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Who Are Your Form 1095-C Employees?

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Beginning in 2016, Internal Revenue Code § 6056 requires large employers to complete, file with IRS and deliver to employees a Form 1095-C for each full-time employee offered minimum essential coverage for each 2015 coverage month. So, who are your Form 1095-C employees? Might they include people not on your payroll?

Here's the relevant IRS rule defining "full-time employee" under Code § 6056:

> (6) Full-time employee. The term *full-time employee* has the same meaning as in section 4980H and § 54.4980H–1(a)(21) of this chapter, as applied to the determination and calculation of liability under section 4980H(a) and (b) with respect to any individual employee, and not as applied to the determination of status as an applicable large employer, if different.

26 CFR § 301.6056-1(b)(6). And here is the cited sub-section 21 of the § 4980H (employer mandate) rules:

> (21) *Full-time employee*—(i) *In general*. The term *full-time employee* means, with respect to a calendar month, an employee who is employed an average of at least 30 hours of service per week with an employer. For rules on the determination of whether an employee is a full-time employee, including a description of the look-back measurement method and the monthly measurement method, see § 54.4980H–3. The look-back measurement method for identifying full-time employees is available only for purposes of determining and computing liability under section 4980H and not for the purpose of determining status as an applicable large employer under § 54.4980H–2.
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> (ii) *Monthly equivalency*. Except as otherwise provided in paragraph (a)(21)(iii) of this section, 130 hours of service in a calendar month is treated as the monthly equivalent of at least 30 hours of service per week, and this 130 hours of service monthly equivalency applies for both the look-back measurement method and the monthly measurement method for determining full-time employee status.
>
> (iii) *Determination of full-time employee status using weekly rule under the monthly measurement method*. Under the optional weekly rule set forth in § 54.4980H–3(c)(3), full-time employee status for certain calendar months is based on hours of service over four weekly periods and for certain other calendar months is based on hours of service over five weekly periods. With respect to a month with four weekly periods, an employee with at least 120 hours of service is a full-time employee, and with respect to a month with five weekly periods, an employee with at least 150 hours of service is a full-time employee. For purposes of this rule, the seven continuous calendar days that constitute a week (for example Sunday through Saturday) must be consistently applied for all calendar months of the calendar year.

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26 CFR § 54.4980H-1(a)(21). But that just tells you which "employees" are full-time. "Employee" is defined in the preceding sub-section 15:

> (15) *Employee*. The term *employee* means an individual who is an employee under the common-law standard. See § 31.3401(c)–1(b). For purposes of this paragraph (a)(15), a leased employee (as defined in section 414(n)(2)), a sole proprietor, a partner in a partnership, a 2-percent S corporation shareholder, or a worker described in section 3508 is not an employee.

26 CFR § 54.4980H-1(a)(15). The IRS uses a multi-factor test to identify common-law employees who have been errantly omitted from an employer's payroll. Most often, the outcome hinges on the employer's right to control how, where and when the worker works. The referenced rule sums it up this way:

> (b) Generally the relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is not an employee.

26 CFR § 31.3401-(c)(1)(b). Sub-section (e) then warns: "If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like." Code § 414(n)(2), with our emphasis, reads:

> (2) Leased employee
>
> For purposes of paragraph (1), the term "leased employee" means any person who is not an employee of the recipient and who provides services to the recipient if—
>
> > (A) such services are provided pursuant to an agreement between the recipient and any other person (in this subsection referred to as the "leasing organization"),
> >
> > (B) such person has performed such services for the recipient (or for the recipient and related persons) on a *substantially full-time basis for a period of at least 1 year*, and
> >
> > (C) such services are performed under primary direction or control by the recipient.

Commonly, workers are leased for less than one year, such as in temp-to-perm staffing arrangements. Section 3508 relates to real estate agents.

A long slog, we realize, but a necessary one to show you why you may have Form 1095-C reporting obligations with respect to people who are not on your payroll. But so what? Here's what. Code § 6721 and 6722 state the penalties for failure to file and deliver your Forms 1095-C as required by Code § 6056. We quote just the main penalty statements from the statute:

> (a) Imposition of penalty
>
> > (1) In general

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> In the case of a failure described in paragraph (2) by any person with respect to an information return, such person shall pay a penalty of $100 for each return with respect to which such a failure occurs, but the total amount imposed on such person for all such failures during any calendar year shall not exceed $1,500,000.
>
> (2) Failures subject to penalty
>
> For purposes of paragraph (1), the failures described in this paragraph are—
>
> > (A) any failure to file an information return with the Secretary on or before the required filing date, and
> >
> > (B) any failure to include all of the information required to be shown on the return or the inclusion of incorrect information.

26 U.S.C. § 6721(a).

> (a) Imposition of penalty
>
> > (1) General rule
> >
> > In the case of each failure described in paragraph (2) by any person with respect to a payee statement, such person shall pay a penalty of $100 for each statement with respect to which such a failure occurs, but the total amount imposed on such person for all such failures during any calendar year shall not exceed $1,500,000.
> >
> > (2) Failures subject to penalty
> >
> > For purposes of paragraph (1), the failures described in this paragraph are—
> >
> > > (A) any failure to furnish a payee statement on or before the date prescribed therefore to the person to whom such statement is required to be furnished, and
> > >
> > > (B) any failure to include all of the information required to be shown on a payee statement or the inclusion of incorrect information.

26 U.S.C. § 6722(a). So, missing one common law employee when you generate your Forms 1095-C in early 2016 could cost as little as $200. Missing 100 could cost $20,000. You'd need to miss 15,000 to reach the $3,000,000 annual cap. But any audit of such errors might also identify payroll taxes that should have been withheld from the wages of people misclassified as independent contractors. There could be collateral damage under wage and hour laws and benefit plan participation rules.

Are you planning to complete, file and deliver your Forms 1095-C manually? Does your automated process cover all Form 1095-C employees? These are questions that large employers should answer in 2015.