

Final Regs on Health Care Reform Large Employer Penalties May Help Employers Who Hire Employees From Staffing Firms

POSTED ON: APRIL 1, 2014 BY: NANCY K. CAMPBELL

As explained in my [Checklist for Employers](#), a large employer will have to pay a subsection (a) penalty for any month if it does not offer "minimum essential coverage" ("MEC") to substantially all (i.e., 70% for 2015 and 95% for future years) of its full-time employees and their dependents if one or more full-time employees receive a premium tax credit to help pay for coverage on a Marketplace.

For purposes of the forgoing rule, employers must take into consideration each of their common law employees. Oftentimes, employees that an employer hires from a staffing firm may be the employer's common law employees. The final regulations include the following new rule, which is very helpful:

- **Offer of coverage by staffing firm on behalf of client employer:** 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, but only if the fee the client employer pays 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.

Under this rule, if an employer hires a full-time employee from a staffing firm and he or she is actually the employer's common law employee, if the staffing firm offers "MEC" to that employee, the offer will count as an offer of coverage for purposes of whether the employer passes the substantially all test, but only if the employer pays a higher fee for an employee enrolled in the staffing firm's health coverage.

Unfortunately, the new rule does not go so far as to say that employees hired from a staffing firm will be treated as the staffing firm's common law employee's rather than the client's common law employees. In addition, even if an employer passes the substantially all test, such common law employees could still subject the employer to a subsection (b) penalty. This could happen if the MEC offered by the staffing firm is not "affordable" or "minimum value".

The large employer shared responsibility penalties take effect in 2015. In the meantime, employers who hire common law employees from staffing firms should consider renegotiating their contracts to require: 1) the staffing firm to offer MEC; and 2) the employer to pay a higher fee for employees who enroll in MEC. In addition, to avoid a subsection (b) penalty, employers might require that the MEC be both minimum value and affordable.

For more information on common law employees, see Sections 1 and 2 of [IRS Publication 15A](#). For more information on the large employer shared responsibility penalties, please see my [Checklist for Employers](#), the [final regulations](#), and the [IRS Questions and Answers on Employer Shared Responsibility Provisions Under the Affordable Care Act](#). For more information on MEC, see ["What the heck is MEC?"](#)