



# NAVIGATING HEALTHCARE REFORM

March, 2015

## ACA In The News: Use of Temporary Staffing Firms by Large Employers (ALEs)

*Harvard Business Review* recently reported that 58% of employers use temporary employees or are considering doing so. Temporary staff fills short term vacancies, supports overtaxed full time employees during peak periods and is an effective, low risk way to test out talent. While most temporary positions don't lead to "permanent" positions, many stay longer than three months.

### PENALTY FOR NOT OFFERING COMPLIANT COVERAGE TO "SUBSTANTIALLY ALL" FULL TIME EMPLOYEES

The Affordable Care Act (ACA) imposes a penalty on large employers that do not offer minimum essential coverage to "substantially all" full time employees and dependents by the 90<sup>th</sup> day of employment. Large employers that do offer coverage may still be liable for a penalty if the coverage is unaffordable or does not provide minimum value.

### DEFINITION OF AN "EMPLOYEE"

A **common law standard** applies to define the terms "employee" and "employer." Under this standard, an employment relationship exists when the person for whom the services are performed has the right to control and direct the individual who performs the services with respect to the result to be accomplished, along with the details and means by which it is done. This is a factual determination and is not necessarily dependent on the label the employer has placed on the relationship in the past.

### IRS DEFINITION

*Anyone who performs services for you if **you can control what will be done and how it will be done.***

In general, leased employees are *not* considered employees of the service recipient for purposes of ACA's "pay or play" provisions. Also, independent contractors, sole proprietors, partners in a partnership, 2-percent S corporation shareholders, real estate agents and direct sellers (under Tax Code section 3508) are not counted as employees.

### CONSIDERATIONS UNDER ACA FOR YOUR TEMPORARY EMPLOYEES

Under ACA, employees at your worksite employed through a temporary agency but directed by you are considered common law employees. As a large employer, these employees have to be offered coverage that is both affordable and meets the minimum value by their agency or subject your organization to a possible penalty. It is also important to note that as a common law employee, should you eventually hire an employee under this arrangement, **you cannot ask them to re-satisfy a waiting period for coverage or extend their waiting period beyond 90 days between their employment under the temp agency and their employment with you.**

## TO ENSURE COMPLIANCE

Confirm with your temporary staffing firms that they are offering their staff coverage that is both affordable and meets the minimum value requirement by the 90<sup>th</sup> day. Document their satisfactory responses to the following questions:

1. Does your company have a strategy for dealing with employer mandate requirement of ACA?
  2. If you answered "No" to the previous question, when will your company execute on this strategy?
  3. Does your company plan on offering an ACA compliant medical insurance plan to some or all of your workers in 2015?
  4. If No, you do not need to complete any additional questions.
  5. If Yes, who will be offered coverage (position, hours worked and length of employment)?
  6. If your company plans to comply, have you been assured that the coverage obtained will comply with ACA?
  7. If Yes, please provide:
    - Estimated actuarial value/medal value of the least expensive plan offered.
    - The monthly employee contribution requirement for the least expensive plan offered.
  8. To your knowledge, will your medical plan be limited or exclude any essential benefits defined under ACA?
  9. Who is your current medical carrier?
  10. How does your agency intend to comply with ACA requirements?
  11. What period of time will you use as your "look back" period?
  12. What period of time will you use as your "administrative period" for existing employees? New hires?
  13. How much time will you use for your "initial measurement period" for new hires?
  14. What period of time will you use for your "stability period"?
    - For existing employees?
    - For new hires?
- Amend your temporary staffing contracts to include an agreement that employees provided are common law employees of the agency for all purposes, including tax, workers' compensation, and ACA. Contact your BKS-Partners representative for sample language.
- Ensure your medical insurance carrier will allow you to administer your plan without a waiting period for these temporary-to-regular employees.
- Determine if you will waive a secondary waiting period for medical coverage only or for all other benefits and perks offered by your organization including such benefits as PTO, if applicable.