

Affordable Care Act Exam Preparation Materials for CSP, TSC, and CHP Credential Exams

The Affordable Care Act imposes major new legal obligations on employers, including new excise taxes, which will increase the cost of supplying temporary and contract workers. The staffing industry is committed to compliance with the ACA, and the American Staffing Association is actively working to help staffing firms and clients understand the rules and how they will affect staffing services.

Beginning in September 2013, the Certified Staffing Professional[®] and Technical Services CertifiedSM exams included questions that test the candidate's knowledge on ACA issues relevant to staffing professionals. This ACA study guide will help you prepare.

These FAQs are designed to help staffing professionals understand the basic ACA requirements and compliance issues. Additional information is available on the ASA website at americanstaffing.net/aca.

1. How Does the ACA Affect Staffing Firms?

Staffing firms will be subject to new “employer shared responsibility” (“play or pay”) requirements effective Jan. 1, 2015. For 2015, the requirements apply to all “large” employers—those with 100 or more full-time and full-time-equivalent employees based on calendar year 2014 headcount. For 2016, the threshold will be 50 or more (based on 2015 headcount). The great majority of staffing firms will qualify as large employers.

Large employers are subject to a nondeductible excise tax penalty in either of two cases if at least one full-time employee qualifies for subsidized coverage from a public health insurance exchange.

- **Play option**

Employers that offer “minimum essential coverage” to at least 95% of their full-time employees—and those employees' dependent children under age 26 (excluding spouses)—will not be subject to penalties unless the plan is “unaffordable” to the employee or does not provide “minimum value.” In such case, the employer will be assessed a monthly penalty in 2016 of \$270 (up to \$3,240 annually) for any full-time employee who qualifies for a government subsidy to buy coverage through a public health insurance exchange.

- **Pay option**

Employers that do *not* offer minimum essential coverage will be assessed a monthly penalty in 2016 of \$180 (up to \$2,160 annually) multiplied by the number of the employer's full-time employees. For 2015, employers were able to exclude the first 80 employees in calculating their monthly penalty. For 2016, the exclusion drops to 30 employees.

Affordability: An employer's plan will be considered affordable if the employee's share of the premium for a single-only plan does not exceed 9.69% of the employee's wages.

Minimum essential coverage: Any employer group health insurance plan that covers “medical care,” which the law defines as “amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or amounts paid for the purpose of affecting any structure or function of the body.”

Minimum value: The actuarial value of the plan's share of cost of benefits must be at least 60%. Except for 2015 plans that qualify under a special one-year transition rule, plans must include coverage for in-patient hospital and physician services to qualify as minimum value. Starting in 2016, a plan must cover substantial in-patient hospital and physician services to be considered minimum value.

2. Are Most Staffing Firms Offering Health Insurance Coverage to Their Temporary Employees?

Yes. Although staffing firms have faced challenges in providing health insurance coverage for temporary employees because of the high employee turnover and insurance carriers' fear of adverse selection, the great majority are offering at least basic minimum essential coverage. Many also are offering "minimum value" coverage that is affordable to most, if not all, employees.

Basic minimum essential coverage plans that cover only preventive and wellness services are designed to be affordable to temporary employees, but they do not provide minimum value. An employee who needs broader coverage could therefore seek subsidized health insurance coverage through a public exchange—which, if granted, would subject the staffing firm to a \$270 monthly tax penalty for each full-time employee receiving a subsidy.

Regardless of the health coverage offered, most staffing firms will incur significant new administrative and operating costs relating to ACA compliance. Their exposure to those costs will vary depending on multiple factors, including the type of work their employees perform, their employees' full-time status and tenure, their employees' wage rates, the type of health insurance plan offered to employees, and how many employees participate.

3. Are Staffing Firms Subject to Tax on All Temporary Employees?

No. The ACA provides that employers are subject to play-or-pay taxes only with respect to their "full-time" employees. For this purpose, the ACA defines a full-time employee as an employee who works, on average, 30 or more hours per week (130 per month) with respect to any month.

The government recognized that offering health insurance coverage or determining employer penalty obligations on a monthly basis would not be feasible for employers whose employees work on a part-time or intermittent basis and whose hours are variable or otherwise uncertain. The law therefore allows employers to use a "look-back" measurement period of up to 12 consecutive months to determine an employee's full-time status for purposes of benefits eligibility.

Employers can use the look-back method for "ongoing" employees who have already worked a full measurement period as well as for new, "variable hour" employees. Variable hour employees are those whose work patterns, on their start date, are expected to be uncertain and unpredictable. Assuming a 12-month look-back, an ongoing or variable hour employee will have to work at least 1,560 hours over 12 months to be considered full-time.

Employees expected to work full time for longer periods of time (e.g., information technology and professional employees) likely will be nonvariable hour, in which case they will be eligible for benefits on their start date subject to a maximum waiting period of 90 days.

4. Do Clients Have Employer Responsibilities for Staffing Firm Employees?

Generally, no. "Employer" under the ACA has the same meaning it has under the Employee Retirement Income Security Act. The U.S. Supreme Court has ruled that whether an entity is an employer under ERISA is determined by the common law multifactor test.¹

Staffing firms generally should be viewed as the common law employer because they recruit, screen, and hire the employees; pay employees' wages and benefits; withhold and pay employment taxes; and have the right to terminate or reassign employees. They generally also retain the right to control and direct how the employees perform their work, although the law doesn't require that they actually exercise such control. The rulings that have specifically examined the employer status of staffing firms under the common law test have upheld the employer status of staffing firms based on facts and circumstances that are typical of most staffing arrangements.²

In the rare case where a client is determined to be the common law employer, a special ACA rule provides that an offer of health insurance coverage made by the staffing firm will be treated as an offer of coverage by the client provided the staffing firm charged the client a higher fee for employees who enrolled in the staffing firm's plan than it would have charged had the employees not enrolled. The ASA model staffing agreement contains language to help ensure that staffing firm agreements reflect the staffing firm's common law employer status and to comply with this special rule.

5. What If the Staffing Arrangement Causes a Client's Headcount to Fall Below 50?

There are no bright line answers to this question, but the regulations suggest that the answer will depend on whether the primary purpose of the staffing arrangement is to avoid the ACA requirements.

Businesses have a right to decide whether and when to outsource portions of their workforce—or how many full-time employees they need—based on legitimate business and economic reasons: for example, meeting fluctuating demand for goods and services, staffing special projects, and managing high-turnover operations. Therefore, staffing services used by clients for such reasons should generally be ACA-compliant even if the client's headcount is incidentally affected. But if the primary purpose of the arrangement is to avoid the ACA requirements, it may come under scrutiny and the client held to be the responsible employer.

6. Can Staffing Firms Help Clients Reduce Costs by Supplying Part-Time Employees?

The ACA applies only to full-time employees, defined as those working, on average, at least 30 hours per week (130 hours per month). Many businesses rely on part-time employees, and staffing firms can supply them if needed. But clients should be aware that this will not necessarily result in lower staffing costs. Staffing firms strive to maximize their temporary employees' work hours by employing them full time during any given work week. So even if a client asks a staffing firm to supply an employee for part of a week, the employee generally will work the rest of the week for another staffing firm client and thus could qualify as full-time (unless classified as variable hour). Whether or not the employee is enrolled in the staffing firm's health insurance plan, the staffing firm will incur costs related to ACA compliance.

Of course, it could be considered an abuse if an employees' weekly hours are split between a staffing firm and its client, or between multiple staffing firms, and each business claims that the employee did not work full time.

7. Can Employees be Terminated or Refused Reassignment to Avoid Full-Time Status?

Terminating or refusing to reassign a temporary employee prior to the employee achieving full-time status would likely be viewed as abusive if the primary purpose is to avoid the ACA employer coverage or tax obligations; such action may also violate ERISA if the primary purpose is to deny the employee benefits.

¹ *Nationwide Ins. v. Darden*, 503 U.S. 318 (1992).

² See, e.g., *Burrey v. Pac. Gas & Elec. Co.*, 1999 U.S. Dist. LEXIS 22619 (N.D. Cal. May 12, 1999) and *Blue Lake Rancheria v. U.S.*, 653 F. 3d 1112 (9th Cir. 2011) upholding the common law employer status of temporary staffing and employee leasing firms.