SPECIAL REPORT
on the Affordable Care Act
April 2016

ACA and the Staffing Industry—
Looking Back and What's Ahead

By Edward A. Lenz, Esq.

Never before in its history has the staffing industry faced a more complex and daunting regulatory and operational challenge than the Patient Protection and Affordable Care Act.

The legislative battle that preceded the ACA's passage in March 2010, and the ensuing multiyear effort to secure regulations under the law to address the staffing industry's unique concerns, consumed an unprecedented portion of ASA's advocacy resources and of the time and attention of the association's leadership.

Much work remains to be done on the ACA, and the 2016 elections will play a major role in determining the law's future. Whatever effect the elections may have, ASA will continue to vigorously advocate for constructive changes in the law for the benefit of the industry and the workers it employs. Support from our members will be critical to our success.

What follows is a brief history of the association's efforts and accomplishments to date, and a look ahead at some of the important issues we are still working on and those that are still to come.

Early Advocacy

ASA became involved in health care reform early in 2009 when the president decided to make it his top domestic policy objective. ASA worked with the U.S. Chamber of Commerce and other business groups in support of comprehensive reform that would address the rising cost of health care without imposing unfair and damaging costs on employers.

Unfortunately, Congress was not much interested in employers' market-based approaches for expanding health insurance coverage and reducing health care costs. Lawmakers instead relied heavily on individual and employer mandates and penalties to expand coverage without seriously addressing the cost issue. This forced the business community to narrow its efforts and focus primarily on scaling back the employer mandate. ASA, in particular, recognized early on that such a mandate could have a unique and potentially devastating impact on the staffing industry.

ASA's big idea—special rules for "variable hour" employees

To mitigate the impact of the employer mandate, ASA was the first business group to propose a minimum work requirement to reduce the coverage and penalty burden on employers, such as staffing firms, whose employees' work hours fluctuate. ASA and the lobbying arm of Ernst & Young worked with the Senate and White House on an amendment that would have required an employee to work at least 390 hours per calendar quarter to be considered full-time for purposes of the employer mandate. Major business groups with large variable hour workforces immediately saw merit in our proposal and joined in the advocacy effort.

Through most of 2009 and early 2010, ASA led an intensive lobbying campaign to include our amendment in the bills that were moving. Most of the effort was directed at key White House health care policy staff and members and staff of the House and Senate labor and tax committees—involving hundreds of communications, issue papers, meetings, and phone calls. ASA mobilized every association resource, including ASA staff, the association's lobbying firm, the ASA legal and legislative committee, a special health care policy group, the ASA board of directors, and individual staffing firms throughout the country. We enlisted Sen. Maria Cantwell (D-WA) and Senate Finance Committee chairman Sen. Max Baucus (D-MT) to include a statement in the Congressional Record in support of our amendment.

In the end, the clock ran out and the ACA passed in March 2010 without the association's amendment. But our efforts laid the critical groundwork for an even more favorable variable hour provision which was adopted four years later in the final employer regulations.

ASA and Its Allies

To leverage its influence in the rulemaking process, ASA, together with like-minded business groups, formed the Employers for Flexibility in Health Care coalition (E-Flex). The coalition represented employers in the retail, restaurant, food service, hospitality, construction, and other service industries, all of which employed large numbers of part-time, seasonal, or variable hour employees.

ASA was one of five organizations that made up the coalition's leadership. The others were the Retail Industry Leaders Association (big box retailers like Wal-Mart), the National Restaurant Association, the Food Marketing Institute (national grocery chains) and Aetna. Other major players served on the coalition's steering committee, including the Associated Builders and Contractors, International Franchise Association, National Retail Federation, and National Association of Home Builders. Staffing firms on the steering committee included Adecco, Allegis, Kelly Services, Manpower, Randstad, Robert Half, and TrueBlue.

Administration agrees to "look-back" rule

The ACA's employer mandate requires health coverage to be offered to "full-time" employees, defined as individuals working "on average at least 30 hours per week." E-flex members were deeply concerned about how to practically manage health insurance plans for employees whose work hours fluctuate unpredictably throughout the year. Hence, the coalition set about to persuade the administration to adopt special rules to address those concerns.

After a multiyear lobbying effort focused on the Departments of Treasury (which includes the Internal Revenue Service), Labor, and Health and Human Services, the administration agreed in 2013 to a dramatic expansion of ASA's original definition of full-time—from 390 hours in a calendar quarter to a maximum of 1,560 hours in a 12-month period for employees classified as part-time, seasonal, or variable hour—which became known as the "look-back" rule.

The look-back provisions were included in the final employer responsibility regulations published in February 2014—10 months before the ACA's employer provisions finally became effective on Jan. 1, 2015. It was a signal achievement that has significantly reduced the cost of ACA compliance for many staffing firms

Other Coalition Priorities

Some E-flex goals could not be achieved in regulations and there-

fore required Congress and the president to act. ASA played a key role in those efforts and was the only member of the coalition designated to testify on how the ACA affected the industries represented by the coalition and its more than 30 million employees.

In October 2013, I presented testimony on behalf of E-flex before the House Energy & Commerce Health Subcommittee in which the coalition urged Congress to

- Repeal the auto-enrollment mandate for employers with more than 250 employees
- Simplify the employer reporting rules, and
- Increase the definition of full-time from 30 hours per week to a number more consistent with customary business practice.

As discussed below, the coalition was successful in repealing auto-enrollment. Substantial progress has been made on the reporting issue, but the definition of full-time is unlikely to be changed during the time remaining in the Obama administration.

Repeal of auto-enrollment

In November, 2015 the president signed into law the E-Flex provision repealing the auto-enrollment mandate—a provision the coalition argued would have prevented employees from selecting the health coverage that best meets their needs and subjected employers to unnecessary and costly regulation. In a press release, E-flex said repeal had been a top priority and was the result of hundreds of meetings with House and Senate members and leadership on both sides of the aisle, thousands of grassroots messages, and a strong coalition.

Simplified employer reporting

The ACA's complex employer reporting requirements is a major concern—especially for staffing firms because of their fluctuating headcount and the difficulty in identifying the full-time employees who must be provided annual health insurance information reports (Form 1095-C). E-flex is urging Congress to reduce the burden by allowing employers to file a simple declaration of coverage at the start of each year. The coalition spent most of last year getting bills introduced in the House and Senate and in January formed a new ACA Reporting Taskforce to help lobby for passage.

Instead of filing detailed employer reports with the IRS on all full-time employees after the end of each calendar year, the legislation would allow employers to voluntarily file a short-form report prior to each year's annual open enrollment. The report would consist of a general certification by the employer of the health coverage offered to full-time employees. Employers choosing this reporting method would have to file year-end Form 1095-C reports for a calendar year only with respect to its full-time employees who received tax subsidies during the year and enrolled in exchange coverage. This would substantially reduce the number of reports employers have to provide each year to employees and the IRS.

Despite bipartisan support, the legislation faces a high bar this year and will require a significant coalition lobbying effort.

Client Concerns—Who Is the Employer?

The ACA requires employers with at least 50 full-time plus full-time equivalent employees to offer "minimum essential coverage" to at least 95% of its full-time employees. "Employer" has the same meaning as under the Employee Retirement Income Security Act (Erisa)—and the U.S. Supreme Court has ruled that the common law multifactor test determines who the employer is for that purpose.

In the great majority of cases, staffing firms should be the common law employer because they pay the employees' wages and benefits; withhold and pay employment taxes; recruit, screen, and hire the employees; establish policies regarding their job performance; have the right to terminate or reassign them; and retain the right to control their conduct at the work site (although the law does not require that the right to control actually must be exercised). ASA lawyers have published a detailed historical analysis of staffing firms' common law employer status.

Some clients nonetheless have expressed concern that they might be viewed as the common law employer and therefore will be held responsible for offering health coverage to the staffing firm's employees. Fortunately, the ACA employer regulations include a special rule specifically designed to deal with this situation.

The special rule provides, in cases where the staffing firm is not the common law employer (which generally would only be determined on audit long after services have been provided) health coverage offered by the staffing firm will be treated as having been made by the client if the client pays the staffing firm a higher fee for an employee enrolled in the staffing firm's plan than what it would have paid for that employee had the employee not enrolled. As long as the client pays such higher fee, it will be viewed as having offered the coverage. Charging a higher fee to comply with the special rule does not, of course, preclude the staffing firm from charging the client for any other costs associated with ACA compliance.

ASA has developed a model staffing contract that includes language designed to help ensure that staffing firm agreements properly reflect the staffing firm's common law employer status; it also includes language designed to comply with the special rule discussed above if a client requests it.

Looking Ahead

Important ACA issues remain unresolved and will continue to require ASA's time, effort, and resources for the foreseeable future. Here is a brief look at some of them.

Notices and appeals of employee tax credits

The ACA requires public health care exchanges to notify employers when an employee is certified as eligible to receive a tax subsidy, and to advise the employer that this might result in an employer tax assessment. Except for certain grandfathered plans, employers may be assessed a tax penalty (the so-called "B" penalty) for 2015 if they offered minimum essential coverage that failed to provide "minimum value" (including substantial inpatient hospital and physician services) or if the minimum value coverage offered was unaffordable.

Notices of subsidy eligibility were not issued by HHS for 2015. For 2016, an administration official recently advised that HHS hopes to begin issuing notices "sometime this summer." The IRS previously confirmed that even though exchange notices were not issued for 2015, employers will still be subject to IRS tax assessments which will be issued sometime after employers file their 2015 Form 1095-C reports (they did not specify how soon after). The IRS also confirmed that employers receiving assessments will have an opportunity to challenge any assessment, and that final assessments will be made only after completion of the challenge process.

The ACA also requires that the government establish a process for employers that receive an exchange notice to appeal the eligibility determination—for example because the employer offered the employee an affordable, minimum value plan. HHS has advised that it plans to post a sample exchange notice form on its website. HHS has issued regulations regarding employer appeals, but has not published details regarding the actual appeals mechanism.

Once the employer appeals process is established, a key issue for staffing firms will be whether they have grounds to appeal employee subsidy determinations when they receive notices from an exchange certifying employees as eligible—and if they do have grounds, whether they need to appeal at that time.

As noted, employers that fail to offer affordable, minimum value coverage have no basis to appeal subsidy determinations because employees who are not offered such coverage are eligible for subsidies if they qualify based on household income. This does not mean the employer is automatically subject to a tax assessment. Because penalties can be assessed only on full-time employees, employees would not trigger a penalty if they were not full-time in a month in which they were receiving a subsidy. This would include part-time, seasonal, or variable hour employees in their initial measurement periods. Such employees are considered to be in a "limited non-assessment period" and thus are not full-time for penalty purposes.

Employers that do offer affordable, minimum value coverage may wish to appeal subsidy determinations to protect employees from the unhappy surprise of having their subsidies retroactively disallowed at the end of the year when they file their tax returns. But such an appeal is not necessary to protect the employer from a tax assessment. Since only the IRS can levy such assessments, failure to appeal a subsidy determination at the exchange level would not affect the ability of an employer from later challenging the assessment on the basis that it offered the employee affordable, minimum value coverage, or because the employee was not full-time.

Definition of "full-time"

E-flex succeeded in getting bills introduced last year to increase the workweek requirement for full-time status from 30 to 40 hours, but the White House was opposed and the legislation did not advance. Increasing the weekly hours required to be full-time almost certainly will be part of any Republican proposal to change the law in 2017 if they win the White House and hold their majorities in Congress.

Nondiscrimination testing

Federal tax law includes nondiscrimination testing rules designed to ensure that the benefit plans offered by employers do not unfairly discriminate in favor of highly-compensated employees. There are testing rules for retirement plans and separate rules for so-called "welfare plans," which include employer-sponsored group health plans. If a plan is found to be discriminatory, the employer may lose the ability to deduct the cost of the benefits for tax purposes.

Prior to the ACA, only self-insured health plans were subject to nondiscrimination testing rules. The ACA, for the first time, extended nondiscrimination testing to fully insured health plans. Those provisions were supposed to take effect six months after the law was enacted but compliance and enforcement has been deferred while the IRS develops guidance. According to the IRS, such guidance "will not apply until plan years beginning a specified period after the guidance is issued."

The ACA requires that the nondiscrimination rules for insured health plans be "similar to" the self-insured plan rules. But the enforcement history of the self-funded rules is sparse and provides little guidance on how the rules work. This has compelled the IRS to address many complex unanswered questions affecting such plans.

ASA has already explained to administration officials the unique issues nondiscrimination testing poses for staffing firms because of their two-tier workforces. A key goal is to ensure that any guidance regarding insured health plans includes exclusions for testing purposes, similar to those under the self-funded rules, for employees who are part-time, under age 25, or have completed less than three years of service. Such exclusions should greatly mitigate the impact of discrimination testing for most staffing firms.

The government has given no indication when nondiscrimination guidance will be issued. Until it is, staffing firms should be able to continue to offer different benefit levels to their internal staff from those offered to their assigned employees.

Repeal of employer mandate

If the Republicans win the White House and continue to control the House and Senate, they almost certainly will work to repeal the employer mandate. The business community, including ASA, would support repeal. But it is possible, perhaps even likely, that many staffing firms, having invested heavily in developing health plans for their temporary and contract employees, will continue offering those plans on a voluntary basis even if the employer mandate is repealed.

Changes to the ACA that affect people's health coverage—for example provisions relating to eligibility for premium tax credits, or that prohibit insurance carriers from discriminating against individuals with pre-existing health conditions—will present difficult political and policy choices. It is too early to say what those changes might be and what positions ASA might publicly take on proposed changes in the law or regulations that do not or specifically or significantly affect the staffing industry.

Edward A. Lenz, Esq., is senior counsel for the American Staffing Association. Alden J. Bianchi, Esq., member of the law firm Mintz Levin and Group Leader of the firm's Employee Benefits & Executive Compensation Practice, contributed to this report.