

# Health Care Reform Management Alert Series

## Exchange Eligibility -- Verification and Appeal



### Issue 49

*This is the forty-ninth issue in our series of alerts for employers on selected topics in health care reform. (Click [here](#) to access our general summary of health care reform and other issues in this series.) This series of Health Care Reform Management Alerts is designed to provide an in-depth analysis of certain aspects of health care reform and how it will impact your employer-sponsored plans.*

On January 14, 2013, the Department of Health and Human Services (HHS) proposed regulations that describe:

- Procedures for the state health insurance exchanges (Exchanges) to verify whether an individual has access to affordable employer-sponsored coverage that provides minimum value.
- Procedures for individuals to appeal an eligibility determination for prepaid tax credits or cost sharing subsidies.
- Procedures for an employer to appeal a determination that it is subject to a tax penalty because the employer is not providing minimum essential coverage or the coverage is not affordable.

Under the Affordable Care Act, beginning in 2014 large employers (generally, employers with 50 or more full-time equivalent employees) will be required to offer a health coverage option that meets affordability standards and covers at least 60% of the cost of benefits offered under the plan, or potentially be subject to a penalty.

**[See our last Issue 48 [here](#) for more information on the Employer Mandate]** The Act also requires that by 2014 residents of each state must be able to purchase medical coverage through an Exchange, operated either by the state or, if the state declines to establish such an Exchange, by the federal government or through a partnership with the federal government. A penalty could be assessed if an employee enrolls in medical coverage on an Exchange and obtains a tax credit or cost-sharing subsidy.

#### Verification Procedures

When an employee applies for an advance payment of a tax credit<sup>1</sup> or cost-sharing subsidy through an Exchange, the Exchange (or HHS where an Exchange has opted to rely on HHS) will verify certain information provided by the individual, such as household income and eligibility for and enrollment in an eligible employer-sponsored plan. The proposed regulations provide that the Exchange must accept an individual's attestation regarding whether he or she is enrolled in an eligible employer-sponsored plan or is eligible for such a plan. However, if the individual's statements are not reasonably compatible with information the Exchange has from other sources (e.g., data from

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<sup>1</sup>Instead of waiting and taking a credit on an income tax return, an individual may apply for an advance payment of the credit to help him or her pay for the premium during the coverage year.

HHS or sources approved by HHS), or are internally inconsistent, then the Exchange must take further steps to resolve inconsistencies, such as contacting an employer of the individual (or a member of his or her household) to verify whether the individual is enrolled in or eligible for qualifying coverage. Employers should be prepared to receive inquiries from Exchanges who are attempting this type of verification.

HHS has also noted that it will propose a voluntary pre-enrollment template that an individual could print and present to his or her employer to complete with information about the employer's coverage options. HHS believes that employers may want to use this template to provide to individuals upon hire or with other benefit materials. This is in addition to the SBC which is already required by the Affordable Care Act, but which does not provide affordability or minimum value information. HHS is seeking comment on the use of such a template.

### Individual Appeal Process

If an individual is denied eligibility for advance payment of tax credits or cost sharing subsidies, he or she may:

- Appeal to the Exchange within 90 days (or, if the Exchange doesn't establish an appeals process, appeal to HHS)
- If the Exchange upholds the denial, the individual may appeal to HHS within 30 days of the denial.
- If HHS upholds the denial, the individual may seek judicial review.

The proposed regulations contain rules regarding methods of making an appeal, acknowledgement of receipt, expedited appeals, coverage pending an appeal, informal resolutions and hearings, and the content of the decision notifications.

### Employer Appeal Process

If an individual is determined to be eligible for advance payment of tax credits or cost-sharing subsidies, the Exchange will notify his or her employer for purposes of the potential tax penalty. Note that HHS specifically comments that employers may receive this notice regardless of their size. That is, a small employer (under 50 full-time equivalent employees) may receive such a notice from the Exchange even though it is not subject to the Employer Mandate. HHS indicates that the appeal procedures in their proposed regulations are "separate and distinct" from the IRS process for assessing tax penalties under the Employer Mandate. A separate appeal procedure through the IRS will be available to address whether an employer will be subject to a tax penalty.

The employer will have 90 days from the date of the notice to appeal a determination that it does not provide minimum essential coverage or provides coverage that is not affordable with respect to the employee. The employer may submit the appeal to the Exchange, where it has established an employer appeals process, or HHS, where it has not. Note that the employer has no right to appeal to HHS in the event the Exchange rules unfavorably upon the appeal - unlike in the case of the individual appeal process.

The employee would be notified of the employer's appeal, and both would have an opportunity to submit additional information to the Exchange (or HHS as applicable). For example, the employer may want to submit evidence that the individual is not an employee, or regarding the cost-sharing terms of the coverage. In connection with the appeal, the employer would have access to information such as whether the employee's income is above or below the affordability threshold for the employer's coverage, and the data used by the Exchange to determine his or her eligibility for advance payments of the tax credit and cost-sharing subsidies. However, the employer would not have access to the employee's tax information.

The proposed regulations provide for a *de novo* review by impartial officials who were not directly involved in the determination that is being reviewed. A determination must be made and provided within 90 days of receipt of the appeal.

Note that it is possible that an individual would be eligible for a tax credit or cost sharing subsidy based on the lack of affordability of the coverage, AND the employer would not be subject to a tax penalty. This would be the case, for example, where the employer has relied on the safe harbor and established the single level premium

at no more than 9.5% of the employee's W-2 income, but the family level premium has exceeded 9.5% of the taxpayer's household income. **[See Issue 48 [here](#) for more information about this safe harbor or alternatives.]**

### What This Means For Employers

- The proposed regulations set up a verification system that may result in the employer being able to "set the record straight" prior to a determination that could result in tax penalties.
- If an employee is determined to be eligible for tax credits or subsidies despite the verification process, an appeal procedure has been set up to allow the employer to dispute the finding that could result in a tax penalty being assessed.
- As mentioned above, a separate appeal procedure through the IRS will be available to address whether an employer will be subject to a tax penalty. It is unclear how the Exchanges, HHS, and the IRS will coordinate the information that arises from these various procedures.

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