

Affordable Care Act Exam Preparation Materials

CSP, TSC, and CHP Credential Exams

The Affordable Care Act imposes major legal obligations on employers and the American Staffing Association is committed to helping staffing firms understand and comply with the rules. To that end, the association's Certified Staffing Professional®, Certified Health Care Staffing Professional®, and Technical Services CertifiedSM exams include questions that test candidates' knowledge of ACA issues. This 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?

“Large employers” are subject to the ACA’s “play or pay” requirements in a calendar year if they had 50 or more full-time and full-time-equivalent employees in the *prior* calendar year. The great majority of staffing firms qualify as large employers.

Large employers are subject to a nondeductible tax penalty as described below if they do not offer their employees “minimum essential coverage” and at least one full-time employee qualifies for subsidized coverage from a public health insurance exchange.

- **Play option**
Employers that offer “minimum essential coverage” as described below will not be subject to tax penalties unless the plan is either “unaffordable” or does not provide “minimum value”—in which case, for 2023, the employer will be assessed a tax (sometimes called the “b” penalty) of \$360.00 per month (up to \$4,320.00 annually) for any full-time employee who qualifies for a government subsidy to buy coverage in a public health insurance exchange.
- **Pay option**
Employers that do not offer minimum essential coverage to at least 95% of full-time employees and their dependent children under 26 will be assessed a monthly tax (sometimes called the “a” penalty) on all full-time employees. For 2023, the tax is \$240.00 per month (up to \$2,880.00 annually) multiplied by the number of full-time employees (over the first 30) in the month.

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.”

Affordability: For 2023, an employer’s plan will be considered affordable if the employee’s share of the premium of a single-only plan does not exceed 9.12% of the employee’s wages.

Minimum value: The actuarial value of the plan’s share of cost of benefits must be at least 60%. For plan years beginning after Mar. 1, 2015 a plan must provide substantial coverage of inpatient hospital or 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 monthly tax penalty for each full-time employee receiving a subsidy.

Most staffing firms have incurred new administrative and operating costs relating to ACA compliance. The costs vary depending on various 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 tax only on 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.

Staffing firms generally use the look-back measurement method to determine the full-time status of new “variable hour” employees—i.e., those whose work patterns, on their start date, are expected to be uncertain and unpredictable. Assuming a 12-month look-back, a variable hour employee will have to work at least 1,560 hours over 12 months to be considered full-time.

Employees expected to regularly work full time for longer periods of time (e.g., information technology and professional employees) likely will be non-variable hour, in which case they will be considered full-time on their start date and eligible for benefits 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 as 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

If a client is concerned that it may be 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.

3. 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.

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

The ACA applies only to full-time employees. While 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 administrative 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.

6. 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 ASA lawyers have published a comprehensive white paper analyzing the employer status of staffing firms. See, Alden J. Bianchi and Edward A. Lenz, *The Final Code §4980H Regulations; Common Law Employees; and Offers of Coverage by Unrelated Employers*, BloombergBNA Tax Management Memorandum (Sep. 8, 2014)