ACA COMPLIANCE OVERVIEW

Pay or Play Penalty—Offer of Coverage

The Affordable Care Act (ACA) requires applicable large employers (ALEs) to offer affordable, minimum value health coverage to their full-time employees (and dependents) or pay a penalty. This employer mandate is also known as the “employer shared responsibility” or “pay or play” rules.

The employer shared responsibility rules and related reporting requirements were **delayed for one year, until 2015.** In addition, ALEs that had fewer than 100 full-time and FTE employees in 2014 generally had an additional year, **until 2016**, to comply with these rules.

The employer shared responsibility rules impose specific requirements on the “offer of coverage” that an ALE must provide to its full-time employees (and dependents). This ACA Overview provides a summary of the requirements related to the ALE’s offer of coverage.

LINKS AND RESOURCES

- On July 9, 2013, the Internal Revenue Service (IRS) issued Notice 2013-45 to provide formal guidance on the one-year delay.
- On Feb. 12, 2014, the IRS published final regulations on the ACA’s employer shared responsibility rules.
- The IRS has also provided Questions and Answers for employers on the employer shared responsibility rules.
- On Dec. 16, 2015, the IRS issued Notice 2015-87 to clarify offers of TRICARE coverage for purposes of these rules.

Applicable Large Employers

Only ALEs are subject to these rules.

- ALEs are employers that employ, on average, **at least 50 full-time and full-time equivalent (FTE) employees** during the preceding calendar year.
- All ALEs are subject to these rules, including for-profit, nonprofit and government employers.

Offers of Coverage

- Under these rules, ALEs must offer coverage that qualifies as “minimum essential coverage,” that is affordable and provides minimum value.
- Employees generally must have an effective opportunity to accept or decline coverage at least once per plan year.

Overview of Employer Penalties

The employer shared responsibility rules apply only to ALEs. An ALE is an employer with, on average, **at least 50 full-time employees, including FTEs**, during the preceding calendar year. Full-time employees are those working an average of **30 or more hours per week** (or 130 hours in a calendar month).

Under these rules, an ALE may be subject to a penalty if it:

- Fails to offer the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan to substantially all full-time employees (and their dependents) for any month; or
- Offers eligible employer-sponsored coverage that is not affordable or does not provide minimum value.

However, regardless of whether or not an ALE offers coverage, a penalty will be assessed ***only if*** at least one of its full-time employees receives a subsidy for coverage purchased through an Exchange. Individuals who are not offered employer-sponsored coverage (and who are not eligible for Medicaid or other programs) may be eligible for an Exchange subsidy if they have income between 100 percent and 400 percent of the federal poverty level (FPL). Individuals who are offered employer-sponsored coverage can only obtain Exchange subsidies if, in addition to the other criteria above, they also are not enrolled in their employer's coverage and their employer's coverage is either **unaffordable** or does not provide **minimum value**.

Offer of Coverage

In general, the employer shared responsibility rules require an ALE to offer an **effective opportunity to accept coverage at least once during the plan year**. If an employee has not been offered an effective opportunity to accept coverage, the employee will not be treated as having been offered the coverage for purposes of these rules.

The employee must also have **an effective opportunity to decline an offer of coverage** that is not affordable or does not provide minimum value at least once during the plan year. An employee's election of coverage from a prior year that continues for every succeeding plan year unless the employee affirmatively elects to opt out of the plan constitutes an offer of coverage for purposes of these rules.

However, an effective opportunity to decline is not required for an offer of coverage that provides minimum value and is either affordable (determined based on the federal poverty level safe harbor) or no cost to the employee. Thus, an ALE may not render an employee ineligible for subsidized coverage by providing an employee with mandatory coverage (that is, coverage which the employee is not offered an effective opportunity to decline) that does not provide minimum value.

For an employee to be treated as having been offered coverage for a month (or any day in that month), the coverage offered, if accepted, must be applicable for that month (or that day). If an ALE fails to offer coverage to a full-time employee for any day of a calendar month during which the employee was employed, the employee is treated as not being offered coverage during that entire month. However, a full-time employee who terminates employment in a calendar month will be treated as having been offered coverage during that month as long as the employee would have been offered coverage for the entire month, if he or she had been employed for the entire month.

If an employee enrolls in coverage but **fails to pay his or her share of the premium on a timely basis**, the ALE is not required to provide coverage for the period for which the premium is not paid on time, but will still be treated as having offered that employee coverage for the remainder of the coverage period (typically, the remainder of the plan year) for purposes of these rules.

Minimum Essential Coverage

For purposes of the employer shared responsibility rules, an ALE is not treated as having offered coverage to an employee unless the coverage qualifies as **"minimum essential coverage"** (MEC). The definition of MEC under the ACA is very broad, and includes coverage under an eligible employer-sponsored plan. An "eligible employer-sponsored plan" is, with respect to any employee:

- Group health insurance coverage offered by (or on behalf of) an employer to the employee that is either:
    - A governmental plan;
    - Any other plan or coverage offered in the small or large group market within a state; or
    - A grandfathered health plan offered in a group market; or
- A self-insured group health plan under which coverage is offered by (or on behalf of) an employer to the employee.

In general, most employer-sponsored coverage will qualify as MEC. However, MEC does not include coverage consisting solely of excepted benefits (as defined by HIPAA). MEC also does not include specialized coverage, such as coverage only for vision or dental care, workers' compensation, disability policies or coverage only for a specific disease or condition.

Minimum Value

If the coverage offered by an ALE fails to provide minimum value (MV), an employee may be eligible for an Exchange subsidy (and thus, the ALE may be subject to a penalty). A plan fails to provide MV if:

- The plan's share of the total allowed costs of benefits provided under the plan is less than **60% percent** of those costs; and/or
- The plan does not provide coverage for in-patient hospitalization or physician services.

MV is calculated by dividing the cost of essential health benefits (EHBs) the plan would pay for a standard population by the total cost of EHBs for the standard population (including amounts the plan pays and amounts the employee pays through cost-sharing) and then converting the result to a percentage. The following four approaches may be used for determining MV:

- ***Approach One: Calculator***—HHS' MV Calculator allows an employer to enter information about its health plan's benefits, coverage of services and cost-sharing terms to determine whether the plan provides MV.
- ***Approach Two: Checklists***—HHS and the IRS provided design-based safe harbor checklists that employers can use to compare to their plan's coverage. If a plan's terms are consistent with or more generous than any one of the safe harbor checklists, the plan is treated as providing MV.
- ***Approach Three: Actuarial Certification***—An employer-sponsored plan may seek certification by an actuary to determine the plan's MV if the plan contains nonstandard features that preclude the use of the MV Calculator and safe harbor checklists.

- ***Approach Four: Metal Level***—Any plan in the small group market that meets any of the "metal levels" of coverage (that is, bronze, silver, gold or platinum) provides MV.

In addition, an eligible employer-sponsored plan must provide substantial coverage of inpatient hospitalization and physician services to qualify as providing MV. Thus, a plan that does not provide substantial coverage of these benefits should not be adopted, regardless of whether the MV Calculator (or any actuarial certification or valuation) indicates that the plan does meet the MV standard.

Affordability

An employee may also be eligible for an Exchange subsidy (and thus, an ALE may be subject to a penalty) if the coverage offered by the ALE is not affordable. Eligible employer-sponsored coverage is generally affordable if the employee's required contribution for the lowest cost self-only coverage does not exceed **9.5 percent** (as adjusted annually) of the taxpayer's household income for the taxable year. The affordability contribution percentage is adjusted annually, as follows: 9.56 percent for 2015 plan years, 9.66 percent for 2016 plan years, or 9.69 percent for 2017 plan years.

Because an employer generally will not know an employee's household income, the following three optional affordability safe harbors are available for ALEs to determine affordability based on information that is available to them:

- The employee's **W-2 wages** from that employer that are required to be reported in Box 1;
- The employee's **rate of pay** (for salaried employees, using the employee's monthly salary, or for hourly employees, using the employee's hourly rate of pay multiplied by 130 hours per month); or
- The **FPL for a single individual** in effect within six months before the first day of the plan year.

Individual eligibility for Exchange subsidies is still based on household income. However, the ALE will not be subject to a penalty for that employee, even if he or she ultimately receives a subsidy.

Employees Who Have Other Coverage

Under these rules, an ALE is not exempt from liability for failing to offer coverage to full-time employees who have coverage from other sources (such as Medicare, Medicaid or a spouse's employer). The IRS noted that this type of rule would be inconsistent with the employer shared responsibility rules and would require the ALE to verify alternative coverage in a manner not contemplated by the ACA (for example, requiring an ALE to question its employees as to Medicaid eligibility or a spouse's eligibility for and purchase of employer-sponsored coverage).

However, an employee who is eligible for Medicare or Medicaid is not eligible for an Exchange subsidy. If no full-time employee receive a subsidy (for example, because all of an ALE's full-time employees are eligible for Medicare or Medicaid), the ALE will not be subject to an employer shared responsibility penalty. In addition, employees who are eligible for Medicare or Medicaid cannot trigger a penalty under the employer shared responsibility rules because they are not eligible for a subsidy.

Offers of TRICARE Coverage

IRS Notice 2015-87 clarifies that an offer of coverage under TRICARE for any month, due to employment with an employer that results in eligibility for TRICARE, is treated as an offer of MEC by that employer under an eligible employer-sponsored plan for that month.

Minimum Participation Requirements

Many employers expressed concern about potential liability under the employer shared responsibility rules for ALEs that cannot obtain or maintain coverage for its employees because the ALE cannot satisfy a health insurance issuer's minimum participation requirements. In the large group market, a minimum participation requirement cannot be used to deny guaranteed issue.

For small employers (such as relatively small ALEs), final regulations issued by HHS provide that an issuer must guarantee issue coverage to a small employer during an annual, month-long open enrollment period, regardless of whether the small employer satisfies any minimum participation requirement. The ACA generally defines a small employer as one that has at least one, but not more than 50, employees. However, states may set the upper limit at 100 employees.

Application to Commonly Owned Companies

The ACA's employer shared responsibility rules apply to companies that are treated as a single employer under Internal Revenue Code (Code) Sections 414(b), (c) or (m) because they form a controlled group of businesses or an affiliated service group. To determine whether a company is an ALE, aggregation rules apply for companies that are related or commonly owned. *Under these rules, all employees of a controlled group of businesses or an affiliated service group are taken into account to determine whether an employer is subject to the employer shared responsibility rules.* If the combined total meets the ALE threshold, each separate member of the group is subject to the employer shared responsibility rules, even those companies that, on their own, do not have enough employees to meet the threshold.

For a full-time employee who is employed by two or more companies that are treated as a single employer under the Code's aggregation rules, an offer of coverage by one company to an employee is treated as an offer of coverage by all other members of the controlled group or affiliated service group. Thus, if one member of the group offers coverage to the employee for a calendar month, every other member of the same ALE group is considered to have made the same offer of coverage to that employee for purposes of determining liability under the employer shared responsibility rules, if any, of each member. For example, in the case of a group of ALEs operating a single plan intended to offer coverage to employees of all the ALE members, any employee offered coverage under the plan would be treated as receiving an offer of that coverage from each ALE member.

Application to Multiemployer and Single Employer Taft-Hartley Plans, Multiple Employer Welfare Arrangements (MEWAs) and Other Similar Arrangements

For purposes of the employer shared responsibility rules, an offer of coverage generally includes an offer of coverage made **on behalf of an employer**. This includes an offer of coverage under a multiemployer or single employer Taft-Hartley plan or a MEWA to an employee on behalf of an employer, if the employer contributed to the plan on behalf of the employee.

Under this same reasoning, if certain conditions are met, an offer of coverage to an employee performing services for an employer that is a client of a **professional employer organization** (PEO) or other **staffing firm** (in the typical case in which the PEO or staffing firm is not the common law employer of the individual) made by the staffing firm on behalf of the client employer under a plan established or maintained by the staffing firm is treated as an offer of coverage made by the client employer for purposes of the employer shared responsibility rules. For this purpose, an offer of coverage is treated as made on behalf of a client employer only if the fee the client employer would pay to the staffing firm for an employee enrolled in health coverage under the plan is **higher** than the fee the client employer would pay to the staffing firm for the same employee if the employee did not enroll in health coverage under the plan.

Demonstrating that an Offer of Coverage Was Made

For purposes of the employer shared responsibility rules, there are no specific rules for demonstrating that an offer of coverage was made. The otherwise generally applicable substantiation and recordkeeping requirements in Code Section 6001 apply, including the recordkeeping requirements in IRS Rev. Proc. 98–25. In addition, the offer generally can be made electronically. The IRS has provided a safe harbor method for use of electronic media in 26 CFR § 1.401(a)–21.

More Information

Please contact Benefit Innovations for more information on the ACA's employer shared responsibility rules.