

Employer Exchange Subsidy Notices – Appeal or Not?

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Introduction

Employers continue to receive notices from public Exchanges indicating that one or more employees are currently receiving a subsidy when purchasing individual health insurance coverage through a public Exchange (e.g. Covered California), which could potentially trigger employer penalties under §4980H. If an employer receives such a notice for one of its employees, the employer has a right, but is not required, to appeal when they feel an employee should not be receiving a subsidy because the employer offers minimum-value, affordable coverage.

Background

The Affordable Care Act (ACA) requires all public Exchanges (Marketplaces) to notify employers when an employee is receiving a subsidy (tax credits and cost-sharing reductions) for individual health insurance purchased through a public Exchange and to provide an opportunity for employers to appeal. Final rules published in August 2013 set forth the requirements for an employer to appeal the finding that it is not offering coverage meeting §4980H requirements. The particulars of the process, however, are managed by each Exchange separately. So long as the requirements in the final rules are met, each state Exchange is allowed to set up its own process and procedures. Information about how to file an appeal is usually included in the notice, but it may be necessary to check with the applicable Exchange to find out exactly how to handle the appeals process.

NOTE: These notices come from the Exchanges and not from the IRS. The IRS has its own set of letters/notices used to enforce compliance with §4980H offer of coverage requirements (the “employer mandate”) and §6056 employer reporting requirements. IRS letters relating to proposed employer shared responsibility payments under §4980H come in the form of a Letter 226J. IRS letters indicating that employer reporting via a Form 1094-C and 1095-Cs was not received by the IRS for an employer expected to be an applicable large employer come in the form of a Letter 5699.

Appeal Form and Process

Information about the form and process being used by federally facilitated Exchanges as well as by several state-run Exchanges may be found here: <https://www.healthcare.gov/marketplace-appeals/employer-appeals/>. The forms and processes for all other states may be found by visiting the state’s Exchange site. The process generally involves filing a paper appeal, providing documentation (e.g. SBC indicating minimum value, rate sheet showing employee contributions for single coverage, and rate of pay information for employees), and in some cases participating in a hearing.

Should Employers Appeal? Maybe...

Small Employers (fewer than 50 FTEs)

Small employers have no penalty exposure under §4980H. The only reason such an employer may want to appeal would be to prevent an employee from incorrectly receiving a subsidy through a public Exchange that might have to be paid back at the end of the year via personal tax return (employee relations). However, perhaps it would be easier simply to have a conversation directly with the employee rather than working through the appeal process.

Applicable Large Employers (50 or more FTEs)

Just because the employer receives a notice it does not mean the employer will actually owe a penalty payment under §4980H. Such penalties/payments are assessed by the IRS after

reconciliation of the employer reporting. And if according to such reporting the IRS sends a payment notice, the employer will at that time have a chance to appeal with the IRS.

In addition, it's not clear how quickly employers are notified that an employee is approved to receive a subsidy toward individual coverage through a public Exchange. Although the Exchanges should provide notice within the same year the subsidy is awarded, it could be several months later that an employer actually receives a notification, and there isn't much detail in the letters about the employees' actual coverage. In other words, an employer will not have a perfect understanding of which months employees qualified for a tax subsidy based on the notification provided.

For part-time employees, the employer is not under any obligation to offer any type of coverage under §4980H, so going through the appeal process probably isn't necessary. As mentioned above for small employers, the only reason an employer might want to appeal a notice provided for a part-time employee would be to prevent an employee from incorrectly receiving a subsidy through a public Exchange that might have to be paid back at the end of the year via personal tax return (employee relations).

For full-time employees,

- If the employee was NOT offered minimum-value, affordable coverage, there is nothing to appeal; rather, it serves as an indication that the employer will probably owe a penalty under §4980H for at least some months of the year.
- If the employee was offered minimum-value, affordable coverage, the employer really has two options:
 1. Appeal as outlined in the notice and provide proof that the coverage offered provides minimum value and is affordable; or
 2. Reconcile this with the IRS early the following year when the employer reporting is submitted via Forms 1094-C and 1095-C.

Summary

Bottom line, the employer does not have to appeal to avoid a penalty under §4980H. Rather, penalties will not apply until after the employer reporting (via Forms 1094-C and 1095-C) is reconciled with the IRS. Now that many employers have gone through the appeals process with the IRS for 2015, we have a better idea of what the IRS appeals process requires. Because some employers have struggled to successfully appeal subsidy eligibility determinations with the public Exchanges, employers might choose instead to wait and reconcile any §4980H penalties directly with the IRS. However, for those employers who choose not to appeal following receipt of a letter from a public Exchange, it may still be beneficial to inform affected employees if there is reason to believe they might not be eligible for the subsidy because of coverage offered by the employer.

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