



# COUNTING DIFFICULT EMPLOYEE TYPES AND EMPLOYER FINES

Presented by: Danielle H. Capilla, JD and Carol Taylor

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# Compliance Webinars

Slides will be archived on [nahu.org](http://nahu.org) under the Compliance Corner tab The session is being recorded and will be archived in Compliance Corner

- *\*Compliance discussions and responses offer NAHU's interpretation and research regarding application of the provisions of the Patient Protection and Affordable Care Act (PPACA). NAHU is providing this guidance as an informational resource for NAHU members. This general information is not a substitute for legal or tax advice.*

# Presentors - Danielle H. Capilla, JD & Carol Taylor

**Danielle Capilla** joined United Benefit Advisors in February 2015 as Chief Compliance Officer, based in the company's Chicago office. Bringing her legal experience with a specific emphasis on health care to UBA, Danielle oversees all compliance initiatives and addresses the complex issues of health care reform.

Prior to joining UBA, Danielle was an attorney and senior writer analyst for the health law division of Wolters Kluwer Law and Business. She was also the lead editor of the Wolters Kluwer health law blog and a senior writer and analyst of the Health Reform WK-EDGE, the Health Law Daily, the Food, Drug, and Cosmetic Law Reports and the Medical Devices Reports publications. Additionally, Danielle published a number of in-depth strategic perspectives focusing on the Patient Protection and Affordable Care Act's (PPACA) contraception mandate and preventive service requirements. Additional publication credits include a broad array of Medicare and Medicaid references and the CCH Law, Explanation, and Analysis of PPACA.

Danielle graduated from DePaul University College of Law with a health law certificate and she has an undergraduate degree in sociology and business from Tulane University. Furthermore, Danielle serves on DePaul University's Health Law Institute advisory board and regularly lectures at DePaul on a variety of PPACA and other health law issues.

**Carol Taylor** is with the D&S Agency in Roanoke, Virginia. She has been in the insurance industry for over 25 years in various capacities, ranging from insurance accounting, claims auditing, account management and compliance. She graduated from the University of Central Florida with a BSBA in Accounting.

Carol has participated in countless seminars, town hall meetings, compliance panels and other educational event meetings both locally and nationally. She is regarded as an industry expert and has been interviewed for multiple newspapers, journals and radio stations. She was chosen to ask the "health care question" at the CNN Republican Presidential Debate held in Tampa, FL in September 2011. She is the immediate past chair of the Compliance Corner Committee and is the current Region II Liaison and Co-Chair of the Staffing/PEO/Association committee for NAHU. In addition, she serves on the Virginia AHU Legislative Management Team tasked with reviewing bills as they are introduced and speaking with legislators' offices.

Carol was honored with the Florida AHU Emerging Leader Award for 2010-2011, and she is a two time United Benefit Advisors (UBA) Staff Person of the Year award winner for her work with legislative issues and assisting the over 140 partner firms nationwide with PPACA compliance issues. She also Chairs the Client Compliance Solutions Committee and serves as Vice-Chair for the Health Plan Survey Committee for UBA.



The slides will be archived on [www.nahu.org](http://www.nahu.org) compliance corner

# DIFFICULT EMPLOYEE TYPES

- Employees not paid hourly or salaried
- Seasonal employees/Seasonal workers
- Foreign workers/Overseas workers
- Leased/Staffing Agency employees
- Educational employees
- Students & Interns
- Union employees
- Employees on leave (FMLA or other leave)
- Terminated and rehired employees

# EMPLOYEES WITH HARD TO DETERMINE HOURS

- Some employees are paid differently than hourly/salaried
  - Such as piece-work, mileage, etc
- Safe harbor methods to count:
  - Actual hours worked
  - Days worked - for any day the employee worked 1 hour or more, credit the employee with 8 hours
  - Weeks worked - for any week the employee worked 1 hour or more, credit the employee with 40 hours
  - CAUTION: the Days worked and Weeks worked methods cannot result in a significant reduction in the number of hours actually worked

# SEASONAL EMPLOYEES & SEASONAL WORKERS

- A Seasonal Employee is an employee hired for a position which has customary annual employment for 6 months or less
- Usually, a season occurs in the same months each year
- A measurement period of 3 to 12 months must be used to determine if a seasonal employee is full-time and should be offered coverage
- Employers may use the look back method for their initial measurement period to determine if the employee meets the definition of seasonal or not

# SEASONAL EMPLOYEES & SEASONAL WORKERS

- Employers may only use this method to utilize the ‘seasonal worker exception’ IF they use the measurement and lookback period for at least one class of ongoing employees (such as hourly, or those in a bargaining unit)
- An employer may not use the look-back method only with variable-hour and seasonal employees.



# SEASONAL EMPLOYEES & SEASONAL WORKERS

- A Seasonal Worker is not the same as a Seasonal Employee
- The 120 day 'seasonal worker' measure is used for determining if the pay or play requirements are applicable to the employer
- Employer size is based on exceeding 50 FT/FTE threshold for less than 4 calendar months or 120 days (does not need to be consecutive) AND only if seasonal workers caused it to exceed the 50 count can they be disregarded in determining if the employer is considered large



# FOREIGN WORKERS & EMPLOYEES OVERSEAS

- Foreign workers, U.S. noncitizens, hours must be counted
- The IRS has specifically stated those workers holding H-2A and H-2B visas are to be counted
- For overseas employees, only those hours worked in the U.S. that are taxed as U.S. source income are to be counted

# PEO OR STAFFING AGENCY EMPLOYEES

- Determination must be done to identify common law employee status
- The IRS has stated that the recipient company is responsible in most cases
  - Carefully review all contracts with experienced legal counsel
  - Who directs/manages employee
  - Cannot use retirement plan eligibility as determination
- The IRS has stated that if an employer tries to avoid penalties by having the employee work directly for the employer for a certain number of hours, as well as for an agency for a certain number of hours, the employee will be considered a full-time common law employee of the recipient company

# PEO OR STAFFING AGENCY EMPLOYEES

- If the PEO/Staffing Agency charges more to the recipient company for a worker that has enrolled in coverage, then the employer is considered to have made an offer of coverage
  - The recipient company must obtain information that the offer meets both Minimum Value (MV) and Affordability
  - The recipient company must report on their coverage, if they are a large employer (50 or employees)

# EDUCATIONAL EMPLOYEES

- Adjunct Faculty safe harbor
  - For each hour of classroom time, the adjunct faculty member should be credited with 2.25 hours
  - For each hour of non-classroom time, they should be credited with one hour
- Substitute teachers are based on how the arrangement is set up
  - They should be treated like any other new hire, with full-time substitutes being offered coverage within the first 90 days.

# STUDENT & INTERN EMPLOYEES

- Students hours must be counted, unless it is work-study hours (such as those paid through a federal or other governmental program)
- Since most students are under age 26, many will likely be covered under their parents plan
- Hours worked in a paid internship must be counted
  - Coverage does not need to be offered if they work less than 90 days
  - Employer is responsible (likely not the educational institution)

# UNION EMPLOYEES

- Union employees hours must be counted
- Even if coverage is provided through the union
  - Employer must report on coverage if they are a large employer (50 or more)
  - Employer must obtain information on plan offering to ensure the coverage meets Minimum Value and Affordability

# EMPLOYEES ON LEAVE

- If the employee is **paid**, the hours must be counted as though they were working
  - This applies to vacation, holiday, sick time, layoff, jury duty, military duty and any other **paid** leave
- For those on unpaid FMLA, USERRA or jury duty hours do not need to be counted if the **monthly** method is used.
- For unpaid FMLA, USERRA or jury duty hours, if the **look-back** measurement method is used, then hours must be counted
  - Employee is considered a continuing employee and average hours must be credited as though they were working



# TERMINATED & REHIRED EMPLOYEES

- Employee who has a break-in-service during which no hours of service are credited for 13 weeks is considered to be a new employee if hired after that break
- Final regulations do not permit employers to treat short-term employees as variable hour employees
  - If hired to work an average of 30 hours or more per week
  - Must be treated as full-time and offered coverage

# DOCUMENTATION OF COUNTING

- All hours, whether the employee is full-time or part-time, must be counted
- Employers will be required to report the number of full-time employees for each month at year end.
- REMINDER: Controlled organization rules apply, so all employers under common ownership must aggregate the employee counts
- CAUTION: Measurement, Stability and other periods should be listed in employee handbooks and/or the ERISA SPD/Wrap

# SELF-REPORTED FINES & PENALTIES

- Pay or Play Fines
  - “A” penalty is \$2,000 per employee, less the first 30 (or 80 in 2015, if transitional relief is retained)
  - “B” penalty is \$3,000 per employee that receives an APTC through the Marketplaces
  - Amounts are indexed, but new index amounts have not been announced
  - Amounts are not tax deductible as a business expense, they are considered an excise tax. For most businesses, these equate to a \$3,070 for “A” or \$4,600 for “B”

# SELF-REPORTED FINES & PENALTIES

- Since 2010, the IRS has stated that employers/plan administrators should self-report any failure to comply with PPACA, COBRA, HIPAA, MHP and HSA laws
  - Fine is \$100 per day, per affected individual
  - Reported on IRS Form 8928
  - Deadline generally is the same as the plan sponsor's federal income tax return
  - HSA comparable contributions deadline is the 15<sup>th</sup> day of the fourth month following the calendar year in which the non-comparable contributions were made
- If a plan fails to report and pay excise taxes when due the IRS may assess penalties and interest, unless the failure to file and pay is due to reasonable cause and not willful neglect
- Late penalty is 5% of the unpaid excise tax for each month the form is late, up to a maximum of 25%
- If the IRS discovers the failure during an audit, minimum penalties are significantly increased
- Plan sponsors may file Form 7004 for an automatic six-month extension, however this will not extend the deadline for payment of the excise taxes

# SELF-REPORTED FINES & PENALTIES

- It is not clear from the IRS instructions if the form should be completed even if no tax was due, if the failure was due to reasonable cause and corrected promptly (within 30 days). A definition of reasonable cause was not supplied
  - No excise tax is imposed during the period when the plan sponsor did not know, or using reasonable diligence would not have known, that a plan failure existed
  - Once discovered, if the failure was due to reasonable cause and the correction is made within 30 days, no penalty is assessed

# SELF-REPORTED FINES & PENALTIES

- Self-reported violations include the failure to:
  - Offer continuation (COBRA) to a qualified beneficiary
  - Provide the prescribed levels of pediatric vaccine coverage
  - Comply with special enrollment period requirements
  - Remove limitations on pre-existing condition exclusions
  - Provide Certificates of Prior Coverage
  - Cover the required 48-hour and 96-hour hospital length of stay for childbirth for mothers and newborns
  - Provide mental health parity and substance use disorder benefits

# SELF-REPORTED FINES & PENALTIES

- Self-reported violations failure to(continued):
  - Removal of pre-existing condition limitations
  - Providing employer contributions for individual medical plans
  - Discriminating against participants and beneficiaries based on health status
  - Discrimination in coverage for services from certain health care providers
  - Cost-sharing limitations on Essential Health Benefits
  - Eligibility waiting periods in excess of 90 days
  - Coverage for individuals participating in approved clinical trials
  - Imposing annual or lifetime dollar limits on EHBs



# SELF-REPORTED FINES & PENALTIES

- Self-reported violations failure to(continued):
  - Most rescissions of coverage
  - Provide first dollar coverage for preventive
  - Extend dependent coverage to age 26
  - Provide Summary of Benefits and Coverages (or miss deadlines to produce)
  - Meet health plan reporting requirements
  - Offer required health plan claim and appeals protections
  - Provide required patient protections regarding selection of a PCP, coverage of emergency services (out of network should be same benefit level as in network) and access to pediatric and OB/GYN providers

# QUESTIONS

- This webinar will be available in the members only section on the NAHU website under Compliance - Webcasts
- Questions? Check out NAHU's *Compliance Corner* premier member benefit.

<http://www.nahu.org/education/programs/compliance.cfm>



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