the employment arrangement: financial control, behavioral control, and relationship between the parties. The IRS uses guidelines such as the amount of instruction, training, integration, use of assistants, length of professional relationship, regularity of work, location of work, payment schedule, source of funds for business expenditures, and right to quit.

In the IRS framework, independent contractors retain control over schedule and hours worked, jobs accepted, and performance monitoring. They also can have a major investment in equipment, furnish their own supplies, provide their own insurance, repairs, and other expenses related to their business. This contrasts with employees who usually work at the schedule required by the employer and whose performance the employer directly supervises. Independent contractors can also work for multiple firms, and offer their services to the general public.

The United States Supreme Court has also offered guidelines to distinguish employees from independent contractors:

1. The extent to which services are integral to the employer's business.

2. The permanence of the relationship.

3. The amount of investment in equipment.

4. The degree of control by the principal.

5. The amount of financial risk. More opportunity for profit or loss favors an independent contractor relationship.

6. The amount of initiative, judgment or foresight in open-market competition with others required for the success of the claimed independent enterprise.involves either asking disability-related questions or performing some kind of medical test. Programs that do not require either of these are not subject to the EEOC rules. So, for example, an employer can offer up to a 50% non-smoker incentive under the HIPAA rules as long as they do not test for nicotine. If they test, it becomes subject to the EEOC 30% limit.