



BENEFITS BRIEF

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EMPLOYER OBLIGATIONS TO SHARE AND REPORT COVERAGE AND AFFORDABILITY INFORMATION UNDER PPACA (PART 1 OF 2)

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With 2014 fast approaching, many employers have been focusing on how the employer shared responsibility ("pay or play") provisions of new Internal Revenue Code ("Code") Section 4980H will apply to their businesses. Considering the potential expense in complying with "pay or play," employers are wise to give full consideration to this issue.

This memorandum, which is Part I of a two-part series, focuses on certain related aspects of the Patient Protection and Affordable Care Act ("PPACA") that have been given less attention by commentators (and likely many employers). These are the new federal tax reporting requirements that will apply to employers beginning in 2014 under new Code Sections 6055 and 6056, and the process that is being established by the U.S. Department of Health and Human Services ("HHS") for purposes of determining an individual's eligibility for certain federal premium and cost-sharing subsidies in connection with the purchase of Exchange-based coverage. Regarding the latter, this process will require a considerable amount of involvement by employers.

Part II of this series will focus on the proposed U.S. Department of the Treasury ("Treasury") regulations regarding Code sections 6055 and 6056, which we expect to be issued in the very near-term. Given the importance of these new tax reporting and Exchange-related requirements, employers should understand how these aspects of the PPACA are likely to affect their businesses and operations.

NEW TAX REPORTING REQUIREMENTS FOR EMPLOYERS

As Figure 1 is intended to illustrate, beginning in 2014, a great deal of information is expected to flow among and between the various stakeholders (which include employers, employees, health issuers, Exchanges, and the IRS). Related to this information flow are two new reporting requirements that apply to employers by reason of the PPACA.

These two new reporting requirements are found in new Code sections 6055 and 6056. As noted above, we are expecting Treasury to issue proposed rulemaking regarding sections 6055 and 6056. The to-be-issued regulations follow a set of notices¹ issued by the IRS in 2012 soliciting comments on issues related to the new reporting requirements. The Council submitted a comment letter to the IRS recommending that future implementation guidance allow sufficient time for compliance, minimize administrative burden and duplicative reporting and allow for electronic reporting and disclosure.²

The purpose of Code Section 6055 appears to be to help facilitate the IRS's enforcement efforts regarding the individual mandate, i.e., the requirement in Code Section 5000A that an individual taxpayer be enrolled in "minimum essential coverage" or otherwise pay an excise tax.³ Per the statutory language of Code Section 6055, all "providers" of "minimum essential coverage"⁴ will be required to provide certain information to the IRS regarding the extent to which an individual enrollee was covered by minimum essential coverage during the preceding taxable year. The term "providers" for this purpose is defined to include both issuers and employer plan sponsors. These reporting requirements will apply to minimal essential coverage provided on or after January 1, 2014, with the first returns to be filed in 2015.

For purposes of Code Section 6055, a provider must *also* provide a written statement to each individual named in the information return, by January 31 of the following year. The first information returns will be due in 2015. The written statement must include

¹ IRS Notices 2012-32 and 2012-33.

² Council comment letter to IRS, June 11, 2012. Available at: http://www.americanbenefitscouncil.org/documents2012/hcr_irs-n2012-32-33_council-comments061112.pdf

³ It is conceivable that this return will also be used to facilitate the IRS's enforcement of an employer's compliance with Code Section 4980H(a) (i.e., the requirement to make available minimum essential coverage to full-time employees and their children up to age 26), but that remains unclear.

⁴ By statute, minimum essential coverage includes an insured employer-sponsored group health plan. Proposed regulations issued this week indicate that the IRS also considers non-grandfathered, self-funded employer-sponsored health coverage to be minimum essential coverage.

the name, address, and contact information of the provider filing the return and the information required to be shown on the return with respect to the individual.⁵

An additional filing requirement applies to employers that are subject to Code Section 4980H (employers with 50+ full-time employees or equivalents, i.e., “applicable large employers”), under new Code Section 6056. For periods beginning after December 31, 2013, each “applicable large employer” is required to file an information return reporting the terms and conditions of the health care coverage, if any, provided to its full-time employees for the year at issue.⁶ The stated purpose of this information return is to assist the IRS in determining whether an employer may be subject to Code Section 4980H penalties for failing to provide affordable, minimum value, minimum essential coverage.⁷ The first Code Section 6056 information returns will be due in 2015.

The type and extent of information that must be communicated to the IRS as part of a Code Section 6056 return are quite significant. More specifically, a subject employer will be required to remit information regarding:

- Its name and Employer Identification Number (“EIN”);
- The date the return is filed;
- A certification of whether the employer offers its full-time employees (and their dependents) the opportunity to enroll in minimum essential

⁵ The IRS stated in Notice 2012-32 that, “[i]f health insurance coverage is provided by a health insurance issuer and consists of coverage provided through a group health plan of an employer, it is anticipated that the regulations would make the health insurance issuer responsible for the reporting.” Based on this statement, it appears the IRS is contemplating making the issuer the sole reporting entity where the coverage at issue is insured (thus wholly excepting employer sponsors of insured plans from any reporting requirements under Code Section 6055). However, given that employers are likely to be in a better position to know certain of the information subject to reporting (such as the social security numbers and addresses of an employee’s dependents, as well as the extent of any employer premium subsidy), it seems likely that some reporting obligations may remain with employer plan sponsors.

⁶ Although by their express terms, the reporting requirements of Code Section 6056 run to the employer plan sponsor and not the issuer (to the extent any), Section 6056(d) permits the Treasury Secretary to provide that any statement required under Section 6056 may be provided as part of a return or statement under Section 6055 or on a Form W-2 provided by the employer. Additionally, Code Section 6056(d)(2) provides that “in the case of an applicable large employer offering health insurance coverage of a health insurance issuer, the employer may enter into an agreement with the issuer to include information required under [Section 6056] with the return required to be provided by the issuer under Section 6055.”

⁷ However, HHS earlier this month released a proposed regulation which stated in the preamble that an employer’s liability under Code Section 4980H is limited to those employees who are “certified to the employer” under the PPACA as having enrolled in a plan through an Exchange, and for whom a applicable premium tax credit or cost-sharing reduction is allowed or paid. The proposed regulation requires the IRS to adopt methods to make such certifications to employers. One unanswered question is whether Section 6056 reporting will somehow be integrated into the certification process.

coverage under an eligible employer-sponsored plan (as defined in Code Section 5000A(f)(2)) and, if so: (i) the duration of any waiting period (as defined in Code Section 6056(b)(2)(C)) with respect to such coverage; (ii) the months during the calendar year when coverage under the plan was available; (iii) the monthly premium for the lowest cost option in each enrollment category under the plan; and (iv) the employer's share of the total allowed costs of benefits provided under the plan.

- The number of full-time employees for each month of the calendar year;
- For each full-time employee, the name, address, and taxpayer identification number of the employee and the months (if any) during which the full-time employee (or any dependents) were covered under the eligible employer-sponsored plan; and
- Such other information as may be required by the Treasury Secretary.

Code Section 6056 also provides that, no later than January 31 following the close of the calendar year, each applicable large employer must furnish to each full-time employee a written statement that includes the applicable large employer's name, address, and contact information (including a contact phone number), as well as the information that is required to be reported on the Code Section 6056 return (as set forth above).

EXCHANGE VERIFICATION OF EMPLOYEE ELIGIBILITY FOR APTCs

Employers will also be required to play an active role in an Exchange determining whether a given individual is eligible for an advance premium tax credit⁸ ("APTC") to assist the individual in his or her purchase of affordable Exchange-based individual insurance coverage. An APTC is only available to an individual if he or she meets certain income requirements and is either not enrolled in employer-sponsored coverage, or not eligible for Code Section 4980H(b)-compliant employer-sponsored coverage, i.e., affordable, minimum value, minimum essential coverage. Although the specifics remain subject to further rulemaking, it is certain that employers will be expected to provide Exchanges with information that will allow for verification of whether an individual is eligible to receive coverage through his or her job, and the level of coverage being offered.

Individuals will apply for APTCs through a process being developed by the Centers

⁸ Most of the principles in here apply to certain cost-sharing reductions available under the PPACA to individuals, as well. For ease of reference this article only refers to APTCs, but it should generally be understood that these issues will similarly arise in regard to applications for cost-sharing reductions.

for Medicare and Medicaid Services (“CMS”). CMS is in the process of creating application materials, but drafts released last week suggest that an individual will be given a form to take to an employer asking for information about any health coverage available through his or her job. One of the draft forms issued by CMS (see Attachment A) asks for the employer to provide the name of the lowest cost self-only health plan available through the job and how much the employee would have to pay in premiums for that plan. The employer is also asked to provide the name of a point of contact who can answer questions about employee health coverage. Also, in proposed regulations issued earlier this month, HHS discussed the possibility of creating a template which an employer could download and populate with information regarding its coverage offerings and then distribute to employees at hiring, upon request, or on an employer intranet or benefit site. Completing such a template would be entirely voluntary from the perspective of the employer. No such template exists currently, but this could be a useful tool for employers whether they decide to “pay” (in which case the document will help employees apply for and receive APTCs) or “play” (in which case the document could explain to employees why they are *not* eligible for APTCs).

In addition, proposed Federal regulations provide that *after* an individual applies for an APTC, employers may be brought into the process used by an Exchange to verify if an applicant is enrolled in or eligible for qualifying coverage from an eligible employer-sponsored plan. (If they are eligible for coverage, that individual would be disqualified from receiving an APTC even if not enrolled in the plan, provided that the plan is “affordable” and provides “minimum value” under the standards of the PPACA.)

HHS has been struggling with how Exchanges would determine if an APTC applicant is enrolled in or eligible for employer-sponsored coverage for some time. The primary dilemma is that there is no current database or repository of employer-sponsored plans that would allow Exchanges to confirm the existence of employer-sponsored coverage. In the recently released proposed regulations, HHS proposed a number of data sources that Exchanges⁹ must use in order to verify access to employer-sponsored coverage (while acknowledging that these data sources cannot, in fact, definitely establish whether an individual is eligible for such coverage). These data sources are:

- Any electronic data sources that are available to the Exchange and which have been approved by HHS. There are two categories of electronic data sources that may provide information. The first category includes sources that can provide data about enrollment and eligibility for coverage in employer-sponsored plans. This is designed to encompass state-based data sources that exist or may be developed by states (for example, a state database used to administer the CHIP premium assistance program). The second category includes sources that can

⁹ Under the proposed regulations, an Exchange can also elect to have HHS conduct the verification process (including obtaining data from the various data sources) instead.

provide data regarding the employment of an applicant and the members of the household, such as state quarterly wage databases or commercial sources of current wage data.

- HHS itself, which can provide data maintained by the Office of Personnel Management regarding the Federal Employees Health Benefits Program.
- The small business (or “SHOP”) Exchange being operated by the Exchange in the state.

While an Exchange is required to *verify* enrollment or eligibility for coverage using these data sources, the proposed regulations also require the Exchange to accept on its face an applicant’s attestation regarding his or her eligibility for coverage — except under two circumstances. If an applicant’s attestation is not reasonably compatible with the information obtained through the above data sources, the Exchange must go through a process described in the proposed regulation to investigate the inconsistency. And if the Exchange cannot get any information regarding an applicant from the data sources listed above, and either cannot get employment data on the applicant or the employment data is not compatible with the applicant’s attestation, the Exchange must select a statistically significant random sample of such applicants and contact the applicants’ employers to verify whether the applicant is eligible for coverage. As a result, it is entirely possible that an employer will have to respond to inquiries from the Exchanges or HHS regarding the health coverage made available by such employer to certain individuals.

Even if an applicant “slips through the cracks” and is approved for an APTC in spite of the fact that he is eligible for employer-sponsored coverage, Exchanges will be required to provide employers with the ability to appeal a determination that the employer does not provide minimum essential coverage through an employer-sponsored plan, or that such coverage is not affordable. Also, the IRS has indicated in guidance that it will contact employers to inform them of their potential liability under 4980H and provide them an opportunity to respond before any liability is assessed or notice and demand for payment is made. This should provide some comfort to employers that choose to “play” but have concerns regarding how the verification process described above will work.

In light of all this, employers should expect to play an active role in connection with an Exchange’s determinations of an individual’s APTC-eligibility – whether it be through the use of voluntary attestations *prior* to the application process, or in connection with an Exchange’s audit activity in verifying these attestations *after* an individual’s submission of an APTC application.

CONCLUSION

Given the financial costs and administrative burdens that are likely to result to employers, as well as the need by many employers to coordinate certain activities across payroll, tax and HR, employers should begin consulting with their advisors and developing a compliance strategy. However, they should also be aware that additional guidance from the federal agencies is imminent. Part 2 of this memorandum will review anticipated guidance under Code Sections 6055 and 6056 once it is released.

INFORMATION FLOWS REGARDING ACA EXCHANGES AND IRC SECTIONS 4980H AND 36B

If contacted by an Exchange, the Employer will need to demonstrate to the Exchange that the Employee does/does not have qualifying employer-sponsored coverage.

6

If the Employee is found to be eligible for an APTC, the Exchange is required to notify the employer since this could trigger Code section 4980H penalties.

Attachment A

5 If no information is available from the databases and/or the exchange possesses inconsistent information, the Exchange may be required to contact the Employer to verify whether the Employee does not have access to qualifying employer-sponsored coverage. Additionally, post-enrollment audits are expected that would require employer participation.

EMPLOYER

Form W-2

EE's Form 1040

EMPLOYEE

Employee applies for an advance premium tax credit and/or cost-sharing reduction (collectively, "APTC").

1

The IRS responds to the Exchange's request with information from the employee's most recent Form 1040.

3

EMPLOYER

ISSUER

IRC section 6055 Return

IRC section 6056 Return

IRS

MAGHI info from EE's Form 1040

2 After the Employee applies for an APTC, the Exchange requests income information from the IRS for purposes of determining the Employee's APTC eligibility.

EXCHANGE

ELECTRONIC DATABASES

The Exchange also verifies the Employee's lack of access to qualifying employer-sponsored coverage by consulting certain electronic databases regarding wage and employment history.

4

NOTE: Employers should begin to consider the administrative burdens that could be imposed upon them with respect to new information reporting requirements under IRC sections 6055 and 6056 – especially with respect to IRC section 6056 given the important role it will play in IRS enforcement of IRC section 4980H liability. Additionally, employers should begin to consider the burdens and costs associated with Exchange activities in reaching out to employers to verify whether the Employee is eligible for and/or enrolled in IRC section 4980H-compliant coverage.

EMPLOYER COVERAGE FORM

Attachment A



Applying for help with health insurance costs from the Health Insurance Marketplace?

The Health Insurance Marketplace application asks questions about any health coverage available through a current job (even if it's from another person's job, like a parent or spouse) to figure out if you might be able to get help paying for health insurance. Use this form to get the information you need from the employer who offers health coverage. We'll verify this information, so it's important to be accurate. If you have more than one job that offers health coverage, use a separate form for each employer.



EMPLOYEE Information

The **employee** needs to fill out this section. Write down the employee's information then you may request the information below from the employer. Use this completed form when you fill out a Health Insurance Marketplace application.

Employee Name (First, Middle, Last)	Social Security Number
	____ - ____ - ____



EMPLOYER Information

Ask the **employer** for this information.

Employer Name		Employer Identification Number (EIN)	
		____ - ____ - ____	
Employer Address		Employer Phone Number	
		() - ____ - ____	
City	State	Zip Code	
Who can we contact about employee health coverage at this job?			
Phone Number		Email Address	
() - ____ - ____			

Tell us about the **health plan** offered by this **employer**.

☐ This employee isn't eligible for coverage under this employer's plan.

The employee is eligible for coverage under this employer's plan on _____ (Start Date).

What's the name of the **lowest** cost self-only health plan this employee could enroll in at this job? (Only consider plans that meet the "minimum value standard" set by the Affordable Care Act.)*

Name: _____

☐ No plans meet the "minimum value standard"

How much would the employee have to pay in premiums for that plan?

\$ _____ How Often? ☐ Weekly ☐ Every 2 weeks ☐ Twice a month ☐ Monthly ☐ Yearly ☐ Other: _____

*According to the standards set by the Affordable Care Act of 2010. If you're not sure, ask your employer or health insurance issuer.

Use the information in this form to complete your Health Insurance Marketplace application.

Apply online at www.placeholder.gov, or call us at 1-800-XXX-XXXX to get started.

NEED HELP WITH YOUR APPLICATION? Call us at 1-800-XXX-XXXX, or visit us at www.placeholder.gov.

Para obtener una copia de este formulario en Español, llame 1-800-XXX-XXXX.