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## MEMORANDUM

To: Washington Fire Districts and Regional Fire Authorities

From: Brian Snure

Re: The Patient Protection and Affordable Care Act

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This memorandum provides guidance to fire protection districts and regional fire authorities (collectively referred to as “fire departments”) in the State of Washington in complying with the Federal Patient Protection and Affordable Care Act “ACA.”

**This memorandum is a work in progress and may change as additional questions are asked and additional interpretations are issued. As substantive revisions are made I will post updated versions of this memorandum on my website, snurelaw.com. (This version has been updated to reflect the Final Regulations issued on February 12, 2014)**

This memorandum is intended to be informational in nature and is not intended to provide legal advice. The memorandum should not be relied on as a full and complete explanation of the materials reviewed or how they apply to any specific fire departments. Fire districts or RFAs that intend to take any actions or make any decisions based on this material should review the actual documents referred to in the summaries and obtain legal advice regarding the materials. The author does not make either express or implied warranties in respect to the accuracy of the memorandum.

The memorandum is presented in four sections: Section One covers the basic legal requirements of the ACA. Section Two addresses whether the ACA applies to volunteers. Section Three covers the calculation methods to determine whether employers are covered by the Act and how to determine whether employees are considered full time. Section Four compiles FAQs that this firm has received from its clients.

## **SECTION ONE – BASIC LEGAL REQUIREMENTS OF THE ACA**

### **Employee Health Insurance Benefits – General Rule:**

Fire departments are not required to provide health insurance for any employees/volunteers. However, effective 2015, the ACA will establish an “assessable payment” (i.e. a penalty) for any fire department with 100 or more full time employee equivalents that does not offer affordable health insurance for all full time employees. Effective in 2016, the ACA will establish an “assessable payment” (i.e. a penalty) for any fire department with 50 or more full time employee equivalents that does not offer affordable health insurance for all full time employees. Accordingly, beginning January 1, 2015 for fire departments with 100 or more full time employee equivalents and January 1, 2016 for fire departments with 50 or more full time employee equivalents, the ACA requires that employers offer affordable and adequate health insurance coverage to its full time employees.

### **What is an Adequate Health Insurance Plan?**

Adequate health care insurance is defined by the regulations in terms of “minimum value” with a fairly technical definition<sup>1</sup> and employers will likely need to rely on their prospective health insurance providers to identify plans that meet this requirement. The health insurance must also cover “essential health benefits” and once again, you will need to rely on your prospective health insurance providers to make sure this requirement is met.

### **What is Affordable Health Insurance?**

The concept of offering affordable health insurance is defined by the regulations as offering an adequate health plan that costs the employee no more than 9.5% of the employees household income for the taxable year. Because employers will not necessarily know what an employees household income is, the regulations offer several safe harbor provisions for making this determination.

W-2 Wage Safe Harbor: The simplest safe harbor provision allows the employer to calculate the 9.5% value based on the taxable wages shown on the employee’s W-2. It is important to note that the reported W-2 Wages will, by definition, normally be equal to or lower than an employee’s household income.

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<sup>1</sup> The Regulations define Adequate Coverage as a health insurance plan whose actuarial value (i.e., share of the total allowed costs that the plan is expected to cover) is at least 60%. A minimum value calculator, for those inclined to explore this concept further can be found at: <http://www.cms.gov/ccio/resources/regulations-and-guidance/index.html> and then searching for “minimum value calculator.” I can also email a copy of the calculator (an excel spreadsheet) if requested.

Rate of Pay Safe Harbor: Under this safe harbor the employer is allowed to base the calculation on the employee's rate of pay as follows: (1) take the hourly rate of pay for each hourly employee who is eligible to participate in the health plan as of the beginning of the plan year, (2) multiply that rate by 130 hours per month and (3) determine affordability based on 9.5% of the resulting monthly wage amount. For salaried employees, monthly salary would be used instead of hourly salary multiplied by 130. If you reduce an employee's rate of pay during the year the calculation of affordability must be done for each month in which the pay changes and affordability is determined based on the lowest month of pay.

Federal Poverty Line Safe Harbor: Finally, the regulations will consider employer-provided coverage offered to an employee to be affordable if the employee's cost for self-only coverage under the plan does not exceed 9.5 percent of the Federal Poverty Line for a single individual. For households with families, the amount that is considered to be below the poverty line is higher, so using the amount for a single individual ensures that the employee contribution for affordable coverage is minimized.

## **SECTION TWO** **ARE VOLUNTEERS CONSIDERED EMPLOYEES UNDER THE ACA?**

Before you can determine whether you are a covered employer under the ACA's 50 full time employee equivalent threshold, we must determine whether the ACA considers volunteers as employees.

The Final Regulations issued on February 12, 2014 clarified that "hours of service" under the ACA do not include hours of service provided by "bona fide volunteers." The definition of "bona fide volunteers" provided in the regulations includes volunteer firefighters of governmental entities such fire districts, regional fire authorities and cities and towns. Although the regulations do not specifically reference the Fair Labor Standards Act definitions of volunteer, the regulations acknowledge that bona fide volunteers may receive expense reimbursements, nominal fees and reasonable benefits which are allowed under the Fair Labor Standards Act definitions of volunteer.

## **SECTION THREE** **HOW TO DETERMINE WHETHER YOU ARE REQUIRED TO OFFER HEALTH INSURANCE TO YOUR EMPLOYEES.**

### **STEP 1: Determining Whether Your District Meets the 50 Full Time Employee Requirement.**

**Note this calculation is separate and distinct from determining whether a particular employee is considered full time and required to be offered health insurance.**

Full time employees are defined as employees working 30 or more hours per week. (26 USC § 4980H(c)(4)(A)<sup>2</sup>.

The threshold is based on the aggregation of all part time and full time employees. Accordingly, the District must calculate all part time employee hours worked during a month (but not more than 120 hours per employee) and divide by 120 to determine the number of full time equivalents.

*For example, if the District part time employees work an aggregate of 4,800 hours per month, that would equate to 40 full time employees.*

To calculate whether the 50-employee threshold is met with respect to a given year, the total number of full time employee equivalents must be determined for each calendar month in the preceding year. The total number of full time employees and full time employee equivalents for each calendar month are added together and divided by 12. If the result is not a whole number, it is rounded down to the next lowest whole number.

*For example, an employer with an average total of 49.9 full time employees the calendar year 2013 would be deemed to have 49 employees and would not be a covered employer.*

## **STEP 2: Determining Whether Employees are Full Time Employees.**

**Note if an employer does not meet the 50 FTE threshold calculated in step 1, this determination is unnecessary.**

The method of calculating the number of hours worked by part time employees is not specified in the statutory provisions but is set forth in detail in the regulations. A summary of the method follows:

In order to determine the full time status of an employee you are required to establish a measurement period, a stability period and an optional administrative period.

**Measurement period.** The period of time established by the employer, from 3-12 months, that you will use to determine whether the employee averages 30 or more hours per week.

**Stability period.** The period of time following the measurement period (which must be equal to or greater than the measurement period) during which you must offer health insurance to employees (regardless of actual hours being worked) that were determined to be full time during the measurement period.

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<sup>2</sup> Regulation §54.4980H-1(18) states that 130 hours per month is the equivalent of 30 hours per week.

**Administrative period.** A period of up to 90 days between the measurement period and the stability period. The administrative period is separate from and cannot reduce or lengthen either the measurement period or stability period (however, it can overlap either period). When determining hours for new part time employees the combined measurement period and administrative period cannot exceed 13 months. The administrative period is similar to what is commonly known as the open enrollment period.

When determining how many hours are worked you are required to include all hours of service, and hours for which an employee is paid but does not work, such as vacation, holiday, illness etc.

### **Current Employees:**

**General Rule for Current Employees.** If an employee averaged at least 30 hours of service during the measurement period then the employee is considered full time during the stability period regardless of the number of hours of service during the stability period. This calculation would then be repeated on an ongoing basis.

#### ***Current Employee Calculation Examples:***

*Measurement Period: October 15 – October 15.*

*Administrative Period: October 15– December 31.*

*Stability Period: January to December*

*Employees that average 30 hours or more per week between October 15, 2013 and October 15, 2014 would need to be offered health insurance coverage for 2015.*

*Employees that did not average 30 hours or more per week, do not need to be offered health insurance in 2015.*

### **New Employees:**

**General Rule for New Employees.** If a new employee is reasonably expected to be a full time employee, the employer must offer insurance to the employee at or before the conclusion of the employee's initial three full calendar months of employment. If full time status is not certain the following procedure is used. This approach would also be used for seasonal employees that may work full time shifts during portions of the year. Since the determination of "full time" is based on an average over the measurement period, seasonal summer firefighters would likely not be considered full time if a full year measurement period is used.

The initial measurement period must begin on the employee's start date or the first day of the first calendar month following the start date. The stability period must be at least as long as the measurement period and must be the same length as the stability

period established for current employees. The administrative period cannot exceed 90 days from the end of the measurement period (Note: any days between the hire date and the start of the initial measurement period are counted as part of the 90 day limit).

***New Employee Calculation Example.***

*Measurement Period:* 12 months beginning on start date.

*Administrative Period:* End of measurement period through end of first calendar month beginning on or after end of the measurement period.

*Stability Period:* 12 months beginning at end of Administrative Period.

*Employee Hired:* May 10, 2014.

*Measurement Period:* May 10, 2014 - May 9, 2015.

*Administrative Period:* May 10, 2015 – June 30, 2015.

*Stability Period:* July 1, 2015 – June 30, 2016.

If the employee averages over 30 hours per week during his or her first year of employment, the department must offer health insurance beginning July 1, 2015 but is not required to offer health insurance during first year of employment. Employee would then be subject to the Current Employee calculations for future years. If employee was not full time under the Current Employee Measurement Period October 15 – October 15, District would still need to make insurance available through June 30, 2016.

## SECTION FOUR - FAQs

### **1. What level or type of medical insurance do we need to offer?**

You are required to provide “Adequate Coverage” that meets the “minimum value” coverage requirements. See the explanation of both concepts in Section 1.

### **2. Does the medical insurance have to be the same for all employee groups?**

Under the ACA, as long as the insurance offered meets the adequate coverage and affordability requirements you can offer different plans to different employee groups. However, there are IRS non discrimination requirements relating to highly compensated employees that may apply. Prior to offering different coverage to different employee groups, you will need to make sure the approach does not violate the Section 105(h) nondiscrimination rules.

### **3. What if the employee’s spouse has insurance and the employee can be carried on that policy?**

You are only required to offer and pay a substantial portion of the cost of the health insurance coverage. If an employee declines to accept the coverage you are still in compliance.

### **4. What if the person is under age 26 and on their parents insurance?**

You would still be required to offer the insurance to full time employees under the age of 26.

### **5. We must offer insurance, but do they need to accept it?**

No, see answer to questions 3 and 4.

### **6. When calculating who is eligible, is insurance only offered to employees who work an average of 30 hrs. per week?**

Yes, the determination of employee eligibility is based on the average hours worked by that employee.

### **7. I have 100 part time employees, each of them works an average of 20 hrs. per week. None of them meet the 30 hrs. per week. But if I take the number of employees and total hours, I come up with an equivalent of 66 FTE’s.**

The large employer calculation is separate and distinct from the employee eligibility calculation. Under this example, the 66 FTE calculation requires that you offer affordable and adequate health insurance to your full time employees. However, none of your 100 part

time meet the full time threshold as each averages less than 20 hours per week so you would not need to offer insurance to your employees in this situation.

**8. Once we are over the 50 FTE's and have to offer affordable health care, can we charge them for it or a portion of the premium?**

Yes, you may require employees to cover a portion of the cost of the health insurance as long as the annual employee cost does not exceed 9.5% of employee's household income for the taxable year. See the discussion in Section 1.

**9. Are there any long term obligations to the District if we hire a temporary worker?**

Temporary, or seasonal worker eligibility for being offered health care is calculated in the same manner as other employees. Generally, seasonal or temporary workers will not average more than 30 hours per week if you are using a 12 month measurement period.

**10. How long can we employ a temporary worker before the District is obligated to provide benefits?**

The ACA uses the Fair Labor Standard Act definition of seasonal employee so the ACA does not directly limit the amount of time a temporary worker may work. Accordingly, the answer to the question would be determined by the length of the measurement period and the number of hours the employee worked during that period.