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PRIORITY *Alert*

Health Insurance Marketplace Subsidy Notices

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Have you received a Health Insurance Marketplace Subsidy Notice (Subsidy Notice) from the Department of Health and Human Services (HHS)? If so, your response may affect whether or not the IRS later assesses a pay or play penalty. This article explains the appropriate way to respond to these notices.

Background

HHS recently began sending Subsidy Notices to employers. The purpose of the Subsidy Notice is to inform employers that an individual—who identified the employer as his or her employer—enrolled in health insurance through the Health Insurance Marketplace and was certified as eligible for an Advanced Payment of Premium Tax Credit (APTC).

Pay or play penalties are potentially triggered when at least one of an applicable large employer's (ALE) "full-time employees" (as that term is defined under the Affordable Care Act or ACA) receives an APTC.

Subsidy Notices are sent by HHS. **Only the IRS can assess a pay or play penalty.** So, it is important for employers to understand:

- The Subsidy Notices do **not** determine whether the employer is subject to a pay or play penalty; and
- Failure to appeal the Subsidy Notice does **not** preclude the employer from later appealing the assessment of a pay or play penalty by the IRS.

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Applicable Large Employer Responses to Subsidy Notices

First and foremost, an employer should not appeal a Subsidy Notice on behalf of an employee for whom the employer did not: (1) offer coverage under its group health plan; or (2) offer coverage that was both affordable and of minimum value.

As explained below, however, employers should carefully consider whether to appeal the Subsidy Notices received on behalf of other employees—especially full-time employees—who were offered coverage under the employer's group health plan that is both affordable and of minimum value.

Full-Time Employees

Only full-time employees can trigger a pay or play penalty. If an employer receives a Subsidy Notice on behalf of a full-time employee who was offered affordable, minimum value coverage, it may be in the employer's best interest to appeal the Subsidy Notice. This may allow the employer to "nip in the bud" the issue of a later assessment of a pay or play penalty by the IRS. (Alternatively, if the IRS still assesses a pay or play penalty on behalf of a full-time employee who the employer successfully appealed a Subsidy Notice, the evidence of the successful appeal may be helpful to the employer in contesting the IRS's assessment of a pay or play penalty.)

It may not only be in the employer's best interest to appeal the Subsidy Notice—it may also be in the employee's best interest because the employee may be ineligible for the APTC. In other words, a successful appeal of the Subsidy Notice may also limit the amount of the APTC that the ineligible employee must repay.

Non-Full-Time Employees

A non-full-time employee cannot trigger a pay or play penalty. So, it is unnecessary to appeal a Subsidy Notice received on behalf of a non-full-time employee for purposes of the pay or play penalty.

If an ALE offered a non-full-time employee affordable, minimum value coverage, however, the ALE may want to appeal the Subsidy Notice to limit the amount of the APTC that the employee must repay.

Non-Applicable Large Employer Responses to Subsidy Notices

Non-ALEs (generally employers with less than 50 full-time and full-time equivalent employees) are not subject to the pay or play penalty. So, again, there is no reason for a non-ALE to appeal a Subsidy Notice for pay or play penalty purposes.

But a non-ALE may consider appealing a Subsidy Notice on behalf of an employee who was offered affordable, minimum value coverage, to limit the amount of the APTC that the employee must repay.

How to Appeal the Subsidy Notice

To appeal the Subsidy Notice, an employer should use the form provided by HHS, which is available at healthcare.gov (https://www.healthcare.gov/marketplace-appeals/employer-appeals). This form provides a space for the employer to include a narrative explaining why the employee is ineligible for an APTC. In this narrative, the employer should indicate that the employee was either enrolled in coverage under the employer's group health plan or that the employee was offered coverage under the employer's group health plan. The employer should also include the employee's cost of employee-only coverage under the employer's lowest-cost group health plan and an affirmative statement that the group health plan provides minimum value.

In addition to the narrative, the employer may include supporting documentation, such as:

- A copy of the election form (or a screenshot from an electronic enrollment platform) showing that the employee is enrolled in the employer's group health plan, or was offered and waived coverage under the employer's group health plan.
- If the employee didn't affirmatively waive coverage, the employer should include plan records showing that the employee was offered coverage but failed to elect coverage under the employer's group health plan.

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- Any materials evidencing the employee's cost of coverage. (Evidence of satisfying an affordability safe harbor may be helpful, but will not be determinative of actual affordability.)
- Evidence that the employer's group health plan is of minimum value (e.g., a summary of benefits showing that the group health plan covers at least 60% of eligible expenses).
- A copy of the Subsidy Notice

Conclusion

As a reminder, an ALE's decision to appeal Subsidy Notices has **no** bearing on the ALE's ability to later appeal the IRS's assessment of a pay or play penalty. But being proactive in appealing Subsidy Notices may prevent the IRS from later assessing a pay or play penalty.

If you have any questions about Subsidy Notices or how you should respond, please contact the author or one of the members of the Health Care Reform Team.

Helpful Guidance Regarding Opt-Out Payments Under the ACA

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In December 2015, when the IRS issued IRS Notice 2015-87, employers were disappointed to learn of the IRS's intended treatment of opt-out payments for affordability purposes under the pay or play penalty.

While the IRS recently issued **proposed** regulations affirming its position regarding the treatment of an opt-out payment for affordability purposes, fortunately the proposed regulations include helpful guidance regarding the treatment of "eligible opt-out arrangements" and opt-out payments that are currently required under collective bargaining agreements.

Background: IRS Notice 2015-87

In our January 2016 article "IRS Clarifies a Number of Health Care Issues," we explained the IRS's intentions to require the amount of opt-out payments or cash-in-lieu payments to be included in the affordability calculation for purposes of the Affordable Care Act's (ACA) pay or play penalty. (Under the pay or play penalty, an applicable large employer must generally offer full-time employees coverage that is both affordable and of minimum value, or pay an excise tax.)

An opt-out payment or cash-in-lieu payment is a payment from the employer to an employee if the employee waives coverage under the employer's group health plan. For example, if an employer charges $80 per month for employee-only coverage under the employer's lowest-cost group health plan providing minimum value, but the employer pays employees who waive coverage $100 per month, then the cost of that coverage—for affordability purposes—is $180 per month ($80 + $100 = $180).

Temporary Relief in IRS Notice 2015-87

In IRS Notice 2015-87, the IRS provided temporary relief that allowed an employer to exclude opt-out payments from the affordability calculation if the employer adopted the opt-out arrangement before December 16, 2015. This temporary relief applies for plan years beginning before January 1, 2017 or—if later—the effective date of **final** regulations.

In the proposed regulations, the IRS stated that it anticipates issuing final regulations that are effective in 2016. As a result, this temporary relief will likely only apply to plan years that begin **before** January 1, 2017.

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Eligible Opt-Out Arrangements

The proposed regulations provide a key new exception to the requirement to include the amount of an opt-out payment in the affordability calculation for "eligible opt-out arrangements."

An eligible opt-out arrangement is an arrangement under which an employee's right to receive the opt-out payment is **conditioned** on the employee providing **reasonable evidence** that the employee, spouse and dependents (for whom the employee reasonably expects to claim a personal exemption deduction for the tax year that begins or ends within the plan year) have alternative minimum essential coverage (other than through the individual market) during the period of coverage for which the opt-out payment applies.

The following arrangement, for example, qualifies as an eligible opt-out arrangement:

> *Employer X offers its employees coverage under a group health plan and requires employees to contribute $1,000 annually for employee-only coverage. If employees decline coverage under Employer X's group health plan, Employer X provides the employee with an opt-out payment of $500. However, in order to be eligible for the opt-out payment, the employee must attest that the employee, spouse and dependents, if any, are covered under another group health plan (e.g., a group health plan that is sponsored by the spouse's employer).*

In this example, the $500 opt-out payment does **not** have to be added to the $1,000 cost of employee-only coverage for affordability purposes because the opt-out arrangement is an eligible opt-out arrangement.

Reasonable evidence of alternative coverage includes an employee's "attestation" that the employee, spouse and dependents, if any, have alternative minimum essential coverage other than through the individual market—whether obtained through or outside the Marketplace (e.g., coverage under another group health plan).

Additionally, employers are permitted—but not obligated—to require the employee to provide evidence of alternative coverage.

The employer must require the employee to provide reasonable evidence at least every plan year for which the opt-out payment applies, such as during the annual open enrollment period.

Relief for Employees Covered By CBAs

The proposed regulations also provided helpful relief to employers that are required to offer opt-out payments under the terms of a collective bargaining agreement (CBA) that was in effect before December 16, 2015. Under this relief, the opt-out payment is **not** required to be included in the affordability calculation until the later of:

- The first plan year beginning after the expiration of the CBA (disregarding any extensions on or after December 16, 2015); and
- The effective date of the final regulations.

This relief applies regardless of whether the opt-out arrangement required by the CBA is an eligible opt-out arrangement. The IRS has also requested comments regarding whether this relief should be extended to other types of agreements that are similar to CBAs.

If you have any questions about opt-out arrangements or whether your opt-out arrangement qualifies as an eligible opt-out arrangement, please contact the author or one of the members of the Health Care Reform Team.

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