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American Staffing Association
277 South Washington Street, Suite 200 ▪ Alexandria, VA 22314-3675 ▪ 703.253.2020 ▪ 703.253.2053 fax ▪ americanstaffing.net

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By Edward A. Lenz, Esq.
Senior Vice President, Legal and Public Affairs
American Staffing Association
703-253-2035
elenz@americanstaffing.net

Alden J. Bianchi, Esq.
Chairman, Compensation and Benefits Practice
Mintz, Levin, Cohn, Ferris, Glovsky & Popeo PC
617-348-3057
abianchi@mintz.com

Health Care Reform Guide for Staffing Firms

The Patient Protection and Affordable Care Act signed by President Obama in 2010 makes sweeping changes in the U.S. health care system, many of which affect employers.

Of primary concern to staffing firms is the requirement that employers offer health insurance coverage to their employees or pay tax penalties. A "look-back" rule recently approved by the Obama administration at the urging of ASA and its business allies should substantially reduce the penalties for most staffing firms. The look-back rule is explained in detail in this paper.

The November elections could affect whether and to what extent the Affordable Care Act is fully implemented, but staffing firms should be planning for implementation regardless. This paper provides a checklist of the key provisions and timelines affecting employers as well as answers to frequently asked questions regarding how the provisions will apply to staffing firms. Many issues remain unresolved and will be addressed in future guidance.

The paper is not intended as legal advice. Staffing firms should consult with their benefits advisers on how the law specifically applies to their firms.

Key Employer Provisions and Timelines

2013—Jan. 1

- Flexible spending account contributions are capped at $2,500.
- Medicare withholding tax increases from 1.45% to 2.35%.
- New 3.8% Medicare tax is imposed on unearned income.
- Employers must report value of employee health benefits on 2012 Form W-2 See the Web site of the U.S. Internal Revenue Service for detailed guidance *(irs.gov/newsroom/article/0,,id=237894,00.html)*.

2013—March 1

- Employers must notify current employees (and all new hires thereafter) of availability of state health benefit exchanges and the employees' potential eligibility for subsidies.

2014—Jan. 1

- Employers with 50 or more full-time or full-time equivalent employees must offer full-time employees (and dependents) health insurance coverage or pay penalties.
- Employers must file annual report to IRS and employees showing health insurance coverage offered.
- Individuals must maintain health insurance coverage for themselves and their dependents or pay a penalty (which the U.S. Supreme Court determined is a tax).

Frequently Asked Questions

Q1. How do I determine whether my company is subject to the law?

The law applies only to employers that employ "an average of at least 50 full-time employees on business days during the preceding calendar year." For this purpose, "full-time employee" means an employee working an average of 30 hours or more per week (at least 130 hours in a calendar month).

"Full-time equivalent" employees are treated as full-time employees in determining whether an employer has 50 or more employees. Because hours worked by temporary employees must be included in determining whether a staffing firm has 50 or more employees, the great majority of staffing firms will be subject to the law.

Seasonal Employees Excluded From Head Count
An employer will not be considered to have 50 or more employees if its work force exceeds 50 employees for 120 days or fewer during the year and the workers beyond the 50th employee are "seasonal workers." U.S. Department of Labor rules define "seasonal employment" generally as work "exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year."

Bona fide independent contractors (1099 workers) are not considered employees and do not have to be included in the head count.

Q2. Can I create separate divisions or subsidiaries to stay under 50 employees?

No. The 50-employee test will be based on the tax code's "control group" rules. In general, those rules treat all firms under common ownership or control as one firm.

Q3. Does the law apply to foreign-owned companies?

Yes. If the foreign company has U.S. operations in which it employs U.S. citizens or legal residents, it will be subject to the law.

Q4. Can an employer be "large" one month and not the next based on its head count from month to month?

No. The law says that an employer's status as a "large" employer is made annually based on its size in the *preceding calendar year.*

Q5. Does the law specify whether the staffing firm or the client is the employer for the purpose of offering health insurance coverage and paying the excise tax?

No. Common-law rules will determine who are employers and employees. Staffing firms should be viewed as the employers if they assume, and properly discharge, the employer responsibilities under the law.

Q6. How does the law apply to payrolled or "leased" employees?

The law generally will apply to any full-time employee of an employer as determined under common law rules. Clients must include "leased employees" employed by a staffing firm or a professional employer organization in determining whether a client is eligible for small business tax credits to help the client buy health insurance for its employees. The tax code generally defines a leased employee as any person who performs services for a client on a substantially full-time basis (i.e., 1,500 hours) for a period of at least one year.

Clients will not have to offer health insurance coverage to leased employees or include them in their head count for purposes of paying employer tax penalties.

Q7. Who is the employer if a staffing firm uses another staffing firm as a subcontractor?

Each firm would be the employer of the individuals on its payroll. Hence, a staffing firm serving as a subcontractor for another staffing firm would be the employer of any employees on the subcontractor's payroll, irrespective of how the services of the subcontractor's employees are billed to the end-user client.

Q8. Who pays the excise tax if the employee works for two or more staffing firms in a month?

Each staffing firm will be considered the employer during the period the employee is on its payroll. To the extent an employee performs services for more than one staffing firm in a month, it will reduce the likelihood that the employee will have worked full-time for any one firm and therefore have to be included in their head count for purposes of the excise tax.

Q9. Assuming I'm subject to the law, how are tax penalties determined?

Effective Jan. 1, 2014, employers with 50 or more employees will be subject to tax penalties if they have at least one employee who receives government tax subsidies to help the employee buy health insurance coverage through a state health benefit exchange.

The penalty amount will depend on whether the employer offers "minimum essential coverage" to its "full-time" employees and dependents. See Q11 for definition of "full-time" and Q13 for definition of "minimum essential coverage."

Employers that don't offer health insurance coverage will be assessed a monthly tax of $166.67 per employee ($2,000 per year) on all full-time employees beyond the 30th employee. Employers that do offer health insurance coverage will pay the lesser of that amount or $250 per month ($3,000 annually) on any full-time employee who receives a subsidy. The tax is nondeductible and will increase based on increases in the consumer price index.

Q10. Can I exclude certain employees for health insurance coverage and penalty purposes?

Yes. In addition to employees who don't work full-time, employees who are enrolled in Medicaid do not have to be counted for purposes of offering benefits or paying penalties. See Q20 for a chart showing income levels and pay rates for Medicaid qualification. In addition, the following individuals do not have to be counted for penalty purposes provided the employer offers all its full-time employees (and their dependents) a plan that provides minimum essential coverage:

- Employees who opt out of the employer plan for reasons other than plan unaffordability or failure to provide minimum value—e.g., employees covered by a spouse's or parent's plan
- Employees who choose to enroll in the employer's plan even though it is "unaffordable" or does not provide minimum value

Q11. Who is a "full-time employee" for the purpose of offering health insurance coverage or paying penalties?

The definition of "full-time" for health insurance coverage and penalty purposes is different from the "50 employee" test. Once you determine that your firm has 50 or more employees and is subject to the law, you then apply a "look-back" rule to determine who is full-time for purposes of offering health insurance coverage and potential penalties. Individuals who are not full-time using the look-back don't have to be counted for coverage or penalty purposes.

To determine who is full-time for a particular calendar year, you can elect to look-back anywhere from three to 12 months to determine if an employee worked full-time (average of 130 hours per month) during that period. Employees who work full-time during the look-back period (also called the measurement period) will be *deemed* full-time during a subsequent "stability period" that will vary based on the length of the look-back but no less than six months. During the stability period, employers must offer health insurance coverage (or pay a penalty) irrespective of the hours worked as long as the individual remains employed. Individuals who perform *no* service in a given month during the stability period should not be considered employed (see Q12).

The look-back guidance distinguishes between "ongoing" and "newly hired" employees. Ongoing employees are tested under a "standard measurement period" selected by the employer. For example, assuming a January–December 12-month standard measurement period, ongoing employees on Jan. 1, 2014, would be identified by looking back at the Jan. 1–Dec. 31, 2013, measurement period to identify employees who worked full-time (at least 1,560 hours). Assuming they are still employed on Jan. 1, 2014, those employees would have to be enrolled in a plan within 90 days (the maximum waiting period for enrollment). If you don't offer a plan, you would pay penalties beginning Jan. 1, 2014, as described in Q9. Full-time employees in 2013 would be considered full time during the 2014 stability period as long as they remain employed.

Employees who did not work full-time in 2013 would not be counted as full-time in 2014. If they are still employed, employers should continue to track their hours in the January–December 2014 standard measurement period and, if they worked full-time in that period, offer them health insurance or pay penalties beginning Jan. 1, 2015.

For "new hires" on or after Jan. 1, 2014, you should track their hours of service from their start date using an "initial measurement period." Assuming you elect a 12-month initial measurement period, you would track their hours until their 12-month month anniversary date to determine whether they worked full-time. If the employee is still working at the end of that initial measurement period, the employee would transition to "ongoing" status and you would test the employee first against the initial measurement period and then against the first standard measurement period.

For example, assume a calendar year standard measurement period and an employee who starts work Feb. 12, 2014. You would test the employee's full-time status over the initial measurement period of Feb. 12, 2014, through Feb. 11, 2015, and also over the standard measurement period of Jan. 1, 2015, through Dec. 31, 2015.

Employees determined to be full-time during an initial measurement period or standard measurement period must be treated as full-time for the entire stability period associated with such period.

Look-Back / Stability / Administrative Period Table		
Look-Back	**Stability**	**Administrative Ongoing / Newly Hired***
3 months	3 months	90 days
6 months	6 months	90 days
12 months	12 months	90 days
** Maximum combined look-back / administrative period for new hires is 13 months*		

Q12. Do I have to continue providing health insurance coverage or pay penalties during the stability period even if an employee isn't working on an assignment?

Individuals would not be considered employed in any month in which they performed no hours of work. However, vacation, holiday, or other days off that the employee has earned and is entitled to be paid for, up to a maximum 160 hours of service, will count as hours worked. ASA is urging the Obama administration to require at least 35 hours of work in a month for an employee to be considered employed.

Q13. What kind of health insurance coverage do I have to offer my full-time employees?

The law doesn't require you to offer health insurance coverage, but whether you do so will affect the penalties you pay.

Employers that do not provide "minimum essential coverage" to all or substantially all their full-time employees (and their dependents) will pay penalties on *all* their full-time employees (except employees enrolled in Medicaid). Employers that do provide such coverage will pay penalties only on those employees who receive tax subsidies (see Q18 for who will be eligible for a subsidy).

"Minimum essential coverage" means any employer group health plan that provides health or medical services. Except for health insurance coverage offered in the individual or small group markets, the law does not specify the benefits that must be offered.[1] Employers are not required to contribute to the cost of the premium, but if the employer makes little or no premium contribution, or if the plan has high co-payments and deductibles, the plan may be "unaffordable" or fail to provide "minimum value," which could affect the number of employees getting subsidies and therefore the employer's exposure to tax penalties (see Q9).

Q14. When must the excise tax be paid?

The law provides that excise taxes are assessed monthly. When they must be paid will be determined by regulations issued by the Secretary of Health and Human Services. One possibility is that employers will pay the excise tax along with their quarterly employment tax payments (IRS Form 941).

Q15. Will "mini-med" plans qualify as minimum essential health insurance coverage?

There are two general types of health plans commonly referred to as "mini-med" plans. One offers traditional health benefits with co-payments and deductibles but generally imposes annual dollar limits. The other type provides fixed dollar indemnity payments and does not involve co-payments, deductibles, or annual dollar limits.

The law severely regulates the first type of mini-med plan by requiring a specified percentage of premiums to be paid out in benefits and by restricting annual dollar limits. Waivers have been granted to allow those plans to continue until Dec. 31,

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1. Beginning Jan. 1, 2014, individual or small group plans must cover "essential health benefits" in 10 benefit categories: ambulatory patient services; emergency services; hospitalization; maternity and newborn care; mental health and substance use disorder services, including behavioral health treatment; prescription drugs; rehabilitative services and devices; laboratory services; preventive and wellness services and chronic disease management; and pediatric services, including oral and vision care. Self-insured plans, grandfathered plans, and large group plans (employers with an average of at least 101 employees) don't have to cover essential health benefits.

2014, but these plans are not expected to be available thereafter. Fixed-dollar indemnity plans will continue to be available and may play a valuable role in recruiting and retaining temporary workers. But they will not qualify as an offer of minimum essential coverage by an employer and will not satisfy an individual's obligation (under the individual mandate upheld by the Supreme Court) to maintain such coverage.

Q16. Will other types of health insurance coverage be available for my temporary employees?

Staffing firms historically have had few practical or economic options for providing health insurance coverage to most temporary workers. The unpredictable and short-term tenure of most temporary employees, and their low plan participation rates, have posed serious challenges for health insurance carriers—which generally require minimum employee participation rates and employer premium contributions. Those underwriting rules have made it virtually impossible for staffing firms to obtain comprehensive, major medical health insurance coverage for short-term temporary workers.

In contrast, health insurance coverage has been, and will continue to be, generally available to certain longer-term workers, especially higher-paid and higher skilled workers whose work patterns are more stable and predictable. The association's success in obtaining a look-back rule, allowing employers to require employees to work full-time for up to 12 consecutive months before coverage has to be offered, should make it easier for staffing firms to obtain, and offer to their temporary employees, health insurance plans that meet the definition of minimum essential coverage under the Affordable Care Act. ASA will be working with its industry partners, suppliers, and other insurance experts to develop a full range of health insurance products that will meet the needs of staffing firms and their employees.

Q17. Will I be able to offer different health insurance coverage levels to my permanent and temporary employees?

That's still unclear. The law includes new nondiscrimination provisions that, for the first time, bar insured group health insurance plans from discriminating in favor of higher-paid employees regarding eligibility and benefits. Enforcement of those provisions has been deferred while guidance is being developed, and ASA and its allies are working with the administration to develop rules that will provide sufficient flexibility so that staffing firms and other employers will continue to be able to design plans with varying benefit levels to accommodate different segments of their work force. It is unclear at this time to what extent plans will be permitted to vary in terms of scope and value of benefits and employer contribution levels.

Q18. Which employees will be eligible for a tax subsidy?

An employee will be eligible for a subsidy if the employer's health plan is "unaffordable" or does not provide "minimum value," and the employee's household income is between 100% and 400% of the federal poverty level. (See the poverty level chart in Q19.)

A plan will be considered unaffordable if the employee's share of the premium of a self-only plan exceeds 9.5% of the employee's household income.[2] However, employers will be allowed to determine affordability based on an employee's W-2 wages rather than household income. If the plan is affordable based on the employee's wages, the employer will not be subject to a tax penalty even if the employee is subsequently deemed eligible for a tax subsidy based on household income.

An employee also may be eligible for a subsidy if the employer's plan does not provide "minimum value." This is an actuarial determination that will be based on the plan's cost-sharing features, such as deductibles, co-payments, and coinsurance. The government is expected to provide a formula for employers and insurance carriers to make this determination on a plan-by-plan basis.

Employees may be eligible for two types of subsidy—premium assistance tax credits, and "cost-sharing reductions." The former is a refundable tax credit payable in advance directly to the insurer to subsidize employees' purchase of health insurance plans through a state health benefit exchange. Cost-sharing reductions lower the annual out-of-pocket cost-sharing expenses for individuals and households. Both are available on a sliding scale basis determined by household income.

Employees enrolled in an employer health plan or Medicaid are eligible for a subsidy.

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2. Although the law states that an offer of health insurance coverage must include an employee's dependents, the administration says the affordability test does not apply to dependent coverage.

Q19. What are the current federal poverty guidelines?

The 2012 federal poverty guidelines established by the U.S. Department of Health and Human Services are set forth in this table.

People in Family	**48 Contiguous States and Washington, DC** Poverty Guideline	**Alaska** Poverty Guideline	**Hawaii** Poverty Guideline
1	$11,170	$13,970	$12,860
2	15,130	18,920	17,410
3	19,090	23,870	21,960
4	23,050	28,820	26,510
5	27,010	33,770	31,060
6	30,970	38,720	35,610
7	34,930	43,670	40,160
8	38,890	48,620	44,710
	Families with more than eight: add $3,960 per additional person	Families with more than eight: add $4,950 per additional person	Families with more than eight: add $4,550 per additional person

(Source: *Federal Register,* Vol. 77, No. 17, Jan. 26, 2012, pp. 4034–5)

Q20. What are the Medicaid eligibility tests and the maximum employee premium share at various income levels for employer health insurance coverage to be considered "affordable"?

Estimates for Eligibility for Medicaid or Tax Credits and Affordability Safe Harbor					
	Percent of federal poverty level	Annual income	Hourly wage[3]	Annual affordable employee premium (self-only) based on 9.5% of current wages	Monthly affordable employee premium (self-only) based on 9.5% of current wages[4]
In states that expand Medicaid to 133% of Federal Poverty Level					
Minimum wage worker eligible for Medicaid[5]	~101%	$11,310	$7.25	Medicaid eligible	n/a
Statutory upper limit for Medicaid eligibility	133%	$14,856	$9.52	$1,411 per year	$118 per month
Effective upper limit for Medicaid eligibility[6]	138%	$15, 415	$9.88	$1,464 per year	$345 per month
Upper limit for eligibility for tax credits	400%	$44,680	$28.64	$4,245 per year	$354 per month
In states that do not expand Medicaid					
Minimum wage worker eligible for state exchange credits if employer plan is not offered or is unaffordable	~101%	$11,310	$7.25	$1,074 per year	$90
Upper limit for eligibility for tax credits	400%	$44,680	$28.64	$4,245 per year	$354 per month

Q21. How will I know if my employee is eligible for a subsidy?

The government is required to notify the state health benefit exchange of the employee's eligibility for premium tax assistance and cost-sharing reductions, and the

3. Assumes employees work an average of 30 hours per week over 52 weeks.
4. 9.5% of current wages divided by 12 months.
5. The federal minimum wage is currently $7.25 per hour. The local minimum wage is higher in Alaska; Arizona; California; Colorado; Connecticut; Washington, DC; Florida; Illinois, Maine; Massachusetts; Michigan; Montana; Nevada; New Mexico; Ohio; Oregon; Rhode Island; Vermont; and Washington.
6. The law requires states to apply an "income disregard" of 5% of the federal poverty level, resulting in an effective income threshold of 138% of the federal poverty level for Medicaid eligibility.

state exchange must notify the employer. The notice to the employer also must include information about the employer's potential excise tax liability.

Q22. Can you provide an example of how the employer tax penalty would be calculated?

Assume two staffing firms, A and B, each of which employs 400 employees in month—100 (25%) of whom are full-time (using applicable look-back). Staffing firm A offers minimum essential coverage to all 100 full-time employees (and their dependents)—one-fourth of whom (25%) get subsidies because the employer's self-only coverage is unaffordable or does not provide minimum value. Staffing firm B does not offer health insurance coverage to all full-time employees and dependents.

Because staffing firm A offers minimum essential coverage to all its full-time employees (and dependents), A's monthly penalty would be $6,250, which is the lesser of $250 per month x the 25 employees getting subsidies ($6,250) and $166.67 x 100 full-time employees minus 30 ($11,667). Because staffing firm B does not offer health insurance coverage to all full-time employees, it pays $166.67 on all its full-time employees beyond the 30th employee ($11,667).

Q23. What is the effective hourly cost of the tax penalty?

It depends on the facts and on how a staffing firm allocates the cost.

For example, assume that staffing firm A's and B's 400 monthly employees work 161 hours per month (37.5 hours per week X 4.3 weeks) = 64,400 hours. Staffing firm A's hourly cost for its 25 subsidized employees would be $1.56 ($250 ÷ 161). But if A spreads its $6,250 monthly cost over all 400 employees, its hourly cost is $0.10 ($6,250 ÷ 64,400). Staffing firm B's hourly cost would be $1.03 for the 70 taxable full-time employees ($166.67 ÷ 161); but if its $11,667 monthly cost is spread over all 400 employees, it would be $0.18 ($11,667 ÷ 64,400).

To account for the nondeductibility of the penalty, the cost should be grossed up by applicable federal and state tax rate to determine pretax cost.

Q24. If I offer health insurance coverage, do I have to automatically enroll employees in the plan?

The law says employers subject to the Fair Labor Standards Act with more than 200 full-time employees must automatically enroll new full-time employees in an employer health plan and continue the enrollment of current employees. The requirement applies to full-time temporary employees, but only if the staffing firm offers a plan to its temporary employees. The act requires adequate notice and opportunity for employees to opt out after enrollment. Citing the need to coordinate the regulations with other guidance and to give employers sufficient time to comply, DOL has announced that the regulations will not be ready by 2014 and that employers are not required to comply until final regulations become effective.

Q25. Would I have to withhold premiums from the payroll of employees who are automatically enrolled?

There is no federal withholding requirement. The law expressly defers to state payroll requirements or standards, except to the extent the state law prevents an employer from implementing the automatic enrollment provision. No state, to the authors' knowledge, requires private-sector employers to withhold employee premium contributions.

Q26. Must a child under 26 be allowed to continue under a parent's plan if the child has his or her own health insurance coverage?

Children covered under a grandfathered plan with plan years beginning before Jan. 1, 2014, do not have to be covered until age 26 if they are eligible for employer health insurance coverage through their own or their spouse's employer. But nongrandfathered plans in effect for plan years beginning on or after Sept. 23, 2010, must allow children to stay on their parents' plan until age 26 regardless of whether they are covered under another employer's health insurance coverage. Beginning in 2014, all children must be allowed to stay on their parents' plan until age 26 even if they are eligible for another employer's health insurance coverage.

Q27. Does the law provide a timeline for employees to opt out of an employer's plan?

The law says employers subject to the autoenrollment provision must provide employees with adequate notice and the opportunity for employees to opt out of any health insurance coverage they were automatically enrolled in. But the law does not provide a specific opt-out timeline. This will likely be spelled out in regulations.

Q28. Can I impose a waiting period before employees are covered?

Employers may impose a maximum waiting period of 90 days before enrolling employees in their plan. Employers offering qualified health plans will not be subject to penalties during a lawful waiting period.

Q29. How does the law affect employers in Hawaii, Massachusetts, and San Francisco that already are subject to mandatory health insurance laws?

Those laws will continue to apply as long as they satisfy the minimum requirements of the federal law. Although nothing in the law suggests that Congress intended to prohibit existing provisions in those laws from imposing requirements that go beyond the law, ASA and other major employer groups believe Congress intended to preserve the principle that the Employee Retirement Income Security Act, the federal law that sets national standards for employee benefit plans, pre-empts state law. That would protect employer-sponsored plans from conflicting state or local health insurance mandates.