

Health Care Reform Update

Understanding the Employer Penalty Provisions Effective January 1, 2014

As the various provisions of the health care reform legislation become codified into the existing statutory framework, we are able to get a more detailed understanding of their terms and of possible technical inconsistencies. A review of the statutory language relating to the penalties that will begin to apply in 2014 to large employers when full-time employees receive government assistance to purchase insurance coverage through an Exchange is a case in point. Despite Congressional and White House summaries that limited the increase from \$750 per employee to \$2,000 for employers who offer no coverage, the statutory language also increases the aggregate penalty for those who do offer coverage, as explained below. Although these changes do not go into effect for several years, it is worthwhile to review the overall structure of the employer responsibility mandate.

Will employers with fewer than 50 employees face penalties?

No. The penalties only apply to *applicable large employers*. Generally, an *applicable large employer* means, with respect to a calendar year, an employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year.¹

To determine whether an employer is an *applicable large employer*, employers:

- Will need to count employees who do not work full-time (i.e. part-time employees) by dividing the aggregate number of hours worked for a month by 120;
- Will need to consider controlled group rules, as members of a controlled group will be treated as a single employer and all employees will be treated as employed by a single employer²; and
- Will not be considered to have employed more than 50 full-time employees if the employer's workforce exceeds 50 full-time employees for 120 days or fewer during the calendar year and the employees in excess of 50 employed during the 120-day period were *seasonal workers*.³

When can employees receive government assistance through the Exchange?

Not all employees of a large employer will be eligible for government assistance through the Exchange.

¹ Be aware that there are various provisions of the statute that apply to *large employers*, but define the term differently. For example, a *large employer* for purposes of the penalty is an employer with 50 or more employees, but for purposes of automatic enrollment a *large employer* has more than 200 employees.

² See Internal Revenue Code Section 414(b), (c), (m) and (o).

³ The term *seasonal worker* means a worker who performs labor or services on a seasonal basis as defined by the Secretary of Labor, including workers covered by 29 CFR §500.20(s)(1) and retail workers employed exclusively during holiday seasons.

To qualify for government assistance, the employee must have household income between 100%-400% of the Federal Poverty Level, and either have:

- No coverage provided by the employer;
- Employer provided health insurance coverage with an actuarial value below 60% (meaning that the plan's share of provided benefits is less than 60%), or
- A required contribution toward employer-provided coverage that exceeds 9.5% of their household income.⁴

Individuals satisfying these requirements may be eligible to receive government assistance (i.e. premium tax credits and cost-sharing subsidies) through the Exchange.

What penalties apply to a large employer when an employee receives coverage through the Exchange?

Large employers will face penalties if their full-time employees (defined as working 30 or more hours per week) receive government assistance for health insurance purchased through the Exchange.⁵ The amount of the penalty depends on whether or not the employer provides health plan coverage to full-time employees. Generally, penalties will be assessed on a monthly basis, but are annualized for illustrative purposes in the following examples.

Large Employer not Offering Coverage

A penalty of \$2,000 multiplied by the number of full-time employees in excess of 30 employees will be assessed on a large employer who does not provide minimum essential coverage to full-time employees (and their dependents) and at least one employee receives government assistance and enrolls in health plan coverage through the Exchange.

Example

ABC Company has 100 full-time employees and does not provide health insurance coverage. Fifteen (15) of ABC Company's full-time employees receive government assistance to purchase insurance coverage through the Exchange. ABC Company will face a penalty of \$140,000 (100 - 30 = 70 * \$2,000).

Large Employer Offering Coverage

A penalty will be imposed on a large employer who offers minimum essential coverage to full-time employees (and their dependents) if one or more full-time employees receives government assistance and enrolls in health plan coverage through the Exchange.

Generally, the penalty assessed will be \$3,000 multiplied by the number of full-time employees receiving government assistance. However, the maximum penalty imposed cannot exceed the penalty that would

⁴ It is possible that the 9.5% threshold will be changed to 9.8% to be consistent with the threshold for the Free Choice Vouchers discussed later in this summary.

⁵ While part-time employees are included for purposes of calculating 50 full-time employees, the employer is only penalized on **full-time employees (and not part-time employees)** who receive government assistance through the Exchange.

be assessed if the employer did not offer health coverage. In other words, the maximum penalty is capped at \$2,000 multiplied by the number of full-time employees of the employer in excess of 30 employees.⁶

Example – Regular Penalty

Same example as above, except ABC Company provides health insurance coverage to full-time employees. Fifteen (15) of ABC Company's full-time employees receive government assistance to purchase insurance coverage through the Exchange. ABC Company will face a penalty of \$45,000 ($15 * \$3,000 = \$45,000$).

Example – Aggregate Limit

Same example as above, except ABC Company provides health insurance coverage to full-time employees and fifty (50) of ABC Company's full-time employees receive government assistance to purchase insurance coverage through the Exchange. ABC Company will face a penalty of \$140,000 based on the aggregate limit ($70 * \$2,000 = \$140,000$), as opposed to \$150,000 based on the regular penalty ($50 * \$3,000$).

In practice, the aggregate limit will likely have limited application, as a large portion of the full-time employee population would need to receive government assistance in order to hit the maximum expenditure.

What are Free Choice Vouchers?

Employers who offer coverage to employees will need to provide a *Free Choice Voucher* to employees with income below 400% FPL and whose premium costs associated with the employer provided coverage exceed 8% but are less than 9.8% of their income. These vouchers can be used by the employee to purchase coverage through the Exchange. The amount of the voucher equals what the employer would have contributed on behalf of the employee under the employer-sponsored plan (including any contribution toward family coverage). Employers providing these vouchers will not face penalties.

When do these requirements take effect?

January 1, 2014.

We expect that there will be significant guidance on these provisions leading up to their implementation in 2014.

⁶ There is some confusion over the intent of Congress with respect to this aggregate limit. In the Senate bill, the per-employee charge for employers that provide no coverage and the aggregate limit for those that do were both pegged at \$750. Certain congressional summaries and the White House summary on the House and Senate bills indicate that only the per-employee penalty for those employers that provide no coverage was increased to \$2,000 by the House bill. The actual statutory language, however, changes both the penalty amount for those employers that do not provide coverage and the aggregate penalty amount for those that do provide coverage from \$750 to \$2,000. Unless and until the statutory language is changed, the aggregate limit will be pegged at \$2,000 per full-time employee.



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