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## The Affordable Care Act and Staffing: One Size Does Not Fit All

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Since its enactment in 2010, the Affordable Care Act (ACA) has generated debate and questions about the law's impact on third-party staffing arrangements. With the effective date of the ACA's "pay-or-play" employer mandate just weeks away for many employers, confusion still exists about how "staffing firms" and their clients should prepare. This task is complicated by the fact that numerous staffing operational models exist and call for different approaches. The lack of clear definitions regarding staffing relationships in the IRS final rule<sup>1</sup> implementing the employer mandate under Section 4980H of the Code<sup>2</sup> (Final Rule) further complicates the issue. Synchronizing the vague definitions in the Final Rule with the varying models for staffing firms is needed to provide a better understanding of how staffing companies and their clients should respond.

At an industry level, staffing firms have historically offered lower-tiered benefits for the temps that are placed with clients in comparison to their own permanent staff. The IRS may critically evaluate staffing firms placing workers in the "variable" category just because they are temps. When the history and past practice of the client and the assignment suggests the position is really a full-time position as a "payrolled" position or a longer-term staff augmentation position, or because similar assignments with the same staffing client have resulted in full time employment, then both staffing firms and their clients should be wary of designating workers as "variable hour" employees not entitled to benefits for the initial measurement period for purposes of the ACA. Proper ACA planning and implementation also hinge on which entity is deemed to be the common law employer of the worker performing services for a client organization, and, thus, who is ultimately liable for the ACA employer mandate penalty. The Final Rule and preamble use the terms "temporary staffing firms", "professional employer organization" and "staffing firm" rather loosely and in a manner not necessarily reflective of common law employer status or staffing industry usage in practice. When it comes to staffing arrangements and the ACA, it is important to remember that one size does not fit all.

<sup>1</sup> 79 Fed. Reg. 8544 (Feb. 12, 2014).

<sup>2</sup> References to the "Code" are to the Internal Revenue Code of 1986, as amended.

## Section 4980H—The Employer Mandate

The ACA added Section 4980H of the Code to require "applicable large employers" to either offer their full-time employees health coverage that meets certain standards or pay a penalty.<sup>3</sup> Employers with at least 100 full-time employees (including full-time equivalent employees) are subject to this so-called "pay-or-play" or "employer mandate" in 2015. For employers with 50 to 100 full-time employees (including full-time equivalent employees), the employer mandate becomes effective in 2016.

The ACA's employer mandate penalty has two components. Under Section 4980H(a) (the "'a' penalty"), an employer that fails to offer "minimum essential coverage" to at least 70% of its full-time employees and their dependents in 2015 (increasing to 95% in 2016 and beyond), will pay a penalty of \$2,000 a year for each full-time employee (including those who were offered coverage), excluding the first 80 employees in 2015 (excluding the first 30 employees in 2016 and beyond) if any full-time employee receives a federal premium tax credit to purchase health coverage through an ACA exchange.

Even if an employer offers "minimum essential coverage" to the threshold number of full-time employees, the employer may face a penalty under Section 4980H(b) (the "'b' penalty") if the employer does not offer coverage to all its full-time employees or the coverage offered to any full-time employee was either "unaffordable"<sup>4</sup> or does not provide "minimum value"<sup>5</sup> and the full-time employee receives a premium tax credit. The "b" penalty is \$3,000 annually for each full-time employee who receives a premium tax credit or the amount of the "a" penalty, whichever is less, prorated on a monthly basis.

For purposes of the Section 4980H penalty, a full-time employee is defined as one working 30 or more hours a week, which the Final Rule equates to 130 hours a month. Although the hours of part-time employees are taken into account to determine whether an employer is an "applicable large employer," the penalty itself only applies with respect to full-time employees. The determination of full-time employee status is critical to analyzing potential penalties under the employer mandate. Employers may use a "look-back measurement method" to determine full-time status as an alternative to a strict monthly calculation. Under the look-back measurement method, an employee's hours of service are averaged over a period of 3-12 months for purposes of offering coverage for the duration of a subsequent stability period.

With respect to new employees, the look-back measurement method is available for new variable hour, seasonal and part-time employees only. Staffing companies and their clients should be prepared to demonstrate why a worker was in good faith properly characterized as a variable hour worker based on the past practice and course of dealing between the parties. It is clear a worker is not automatically a variable hour employee for purposes of the ACA just because he or she is a temp. Nonetheless, properly categorized new variable hour, seasonal, or part-time workers need not be offered health care coverage initially to avoid a penalty under Section 4980H. Rather, the employer can wait until the commencement of the subsequent stability period to offer coverage to variable hour employees who averaged at least 30 hours a week during the initial measurement period. In contrast, an employer must offer coverage to a new employee hired to work at least 30 hours a week by the first day of the fourth calendar month following the date of hire to avoid the penalty. A new employee is considered a "variable hour" employee if, at the employee's start date, the employer cannot in good faith determine whether the employee is reasonably expected to average at least 30 hours a week during the initial measurement period.

The Final Rule gives voluminous and detailed direction about how to calculate the 30-hour threshold and hours of service, including through the use of the look-back measurement method, with its measurement periods, administrative periods and stability periods. However, the rule gives relatively scant guidance on the other key component of identifying full-time employees, that is, whether the worker is deemed to be an employee in the first place.

## The Common Law Test

Staffing firms being contractually exclusively responsible for all temporary worker benefits has long been a cornerstone of the value proposition for most staffing relationships. The ACA's employer mandate is imposed on the common law employer of the employee regardless of the

<sup>3</sup> For a more complete discussion of the ACA's employer mandate and the Final Rule, see Ilyse Schuman, [IRS Final Rule Partially Delays ACA Employer Shared Responsibility Requirement](#), Littler ASAP (Feb. 24, 2014).

<sup>4</sup> Under the affordability safe harbor rules set forth in the Final Rule, coverage is deemed affordable if the lowest-cost self-only coverage that provides minimum value does not exceed 9.5% of (i) W-2 wages, (ii) rate of pay, or (iii) federal poverty level.

<sup>5</sup> A plan provides minimum value if it has an actuarial value of at least 60%, meaning the plan pays for at least 60% of covered benefits.

content of the staffing services agreement. The Final Rule defines the term "employee" as an individual who is an employee under the common law control standard under Treas. Reg. § 31.3401(c)–1(b). Although the Final Rule includes little more discussion of the common law test, the preamble to the proposed rule described the common law test as follows:

Under the common law 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, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. Under the common law standard, an employment relationship exists if an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so.

In turn, Treas. Reg. § 31.3401(c)–1 provides that:

- a. Every individual is an employee if under the usual common law rules the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.
- b. Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.
- c. Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.<sup>6</sup>
- d. If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

The "20 factors" that form the basis of the common law test for federal employment tax purposes is set forth in Rev. Ruling 87-41.<sup>7</sup> In *National Mutual Insurance Co. v. Darden*, the Supreme Court condensed the 20 factors to 13 factors.<sup>8</sup> The IRS has subsequently further grouped the factors into three categories: behavioral control, financial control and type of relationship (sometimes referred to as "legal control").<sup>9</sup>

<sup>6</sup> In addition, the Final Rule provides that the "safe harbor" (actually, a rule prohibiting the IRS from retroactively reclassifying independent contractors as employees if certain conditions are met) set forth in Section 530 of the Revenue Act of 1978, will not apply for purposes of classifying workers under the ACA employer mandate.

<sup>7</sup> The 20 factors are: (1) the right of one person to tell a worker when, where, and how he or she is to work; (2) one person training the worker; (3) integration of the worker's services into the business' general operations; (4) the requirement that services be rendered personally; (5) direction over hiring, supervising, and paying assistants; (6) a worker's continuing relationship with one business; (7) set hours which the worker must work; (8) the requirement that the worker devote full-time attention to one business; (9) performing work on a business' premises; (10) control over the order or sequence of work performed; (11) the requirement that the worker submit reports to the person for whom work is performed; (12) payment by hour, week, or month; (13) compensation for business and/or traveling expenses; (14) provision of tools and materials; (15) the worker's investment in the facilities in which he works; (16) a worker's direct interest in the profitability of the work accomplished; (17) working for more than one firm at the same time; (18) making services available to the general public; (19) a person's right to discharge the worker; and, (20) a person's right to terminate the work relationship at any time without penalty.

<sup>8</sup> 503 U.S. 318 (1992). These factors include: the hiring party's right to control the manner and means by which the product is accomplished; the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

<sup>9</sup> See IRS, Employer's Supplemental Tax Guide (Pub. 15-A) (revised 12/2013).

## Staffing Arrangements Discussed in the Final Rule

When examining the impact of the ACA employer mandate on staffing arrangements, the analysis regarding potential liability hinges on the common law test as used by the IRS for employment tax purposes. However, the Final Rule recognizes that staffing arrangements may differ markedly from one case to the next. In some staffing models, the staffing firm will indeed be the common law employer of staffing firm personnel performing services for a client. In other models, the client may be deemed the common law employer of the worker. Irrespective of the label placed on the staffing arrangement, ultimate liability for the employer mandate penalty rests with the common law employer. As noted in an IRS Chief Counsel Memorandum: "The fact that the staffing contract designates which party is the employer is not dispositive of the issue, as taxpayers may not by agreement designate one party to be an employer when that party fails to meet the federal criteria for status as an employer."<sup>10</sup> The language of the services agreement between the staffing company and the buyer of the services (the "buyer") regarding the control over the placed workers ("workers") is important, and depending on the wording, may confirm that the workers are in fact common law employees of the buyer. However, even if the agreement states that the workers are employees of the staffing company, the actual facts and circumstances will govern the status relationship for tax liability purposes.

The structure of the Final Rule makes it clear that the common law standard, and only the common law standard, is intended to determine the employer-employee relationship for purposes of the ACA employer mandate. The Final Rule incorporates Treas. Reg. Sec. § 31.3401(c)-1(b), which sets out the common law test, described above. This reference is specific and self-contained, and apparently intends that the common law control test, and no other test, will be referred to for determining who is the "employer" and the "employee" for purposes of the ACA employer mandate. However, as set forth below, provided certain requirements are satisfied, an offer of coverage made by the staffing firm is treated as an offer of coverage by the buyer.

## Play-or-Pay and Staffing Firms: Who is Liable for the "Employer" Mandate Penalty?

The Final Rule does not include a definition of "staffing firm" and makes reference to several third-party staffing models. Understanding the distinction between various staffing arrangements is critical for determining which entity—the staffing firm or the client—is the common law employer ultimately liable for purposes of the pay-or-play penalty. The distinction is also critical in determining whether a provision included in the Final Rule allowing a "staffing firm" that is not the common law employer of the worker to offer coverage on behalf of a client is available. A good deal of the confusion around the impact of the ACA on staffing arrangements may stem from the way in which the IRS discusses various staffing arrangements in the Final Rule.

### "Temporary Staffing Firms"

The preamble to the Final Rule refers to "temporary staffing firms"<sup>11</sup> and sets forth additional factors relevant to determining whether a new employee of a temporary staffing firm intended to be placed on temporary assignment at a client organization is a variable employee. The IRS discussion of "temporary staffing firms" assumes that, as discussed in the Final Rule itself, the temporary staffing firm, based on all of the facts and circumstances, is the common law employer of the worker, and thus, the responsible party for the employer mandate.

The preamble to the proposed regulations noted that the application of Section 4980H may be particularly challenging for temporary staffing firms and requested comments on certain specific areas relevant to temporary staffing firms, including whether new employees of a temporary staffing firm should be deemed or presumed to be variable hour employees for purposes of the look-back measurement method. The Final Rule did not adopt a presumption that new employees of temporary staffing firms be deemed "variable hour" employees, and therefore automatically eligible for the look-back measurement method. Instead, the Final Rule set forth additional factors relevant to the determination of whether a new employee of a temporary staffing firm intended to be placed on temporary assignments at client organizations is a variable-hour employee.

The Final Rule explains that, in the case of an individual who, "under all the facts and circumstances, is the employee of an entity, (referred to solely for purposes of this paragraph (a)(49) as a 'temporary staffing firm') that hired such individual for temporary placement at an unrelated entity that is not the common law employer," there are additional factors to consider to determine whether the employee is reasonably

<sup>10</sup> IRS Chief Counsel Memorandum 200017041 (Release Date 4/28/2000).

<sup>11</sup> 79 Fed. Reg. 8544, 8556-8557.

expected to be employed by the temporary staffing firm on average at least 30 hours of service per week during the initial measurement period or is, instead, a new variable-hour employee. These factors include, but are not limited to, (i) whether other employees in the same position of employment with the temporary staffing firm, as part of their continuing employment, retain the right to reject temporary placements that the temporary staffing firm offers the employee; (ii) typically have periods during which no offer of temporary placements are made; (iii) typically are offered temporary placements for differing periods of time; and (iv) typically are offered temporary placements that do not extend beyond 13 weeks. Such temporary staffing firms need to carefully consider these factors to determine whether a newly hired employee can, indeed, be treated as a variable-hour employee. It is important to stress that an employer cannot take into account the fact that a new employee might not be employed for the full initial measurement period to treat the new employee as a variable-hour employee. In other words, the staffing firm cannot classify a new employee who will work a full-time schedule as a variable-hour employee just because the employee is not expected to be there for the full year measurement period.<sup>12</sup>

The preambles to the proposed rule and Final Rule also refer to "temporary staffing firms" in the context of anti-abuse provisions<sup>13</sup> which address arrangements under which a client employer may use a temporary staffing firm to attempt to evade application of the employer mandate. In the first hypothetical, the client employer purports to employ an employee for only part of a week, such as 20 hours, and to hire that same individual through a temporary staffing firm for the remaining hours of the week, and then claim that the individual was not a full-time employee of either the client employer or the temporary staffing firm. In the second hypothetical, a temporary staffing firm purports to supply a client an individual as a worker for only part of a week, such as 20 hours, while a second temporary staffing firm purports to supply the same client the same individual for the remainder of the week, and then claim the individual was not a full-time employee of either the client or the temporary staffing firms. Fortunately, such blatant examples of abusive tactics are few and far between among staffing providers and their clients.

#### "Professional Employer Organization or Other Staffing Firm"

In contrast to the use of the term "temporary staffing firm", the preamble to the Final Rule refers to "an employee performing services for an employer that is a client of a professional employer organization or other staffing firm (in the typical case in which the professional employer organization or staffing firm is not the common law employer of the individual) (referred to in this section IX.B of the preamble as a 'staffing firm')".<sup>14</sup> In such cases, the "staffing firm" that is not the common law employer of the worker may offer coverage on behalf of a client and satisfy the client's employer mandate obligation so long as the client pays the "staffing firm" and extra fee for individuals who enroll in the "staffing firm" health plan.

Specifically, the Final Rule states:

For an offer of coverage to an employee performing services for an employer that is a client of a staffing firm, in cases in which the staffing firm is not the common law employer of the individual and the staffing firm makes an offer of coverage to the employee on behalf of the client employer under a plan established or maintained by the staffing firm, the offer is treated as made by the client employer for purposes of section 4980H only if the fee the client employer would pay to the staffing firm for an employee enrolled in health coverage under the plan is higher than the fee the client employer would pay the staffing firm for the same employee if that employee did not enroll in health coverage under the plan.<sup>15</sup>

Accordingly, for client organizations to potentially be covered and indemnified by appropriate offers of coverage to temporary works by staffing firms, the client service agreements must provide for an increase in fees if the worker enrolls in the health coverage plan. The IRS refers to "professional employer organizations (PEOs) or staffing firms" that are not common law employers of the worker as the "staffing firm," thereby conflating the terms PEO and staffing firm to create the impression that PEOs and "staffing firms" generally are not the common law employers of the workers.

<sup>12</sup> Additionally, for established staffing relationships spanning over a period of years, both the staffing firm and buyers must consider the past practice regarding the duration of the assignments, the average number of hours worked, and the other relevant factors in their course of dealing.

<sup>13</sup> 79 Fed. Reg. 8544, 8557.

<sup>14</sup> 79 Fed. Reg. 8566.

<sup>15</sup> 26 CFR Section 54.4980H-4(b)(2).

As mentioned, while a PEO is generally not deemed to be the common law employer of the worker performing services for a client, the determination depends on the facts and circumstances of each case. Other staffing models and specific arrangements may exist in which the staffing firm generally would be considered the common law employer of the workers. The IRS seems to acknowledge as much in its description of "temporary staffing firms" in the preamble to the Final Rule. Again, the dispositive inquiry in determining which party is liable for the 4980H penalty is which entity is viewed by the IRS as the common law employer.

### Co-Employment: Does it Exist under the ACA Employer Mandate?

Recently, the issue of "co-employment," that is, employment of an employee by two or more employers relating to the same services, has been raised in the context of certain federal employment laws, such as the Fair Labor Standards Act and the National Labor Relations Act, among others.<sup>16</sup> The IRS has indicated informally that co-employment, or joint employment, does not exist for purposes of the ACA employer mandate, and that an employee may have only one employer for this purpose.<sup>17</sup> While the IRS has stated that such joint or co-employment may occur for purposes of the IRS common law test in "unique circumstances," its stated position is that neither "the Code, regulations, other formal guidance, [nor] any binding court precedent recognize 'co-employment' or 'co-employer' for federal employment tax purposes."<sup>18</sup>

Some courts have rejected the "joint employer" theory outright in the context of ERISA litigation.<sup>19</sup> Thus, it is theoretically possible, but unlikely, that joint employment exists for purposes of the ACA mandate. Despite the normal value proposition inherent in most staffing firm relationships, it is legally advantageous for staffing firms and their clients to avoid situations where the workers subject to the staffing arrangement are supervised by employees of both the staffing firm and the staffing firm's client. In both the client service agreement, and in practice, well thought out and delegated management and supervision duties will help in defending potential ACA tax liability claims.

### Offers of Coverage on Behalf of Another Entity

As noted above, the IRS Final Rule includes a provision describing circumstances in which an offer of coverage on behalf of another entity will be treated as made by the employer for purposes of Section 4980H. This provision states that an offer of coverage made to an employee on behalf of a contributing employer under a Taft-Hartley plan or multiple employer welfare arrangement (MEWA) will be treated as an offer of coverage made by an employer. In addition, "**in cases in which the staffing firm is not the common law employer of the individual**" performing services for an employer that is a client of a staffing firm and the "staffing firm" offers health coverage on behalf of the employer client, the offer is treated as made by the client employer so long as the client employer pays the "staffing firm" a fee for an employee enrolled in the "staffing firm's" health plan that is higher than the fee paid for the same employee if that employee did not enroll in the plan. As discussed above, this enhanced fee requirement should be clearly spelled out in all client service agreements.

The language in the Final Rule with respect to offers of coverage on behalf of another entity has been described by some as a so-called "safe harbor." However, it should be noted that the provision is not truly a "safe harbor" from Section 4980H liability as that term has been used in other contexts. The use of the offer of coverage provision by clients who may be deemed the common law employer still presents some questions and concerns.

For example, the IRS Final Rule requires that employers pay a higher fee for employees enrolled under the staffing plan. However, the agency does not specify what amount would be sufficient. Though the Final Rule does not specify or describe the additional fee other than by use of the term "higher," presumably, the employer client would need to pay more than a token amount. Further, the use of the provision could

<sup>16</sup> See, e.g., Michael J. Lotito, *NLRB General Counsel Takes Aim at Franchises*, Littler Workplace Policy Update (July 29, 2014).

<sup>17</sup> But see, e.g., Rev. Rul. 66-162, 1966-1 C.B. 234, holding both a department store and the store's concessionaire to be the common law employer of concessionaire employees where both had the right to supervise and direct the concessionaire's employees.

<sup>18</sup> Technical Advice Memorandum (TAM) 201347020, Nov. 22, 2013. However, footnote 19 to TAM 201347020 acknowledges that "[i]n unique circumstances, an individual may be a common law employee of more than one employer (concurrent employment) with regard to the same service[.]" citing Rev. Rul. 66-162.

<sup>19</sup> See, e.g., *Burrey v. Pac. Gas & Elec. Co.*, 1999 U.S. Dist. LEXIS 22619 (N.D. Cal. May 12, 1999) (rejecting joint employer theory in ERISA context, reasoning that "applying the doctrine in the ERISA context would not further the goals of the statute . . . to ensure employees receive benefits to which they are entitled" and noting that such purpose would not be served by "requiring two employers both to provide employee benefits." *Id.* at \*\*32-33. The *Burrey* court further cited the Supreme Court's ruling in *Nationwide Mut. Ins. v. Darden*, 503 U.S. 318, 326-27, 117 L. Ed. 2d 581, 112 S. Ct. 1344 (1992), which rejected application of the expansive employee test under the FLSA, which would permit joint employment, noting that such an approach "would severely compromise the capacity of companies . . . to figure out who their 'employees' are and what, by extension, their pension-fund obligations will be."

present issues under existing rules that prohibit self-funded group health plans and Section 125 cafeteria plans from discriminating in favor of highly compensated employees. The ACA will extend nondiscrimination requirements to insured group health plans, under regulations yet to be issued. Additional guidance from the IRS to reconcile the use of the safe harbor with nondiscrimination testing requirements would certainly be welcome.

Finally, use of the offer of coverage provision may raise HIPAA privacy concerns. Presumably, clients may ask staffing firm to provide some sort of accounting to support the additional fee. If workers who have enrolled in the staffing firm's group health plan may be identified through this accounting, it is likely this information is considered protected health information (PHI) under the HIPAA privacy rules and would be subject to HIPAA penalties for violations. Therefore, great care must be exercised when invoicing the additional fee.

### **Misclassification and the ACA Employer Mandate**

A determination by the IRS of misclassified workers under the ACA could lead to companies suddenly being retroactively deemed large employers subject to the mandate and all applicable penalties.

Further, if the staffing firm is offering health and other welfare benefits to the workers, and the workers are reclassified by the IRS as employees of the clients, then the staffing firm will have arguably been providing benefits through a Multiple Employer Welfare Arrangement (MEWA), which carries its own set of compliance issues, both at the federal and state levels.<sup>20</sup> If the staffing firm provides pension, profit-sharing or 401(k) benefits to the reclassified workers under tax-qualified plans, then those plans might also be deemed multiple employer plans.

## **Conclusion: One Size Does Not Fit All**

Ultimately, the employer-employee determination by the IRS under the ACA's employer mandate will be evaluated on a case-by-case basis applying the common law control legal analysis. There are many different staffing and contingent worker operational models, and for purposes of the ACA, one size will not fit all. For staffing firms, vendor management companies, PEOs, and their clients, careful analysis of the control exercised over the workers, the client service contract and the ACA requirements, is the best preparation.

The Littler Employment Tax and ACA Consulting and Contingent Workforce Practice Groups are ready to assist.

## **Next Steps**

Staffing companies, professional employer organizations, vendor management companies, and the clients that engage their services should all be aware of the impact of the ACA on these relationships and be aware of the potential legal risks. We recommend immediately taking the following steps:

1. Under the operational and financial realities of the engagement, determine who is most likely the employer under the common law test of all workers provided;
2. Review and revise client service agreements to enhance the likelihood of clients being indemnified and being able to rely on offers of coverage made by the staffing firm;
3. Assure overall compliance with the ACA employer mandate (both internally and by your staffing provider or client) by reviewing health coverage, making sure all employee hours can be tracked, and accurately characterizing new employees as variable hour, part-time or seasonal versus full-time;
4. Carefully evaluate based on the legal standards, past practice, and course of dealing, whether new workers may be properly classified as variable; and

<sup>20</sup> ERISA Section 3(40)(A). A MEWA is a welfare arrangement provided to employees of different non-affiliated employers. Whether employers are affiliated for purposes of the MEWA regulations requirements is determined under the 80% control test, but whether the MEWA reporting requirements apply, and only for that purpose, a 25% affiliation rule applies. DOL Reg. §2520.101-2(c)(2)(ii)(A). ERISA's preemption of state law rules are significantly relaxed in the case of a MEWA. ERISA §514(b)(6)(A). Further, the ACA added several new requirements to MEWAs, including a criminal penalty for knowing misrepresentations of fact regarding a MEWA. ERISA Sec. 519, added by the ACA. A detailed discussion of MEWAs is beyond the scope of this paper.

5. Establish a policy under the group health plan for compliance with the ACA mandate through use of the measurement periods as provided in the Final Rule.

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