

# ACA Review: Determining Employee Status



## ***Common Law Test Crucial***

A national group, the Association of School Business Officials (ASBO), has been working with the Internal Revenue Service (IRS) on an ongoing basis to reduce, simplify, clarify and streamline Affordable Care Act (ACA) compliance requirements for school districts. Recently, IRS auditors in several states have indicated that several school districts are misclassifying employees as contractors for ACA purposes, who in fact should be considered short-term employees.

### **The issue at hand: Employee or Contractor**

Applicable large employers (ALE) are faced with the reality of complying with employer shared responsibility rules included in the Affordable Care Act (ACA). In order to comply with the ACA rules, ALEs must understand what it means to make an offer of minimum essential coverage (MEC) under an eligible employer-sponsored health plan to their full-time employees.

School districts may have many unique circumstances when it comes to ACA compliance and full-time employee status. Such unique circumstances include: substitute teachers, coaches, ticket takers, aides and others. When districts categorize these employees for ACA purposes, they should keep two important concepts in mind: contracted staff versus employee/employment categories.

### **How to Determine Status**

To determine an individual's status as an "employee", final regulations have focused on applying the "common law" standard. The determination can be complicated in many cases. Where the ACA's employer shared responsibility rules are concerned, the answer to this question tells us which entity must make the requisite offer of coverage when assessing exposure for penalties.

### **The Common Law Employer Test**

When it comes to non-traditional staffing issues, the question of who is a common law employer/employee is, at first glance, difficult to answer. For purposes of the federal tax code and ERISA, employers have historically been required to distinguish between workers who are their common law employee and those who are not. The determination of common law status is based on a multi-factor test established by the Internal Revenue Service to determine which employer has "primary direction and control" of an employee. A series of factors are applied based on the unique facts and circumstances of the situation, but those factors generally fall into three broad categories regarding whether the entity exercises: (1) behavioral control; (2) financial control; and (3) legal control.



The final regulations do not directly address when and how the common law test will apply with regard to temporary or unique employment situations. So, it remains to be seen just how vigorously the Internal Revenue Service (IRS) intends to apply the test, which is by no means a black-and-white indicator. School districts that routinely provide contracts for certain positions may want to consider such personnel as employees for ACA purposes, as the common law test would be easy to satisfy in most cases.

### **ACA Employment Categories**

It is all about keeping it simple! The ACA, with limited exceptions, does not go into great detail when categorizing employees. Terms such as “limited term employee”, “temporary employee” and “substitute teacher” are not included in the regulations. Rather, employers are required to consider employees as fitting into one of four categories at the time of hire: full-time (FT), part-time (PT), variable hour or seasonal. And, in terms of identifying FT status in an on-going employment situation, the rules require only that the employer determine if the employee works 30 or more hours per week based on one of two methods: the monthly measurement method or the look back measurement method.

Many school districts consider anyone on the current payroll as an “employee”, thereby eliminating the need for the “common law” test. In essence, the employer considers all payroll participants as employees and should apply the selected measurement method to the employee’s hours to determine FT status, without regard to contract terms or length of service. If anyone is employed per the payroll records at the start of the measurement period (for the look back measurement method) or the start of the month (for the monthly measurement method), they should be measured and treated accordingly.

New hires for purposes of the look back measurement method should be categorized as FT, PT, variable hour or seasonal at the time of hire. Circumstances of each of these employees may be different. For instance, a coach hired to work one season (i.e., basketball) could be categorized as a seasonal employee and put into an initial measurement period while a person hired as a long term FT substitute would have to be categorized as FT employee and offered coverage within the first three months or per the employer’s eligibility requirements.

### **Key Takeaway:**

Many organizations are lobbying the federal government to simplify the implementation of the Affordable Care Act. However until the federal government issues rules dictating changes, organizations should continue to comply with the law as it currently stands. Currently the common law standard is the rule for determining employee status, and organizations should approach the standard with caution, as to minimize risk of penalty exposure. Please also note that the identification process of an individual as an employee may have ramifications beyond the ACA, for example worker’s compensation, fair labor standards act application, unemployment compensation and contractual issues to name a few. It should also be noted that the tests to determine whether an individual is an employee vary from area to area, for example the test for being an employee under Wisconsin’s Worker’s Compensation Law is separate and distinct from the ACA, IRS and Department of Labor Tests. Please work with your legal counsel, tax professionals and/or insurance experts to help you determine the right approach for your organization.

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