Nov. 19, 2015

ACA Issues when Using a Staffing Firm

Presented by Benefit Comply

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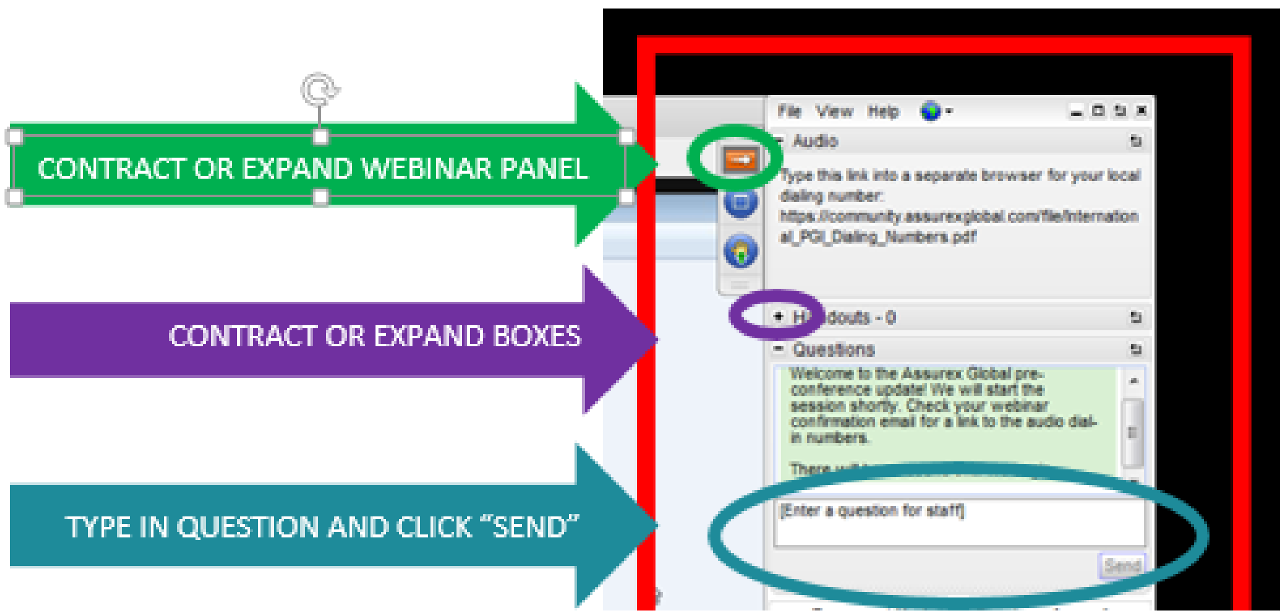
- Welcome! We will begin at 3 p.m. Eastern
- There will be no sound until we begin the webinar. When we begin, you can listen to the audio portion through your computer speakers or by calling into the phone conference number provided in your confirmation email.
- You will be able to submit questions during the webinar by using the “Questions” box located on your webinar control panel.
- Slides can be printed from the webinar control panel – expand the “Handouts” section and click the file to download.



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Overview – Agenda for Today's Webinar

- ACA requires that ALEs (large employers) offer qualifying health care coverage to full time common law employees or pay a penalty (in some circumstances)
- Digression – definitions
- Example of a not-so-good scenario
- Best practices for relationships with Staffing Companies
- TIPS for Staffing Agency relationships

Penalties

- "A" Penalty
  - The Employer fails to offer minimum essential coverage (MEC) to 95% of full-time employees (70% for 2015) and at least one employee who purchases individual coverage through the marketplace receives a subsidy
  - The penalty is roughly $167 / month per employee (excluding the first 80 employees in 2015 and the first 30 employees in following years)
  - That could mean a $740,000 penalty for an employer with 400 employees in 2016
  - You don't want this to happen—at least not by surprise
- "B" Penalty
  - The Employer offers MEC to substantially all full-time employees but it is "unaffordable" or not "minimum value"
  - There are dollar penalties (roughly $250 / month) for each full-time employee who purchases individual coverage through the marketplace and receives a subsidy
  - Not too relevant for this webinar

Definitions – Industry Terms

- **Common Law Employee.** There are various tests and definitions to identify common law employees. But the key is control -- the employer’s right to control the employee, both as to the result and the means by which the result is accomplished
- **Independent Contractor.** A worker performing services outside of the common law employment relationship

Definitions – Industry Terms

- **Staffing Firm.** A vendor who recruits, screens and supervises workers who will be placed at clients for temporary and long term engagements
- **Professional Employer Organization (PEO).** A vendor that has less control over workers than a Staffing Firm. For example, a PEO may be retained by ABC Company to hire all of ABC Company's employees and "lease" them back to ABC. PEOs typically provide a full suite of HR services
- **Placement Service.** An organization that recruits and screens workers for placement at clients after a short probationary period, e.g., 3 months
- **Payrolling Service**. An organization that provides payroll services for an Employer, using the Payrolling Service EIN

Pretend we are in 2016

- You are HR Administrator for Bob's Canoe Company
- You have 120 full time-employees in the parent company. They do mostly design, sales and administration.
- The manufacturing arm (in a separate corporate organization) has 10 employees and the rest (about 10) are provided by Ely Staffing
- You offer Affordable, Minimum Value MEC to the 120 full time employees at the Parent Company and the 10 employees at the Manufacturing Company
- You are in the clear under ACA, right?
  - 130 full-time employees.
  - They all get offers of coverage.
  - So you have made offers to 100% of your full-time employees.

Not so fast. Let's look at Ely Staffing.

- It turns out that Ely Staffing was hired by Bob's Canoes in 2014 to "take this hiring and payroll mess at manufacturing" off our hands.
- The agreement between Ely Staffing and Bobs' Canoes says that Ely Staffing is a Placement Service and Payroll Service.
- Ely Staffing claims to NOT have control over the manufacturing employees and they are doing tax withholding merely as agent for Bob's Canoes.

Hmmm…….

- This means Bob's Canoes likely has 140 full-time common law employees.
- They have made offers of coverage to 130 of those full-time employees.
- That means Bob's Canoes has made offers to 92.9% of its employees.
- If one of those manufacturing employees purchases insurance through the marketplace and receives a subsidy, Bob's Canoes will pay an "A" penalty of more than $220,000 in 2016.

Best Practices – 3rd Party Staffing Agencies

- Start with the assumption that the Staffing Agency is the Common Law Employer – and then test your assumption.
- Good facts to look for in the contract: the staffing agency:
  - claims to be the common law employer of the Assigned Workers and has the ultimate right to control the Assigned Workers
  - has ultimate authority to hire, fire and direct the Assigned Workers
  - pays Assigned Workers' wages, withholds and transmits employment and income taxes
  - will comply with federal, state and local employment laws applicable to Assigned Workers
  - requires the Assigned Workers to sign agreements that they are not entitled to any benefits from the Client
- Aside: pay special attention to individuals acting as "independent contractors"

Best Practices – 3rd Party Staffing Agencies (continued)

- Fallback Provisions
  - Recite that the parties agree that the Assigned Workers are common law employees of the Staffing Agency
  - Staffing Agency will offer MEC that is Affordable and Minimum Value (or MEC that is not Affordable or Minimum Value)
  - Client will pay additional fees in exchange for this coverage. (Note: This point has generated lots of questions and very few answers)
  - Staffing Agency will indemnify Client for any penalties it incurs under ACA as a result of a determination that the Assigned Workers are common law employees of the Client

Best Practices – Other Organizations

- Professional Employer Organizations (PEOs)
  - Assume the Assigned Workers are your common law employees
  - Insist on qualifying offers of coverage to the Assigned Workers
  - Request appropriate indemnifications
  - Consider impact on other benefit plan compliance
- Payrolling Services
  - Assume the Assigned Workers are your common law employees
  - Plan on making offers of coverage, if necessary, to comply with ACA or work through details to ensure Payrolling Service offers coverage to Assigned Workers
  - See best practices and fallbacks for Staffing Firm contracts
- Placement Service
  - There may be an argument that the Assigned Workers are common law employees of Placement Service during probationary period
  - This argument likely goes away after hire into “regular employment”
  - This one requires some customization

Considerations for Staffing Agencies

- Will you claim "common law employer" status over the workers?
- Consult the regulations for guidance on how to determine whether new hires are expected to be full time or not
- Figure out what sort of health coverage you will offer
  - MEC + Minimum Value + Affordable
  - MEC only
- Think about MEWAs, especially if self-insured
- Pay attention to the scope of your indemnification

Summary

- Identify all Assigned Workers supplied by 3rd Party Staffing Agencies
- Single out any “independent contractors” for special treatment
- Make sure your contract is appropriate for the situation:
  - Staffing Agency (likely not your common law employees, but get some belts and suspenders in place, such as offers of coverage and indemnification)
  - PEO (possibly your employees—PEO likely offering coverage)
  - Payrolling Service (likely your common law employee—plan accordingly)
  - Placement Agency (likely your employee by design at some point)
- Consider impact of your position on other employee benefit plans and employment practices
- If concerned, do the math on the ACA tests assuming Assigned Workers are your common law employees

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Thank you.

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