

# Limiting risk under the ACA

## Staffing firms and their clients: Who is the employer?

The Affordable Care Act (ACA), with its so-called “play or pay” penalties under the employer mandate, has some businesses deciding not to increase their permanent workforce. Large employers must offer group health insurance to their full-time employees or pay a penalty. That has many employers turning to staffing agencies as a cost-saving solution.

“Generally, staffing firms offer lower benefits for the temporary workers placed with clients as compared to a business’s permanent employees,” says Jules S. Henshell, of counsel at Semanoff Ormsby Greenberg & Torchia, LLC.

*Smart Business* spoke with Henshell about the employer mandate and the use of staffing agencies.

### What is the employer mandate?

The ACA added Section 4980H to the IRS Code to require applicable large employers to either offer their full-time employees, including full-time equivalent employees (FTEs), affordable, minimum essential health coverage or pay a penalty. For 2015, employers with at least 100 FTEs are subject to this so-called pay or play mandate. In 2016, the mandate becomes effective for employers with at least 50 FTEs.

For 2015, an employer that fails to offer minimum essential coverage must pay a penalty of \$2,000 per year for each full-time employee minus the first 80 if any full-time employee receives a tax credit to purchase health insurance through a health care exchange. Beginning in 2016, the penalty is based upon the number of full-time employees minus 30.

An employer may be liable for a penalty of \$3,000 annually for each full-time employee who receives a tax credit because the employer does not offer coverage that is affordable or fails to provide minimum value.

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### How can staffing agencies help business owners comply with the ACA, contain costs and avoid penalties?

If a business uses temporary workers from a staffing agency, it can get work done without increasing its FTE count. If the business is close to the threshold for becoming a large employer, using a varying number of temporary workers hired through staffing agencies can save benefit costs. A small business with fewer than 25 FTEs could bring in temporary workers as needed, remain below the employee threshold and thereby maintain eligibility for health care tax credits under the ACA.

By using a temp-to-perm hiring plan, businesses can delay the cost of providing health insurance. The staffing agency supplies qualified candidates. If they don’t work out, the client can request another worker from the staffing agency without having to go through the firing process.

### Is the staffing agency responsible for the ACA pay or play obligations?

The determination of who is the employer is complicated in a scenario in which a business retains the services of temporary and contract workers through a third-party staffing agency. The operating premise of the staffing industry has been that a staffing firm is the employer of the workers it assigns to clients for the purpose of tax and benefits laws.

It remains to be seen, however, whether the ACA’s shared responsibility requirements will impact which entity is deemed to be the common law employer and subject to the employer mandate penalty. That determination requires a case-by-case factual analysis. There are some 20 factors that are considered by the IRS. Those factors address what entity has behavioral, financial and legal control over a worker. The fact that a staffing contract designates which party is the employer is not dispositive of the issue, according to the IRS.

### How can businesses using staffing agencies limit their risk under the ACA?

Together with counsel, businesses should review their staffing agreements, operations and financial arrangements and determine who is likely to be deemed the employer under the common law test. Businesses and staffing firms should each assess internal compliance with the ACA employer mandate by reviewing health insurance coverage, correctly tracking employee hours and accurately identifying new workers as variable hour, part-time, seasonal or full-time. Also, review and revise all staffing agreements to promote the reliability of representations that the staffing firm is the employer and it will provide adequate offers of health coverage where required by the ACA as well as indemnification of the business client. ●