ACA Increases Exposure for Misclassifying Leased Employees

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ACA INCREASES EXPOSURE FOR MISCLASSIFYING LEASED EMPLOYEES

As employers race to satisfy various Affordable Care Act ("ACA") requirements effective January 1, 2015, they need to include amendments to staffing agency contracts on their ACA checklist. Properly structuring such contracts could be the difference between suffering and avoiding enormous penalties.

Employers can be penalized under Internal Revenue Code ("Code") section 4980H in either of two ways. One penalty applies to an employer who fails to offer a sufficient percentage of its full-time employees the opportunity to enroll in minimum essential coverage. A second penalty applies when an employer offers minimum essential coverage but the coverage is not affordable or does not provide minimum value.

Both penalties tie to whether qualifying coverage is offered to full-time employees. Employee status is determined based upon the common law facts and circumstances test. Comments on the proposed regulations included requests for relief from the penalties in cases where employers mistakenly, but in good faith, treat individuals as non-employees. Specifically, requests were made to extend Section 530 payroll tax relief where the employer had a reasonable basis for the errant characterization. In the preamble to the final regulations, the IRS expressly declined to extend 530 relief to the 4980H rules. As a result, in a worst case scenario, misclassifying a handful of staffing agency workers could produce annual penalties in an amount equal to $2,000 multiplied by the employer's entire full-time workforce.

However, the final regulations allow employers to help themselves in this regard. With respect to individuals provided by the staffing agency but determined by the IRS to be common law employees of the client employer, the regulations allow the client employer to treat certain staffing agency offers of qualifying coverage as made by the client employer. If the staffing agency makes offers of qualifying health coverage, the offer is treated as made by the client employer for purposes of Section 4980H "if the fee the client employer would pay to the staffing agency for an employee enrolled in health coverage under the plan is higher than the fee the client employer would pay the staffing agency for the same employee if that employee did not enroll in health coverage under the plan."

What does all of this mean as a practical matter? It means that client employers need to contractually protect themselves from unexpected and potentially costly 4980H consequences resulting from their use of staffing agency workers. Contracts with staffing agencies should be amended to require, among other things, that the staffing agency commits to:

(1) Ensure that it is the common law employer of the individuals in question;

(2) Provide qualifying coverage to the individuals in question and satisfy all other 4980H requirements as if the individuals were common law employees of the staffing agency;

(3) Represent and warrant that the fee the client would pay to the staffing agency for an employee enrolled in health coverage under the plan is higher than the fee the client employer would pay the staffing agency for the same employee if that employee did not enroll in health coverage under the plan; and

(4) Indemnify and hold harmless the client employer from breaches of #1, #2 or #3 above.

If you have any questions, please feel free to contact Steve Witmer at switmer@ipbtax.com or your regular Ivins, Phillips & Barker contact.

FOR MORE INFORMATION

Contact the Ivins,

Phillips & Barker

Employee Benefits Practice