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Employers: Be on the Lookout for Notices from the Health Care Exchanges

6.30.2016

Pursuant to the Patient Protection and Affordable Care Act and corresponding regulations, the Health Insurance Marketplaces (also known as the “Exchanges”) will begin to notify certain employers if an employee was determined eligible for advance premium tax credits because the employee attested that he or she was neither enrolled in employer sponsored coverage nor eligible for employer coverage that is affordable and meets the minimum value standard[1]. The Exchanges anticipate sending notices in batches throughout 2016. The Exchanges will send notices to employers if the employee received the premium tax credit for at least one month in 2016 *and if the Exchange has an address for the employer.*

The Exchanges will send notices to the mailing address of the employer which was provided by the employee on his/her application for Exchange coverage. Accordingly, depending on the address provided by the employee, the notice could be transmitted to any of an employer’s locations. Employers should consider devising an internal procedure so that any notices received by any employer representative at any location can be internally transmitted to one recipient at one employer location.

Significance of a Notice from an Exchange

In an effort to avoid the application of the “play or pay” penalty, upon receipt of a notice from the Exchange, an applicable large employer can appeal the notice to the U.S. Department of Health and Human Services (“HHS”)[2].

In its appeal, the employer can assert that it provides its employee access to affordable, minimum value employer sponsored coverage or that its employee is enrolled in employer coverage, and therefore that the employee is ineligible for the premium tax credit. If the employer is successful, the Exchange will send a notice to the employee encouraging the employee to

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update his or her Exchange application to reflect that he or she has access to or is enrolled in other coverage. The notice to the employee will also explain that failure to update the application may result in a tax liability.

An employer has **90 days** from the date of the notice it receives from the Exchange to request an appeal. An employer appeal request form will be available on <https://www.healthcare.gov/marketplace-appeals/>. An employer must mail an appeal request to: Health Insurance Marketplace, 465 Industrial Blvd., London, KY 40750-0061. The employer may also transmit its appeal via facsimile to a secure fax line: 1-877-369-0129.

IRS Determination is What Counts

Notification from an Exchange does not establish an employer's shared responsibility payment (i.e. the play or pay penalty), as only the Internal Revenue Service ("IRS") can assess the penalty. In other words, the IRS will independently determine any liability for the employer shared responsibility payment without regard to whether the Exchange issued a notice. Furthermore, in practice, an Exchange may not be issuing a notice to an employer for every one of its employees who is claiming the premium tax credit. So, even if an employer is successful in appealing every Exchange notice it actually receives, the IRS could still assert the penalty with regard to an employee for whom the employer did not receive an Exchange notice. Nevertheless, an employer's successful appeal of the incorrect determination of an employee's eligibility for a premium tax credit may still prove helpful in decreasing (or possibly eliminating) a potential penalty otherwise assessed by the IRS in the future.

It is anticipated that beginning as early as July 2016 the IRS will begin to assess employer shared responsibility payments. The IRS provides an appeals procedure (which includes a direct appeal to the IRS) if an employer desires to contest the assessment. The IRS has published guidance explaining its general appeals procedures.

Conclusion

In sum, the IRS appeals procedure for contesting the assessment of the employer shared responsibility payment is completely separate from the HHS procedure. As only the IRS (and not an Exchange or HHS) can assess the penalty, an appeal to the IRS has greater importance. Nevertheless, a successful appeal of an Exchange notice to HHS may prove fruitful in the long term to help reduce or eliminate the assessment of the penalty by the IRS.

If you receive a notice from an Exchange indicating that one of your employees has been determined eligible for a premium tax credit -- or if you receive an assessment from the IRS asserting your liability for the employer shared responsibility payment -- please contact Butzel Long as we can help you analyze your options and assist with an agency appeal.

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[1] The guidance announcing that the notice process will begin technically applies only to federally-facilitated marketplaces and state-based marketplaces using the federal platform. It is likely that other state-based marketplaces will have similar notification programs.

[2] An “applicable large employer” is subject to the “play or pay” penalty. The “play or pay” penalty is more formally referred to as the employer shared responsibility payment provisions under the Patient Protection and Affordable Care Act, as amended. Summarily stated, an applicable large employer is an employer which employed an average of at least 50 full-time employees (including full-time equivalent employees) on business days during the preceding calendar year.

If an applicable large employer does not offer coverage or offers coverage to fewer than 95% of its full-time employees (and their dependents), it owes an employer shared responsibility payment equal to the number of full-time employees the employer employed for the year (minus up to 30) multiplied by \$2,160 (for 2016), as long as at least one full-time employee receives the premium tax credit. (Note that for purposes of this calculation, a full-time employee does not include a full-time equivalent).

For an employer that offers coverage for some months but not others during the calendar year, the payment is computed separately for each month for which coverage was not offered. The amount of the payment for the month equals the number of full-time employees the employer employed for the month (minus up to 30) multiplied by 1/12 of \$2,160 (for 2016).

For an employer that offers coverage to at least 95% of its full-time employees (and their dependents), but has one or more full-time employees who receive a premium tax credit, the payment is computed separately for each month. The amount of the payment for the month equals the number of full-time employees who receive a premium tax credit for that month multiplied by 1/12 of \$3,240 (for 2016). The amount of the payment for any calendar month is capped at the number of the employer’s full-time employees for the month (minus up to 30) multiplied by 1/12 of \$2,160 (for 2016). (The cap ensures that the payment for an employer that offers coverage can never exceed the payment that employer would owe if it did not offer coverage.)

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