

Staffing Firms and the Affordable Care Act: How Do They Mix?

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Since the inception of the Patient Protection and Affordable Care Act (the “Affordable Care Act”) in 2010, employers and the employee leasing industry have experienced trepidation over what the Employer Shared Responsibility Mandate would mean to staffing and leased employee arrangements. Prior to the enactment of the Affordable Care Act, governing agencies and employers historically battled over employee classification as it concerned payroll withholding taxes, minimum wage, overtime, union organization, OSHA, benefit plan eligibility and EEO duties owed to one’s own employees. However, the introduction of the Affordable Care Act’s Employer Shared Responsibility requirements heightened the stakes at issue over the classification of employees in the leasing agency and employer context.

The Affordable Care Act’s implementation of the Employer Shared Responsibility rules requires applicable large employers to offer affordable coverage to substantially all of its full-time employees or be subject to excise tax penalties. The proposed regulations to the Employer Shared Responsibility requirement did not definitively state whether leased employees would be considered employees of the leasing agency or employees of the leasing agency’s customer. This caused fear amongst employers with large numbers of leased employees with the concern that if leased employees were re-characterized as employees of the employer and not offered coverage, a violation of the requirement to offer coverage to substantially all of an employer’s fulltime employees will have occurred.

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The final regulations to the Employer Shared Responsibility requirements clarified who has the employer mandate obligation under the Affordable Care Act in employee leasing arrangements. The final regulations treat a leasing agency's offer of coverage to a leased employee as fulfilling the employer mandate obligation of the firm's customer employer, even if that customer is found to be the common law employer of the leased employee, provided that the leasing agency adds a surcharge for employees enrolled in that coverage as evidence that the leasing agency's group health plan covers the leased employee.

In light of the guidance in the final regulations to the Employer Shared Responsibility requirements it would be prudent to review any employee leasing agreements you may have to ensure that the agreement properly accounts for and provides (in writing) a surcharge for the leased employees to be offered qualifying coverage under the leasing agency's group health plan as well as indemnification provisions from the responsible party in the event an excise tax is imposed under the Employer Shared Responsibility mandate.