

## Determining if Individuals are Full-Time Employees under the Employer Mandate

A Program for Community Action Agencies sponsored by CAPLAW  
Tuesday, August 11, 2015

Presented by:

Edward I. Leeds  
Ballard Spahr LLP  
leeds@ballardspahr.com  
215.864.8419

© 2015 by Ballard Spahr LLP

DMEAST22411709 v 1

## Background

## Background

- The ACA introduced the Employer Mandate
  - Originally effective 2014
  - Delayed to 2015
- Applies to Applicable Large Employers
  - At least 50 Full-time Employees or Full-time equivalents
  - For 2015, increased to 100

## Background

### Employer Mandate

Employer must offer coverage that meets two tests or IRS may impose an assessable payment

## Background

### First Test

Employer must offer minimum essential coverage to at least 95% of all Full-time Employees

- Assessment triggered if any Full-time Employee obtains subsidy on an Exchange
- Assessment equals \$2,080 (indexed) times the number of all Full-time Employees minus 30 employees
- For 2015, 95% is decreased to 70% and 30 employees is increased to 80.

Ballard Spahr

5

## Background

### Second Test

Employer must offer Full-time Employees coverage that is Affordable and that provides Minimum Value

- Affordable means that employee contributes no more than 9.56% of household income
- Minimum Value means that coverage meets at least 60% of a prescribed set of costs in accordance with government rules
- Assessment equals \$3,120 (indexed) times the number of Full-time Employees who obtain subsidy on Exchange

Ballard Spahr

6

# Full-time Employees

## Determination of Full-Time Status

### Basic Definitions

- An Employee is Full-time if credited with
  - 30 hours of service per week
  - 130 hours of service per month
- An hour of service is an hour for which an employee is paid or entitled to payment for the performance of duties or for a period when no duties are performed because of vacation, leave of absence or certain other reasons

## Determination of Full-time Status

### Calculation of Hours

- For hourly employees, count actual hours
- For salaried employees, count hours or use equivalency
  - 8 hours for each day in which employee works an hour
  - 40 hours for each week in which employee works an hour
  - May not substantially understate hours in a way that affects Full-time status

## Determination of Full-time Status

### Two Methods for Determining Status

- Monthly
- Look-back Measurement Method

## Determination of Full-time Status

### Monthly Method

- Treat employee as Full-time for a month if the employee works Full-time hours for that month
- Real time determination
- Unpredictable for employees whose hours vary

## Determination of Full-time Status

### Look-back Measurement Period

- Determine hours by looking back over Measurement Period
- If credited with at least 30 hours/week for Measurement Period, treat as Full-time for Stability Period
  - Typically employers use 12-month periods
  - Fix periods on an ongoing basis
  - For new employees, initial Measurement Period based on commencement of employment

## Examples

## Volunteers

### Example #1

Community Action Program (CAP) has volunteers. Do their hours need to be tracked for purposes of the employer mandate?

## Volunteers

CAP does not need to count hours of bona fide volunteer if:

- CAP is
  - Tax-exempt organization under section 501(c) or
  - Governmental entity
- Volunteer does not receive compensation other than:
  - Reimbursement for expenses
  - Reasonable benefits and nominal fees customarily paid by similar entities
- Note that Foster Grandparents are deemed volunteers under federal FGP regulations (45 C.F.R. § 2552.45)

Ballard Spahr

15

## Student Employees

### Example #2

- CAP employs students in work-study jobs. Do their hours need to be tracked for purposes of the employer mandate?

Ballard Spahr

16



## Student Employees

Student employees generally count as employees, and their hours must be tracked

There is a narrow exception for student employees who receive financial aid for studies through

- The federal work study program; or
- A similar state program

## Interns

### Example #3

CAP conducts a summer youth employment program that employs youth as young as 16 years of age. Do their hours need to be tracked for purposes of the employer mandate?

## Interns

Two rules may relieve CAP from needing to track the hours of summer interns, even if they are expected to work Full-time

- Limited non-assessment period
- Exception for seasonal employees

Age is not a relevant factor

## Interns

### Limited Non-assessment Period

- If intern's hours vary, CAP may use initial Measurement Period to determine if intern is Full-time. No assessment applies during that period.
- If intern is expected to work Full-time hours, no assessment will apply as long as CAP provides coverage by 1<sup>st</sup> day of 4<sup>th</sup> month of employment.
- If summer youth employment program lasts no more than 3 months, no coverage will need to be provided.

## Interns

### Seasonal Employment

- Employee for whom customary annual employment is no more than six months
- Customary means that the duration of the job is limited by its nature and that it begins approximately the same time each year

Seasonal employees are treated as being in a limited non-assessment period

Participants in summer youth employment program could qualify as seasonal

**Ballard Spahr**

21

## Trainees

### Example #4

- CAP pays individuals participating in a six-month job training program that regularly requires them to work more than 30 hours per week. Do they need to be treated as Full-time Employees?

**Ballard Spahr**

22

## Trainees

If job training program starts approximately the same time each year and CAP restricts relationship to six months or less, the trainees could be treated as seasonal employees.

If position extends beyond six months:

- Circumstances may be considered, but unlikely to warrant extension of seasonal relationship
- Need to provide coverage

## Third Party Employment

### Example #5

CAP pays a job trainee to perform work for an outside employer. If job trainee works more than 30 hours per week, who has responsibility under the employer mandate?

## Third Party Employment

If trainee is seasonal employee, the employee will not need to be offered coverage

If training program ends before 1<sup>st</sup> day of 4<sup>th</sup> month of employment, the employee will not need to be offered coverage

If trainee is a Full-time Employee, the issue depends on an evaluation of who is the common law employer

**Ballard Spahr**

25

## Third Party Employment

An employee's common law employer is responsible for meeting the employer mandate

- Common law employment is determined by considering a set of factors
- None of the factors is determinative, but focus is often placed on control
- In this situation, it may be hard to determine definitively

**Ballard Spahr**

26

## Third Party Employment

If circumstances permit, CAP may proactively assume responsibility through rules that apply to staffing firms

- Third party employer would be deemed to meet obligations through CAP's provision of coverage that meets employer mandate standards, but it must pay CAP more for trainee who elects coverage than for trainee who does not (or pay CAP some amount, if it was paying nothing)

## Third Party Employment

If CAP engages any staff through staffing firm, it may seek to have staffing firm assume responsibility

- Will want contractual commitment from staffing firm
- Will need to pay more for staff that elect health coverage, but there appears to be flexibility as to amount

## Head Start Teachers

### Example #6

- CAP lays off a Head Start teacher for 10 weeks during the summer and rehires the teacher in September. The teacher does no work for CAP during the 10-week lay-off. Can CAP treat the teacher as a new hire in September?

## Head Start Teachers

Employer mandate rules allow for treatment as new hire in some circumstances

- Typically an employer may treat an employee as a new hire if the employee is credited with no hours of service for 13 weeks
- For an educational organization, the period is increased to 26 weeks

## Head Start Teachers

- For a 10 week lay-off, the Head Start teacher would not be treated as a new hire.
- If the lay-off were 14 weeks, it would depend on whether CAP were treated as an educational organization

## Head Start Teachers

*Educational organization.* An educational organization is described in section 170(b)(1)(A)(ii) if its primary function is the presentation of formal instruction and it normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on. The term includes institutions such as primary, secondary, preparatory, or high schools, and colleges and universities. It includes Federal, State, and other public-supported schools which otherwise come within the definition. It does not include organizations engaged in both educational and noneducational activities unless the latter are merely incidental to the educational activities. A recognized university which incidentally operates a museum or sponsors concerts is an educational organization within the meaning of section 170(b)(1)(A)(ii). However, the operation of a school by a museum does not necessarily qualify the museum as an educational organization within the meaning of this subparagraph.



## Head Start Teachers

### Example #7

The facts are the same as Example #6 except that the Head Start teacher is hired six weeks (perhaps to fill an unexpected vacancy) before the end of the school year.

## Head Start Teachers


### There is one more special rule

- An employee may be treated as a new hire if the employee is credited with no hours of service for at least 4 weeks (and no more than 13 or 26 weeks, as applicable) and the break is longer than the employee's prior period of employment

Because the employee worked only 6 weeks and was absent for 10 weeks, the employee could be treated as a new hire



# Questions



The information provided in this presentation should not be construed as legal advice or legal opinion regarding any specific facts or circumstances, but is intended for general informational purposes only.