# Health Care Reform: Employer Mandate

Beginning January 1st, 2016 employers (those employing 50 or more full-time equivalent employees) will be subject to a penalty if one or more full-time employees receives a tax credit or cost-sharing reduction (a "Subsidy") based on one of the following conditions:

1. The employer doesn't offer coverage, or

2. The coverage offered by the employer either does not provide minimum value (as defined by a 60% actuarial value) or is "unaffordable" (defined as no more than 9.5% of EE annual income) to the employee.

**What are the penalties?**

Failure to offer Minimum Essential Coverage (MEC)- A large employer that fails to offer minimum essential coverage to all full-time employees must pay an excise tax of $**2,000 per full-time employee**. The monthly penalty is equal to $2,000 divided by 12, multiplied by the number of full-time employees employed during the applicable month, not counting the first 30 full-time employees. Only full-time employees (not full-time equivalents) are counted for purposes of calculating the penalty. After 2016, the penalty amount may be indexed.

Failure to Offer "Affordable" Minimum Essential Coverage - A large employer that offers minimum essential coverage that is not "affordable" will be subject to an excise tax of **$3,000 per employee** divided by 12, for each full-time employee receiving subsidized coverage through an Exchange for the month. However, the penalty will not be greater than the monthly penalty that would apply if the employer offered no coverage at all ($2,000 divided by 12, multiplied by the number of full-time employees employed during the applicable month, not counting the first 30 full-time employees). Only full-time employees (not full-time equivalents) are counted for purposes of calculating the penalty. After 2016, the penalty amount may be indexed.

Note: *If an individual has access to employer-sponsored insurance that is "affordable" and provides "minimum value" he/she is not eligible to receive a subsidy or reduction in cost sharing on the Exchange, even if he/she meets the federal poverty level criteria.*

**What is a large employer for purposes of these penalties?**

- In determining whether an employer is a large employer subject to these penalties, the employer must employ 50 or more full-time or full-time equivalent employees during the preceding calendar year. Therefore, an employer's employee population in 2015 will determine whether it will be subject to the employer penalties in 2016. The employer aggregation rules set forth in Section 414 of the Internal Revenue Code apply.
- An employer will not be considered to employ more than 50 full-time employees if (a) its workforce exceeds 50 full-time employees for 120 days or fewer during the calendar year, and (b) the employees in excess of 50 employed during the 120-day period were seasonal workers.

**Who is counted as a full-time employee and a full-time equivalent employee?**

- A full-time employee is one who works an average of at least 30 hours per week. Part-time employees

are counted as full-time equivalent employees. Seasonal workers are excluded unless they work for an employer for more than 120 days.

- To determine the total number of full-time and full-time equivalent employees for a particular month for purposes of determining if the employer is a "large employer," the employer must add together (a) the total number of full-time employees for the month, plus (b) a number that is equal to the total number of hours worked in a month by part-time employees, divided by 120.

**Do these penalties apply to part-time employees?**

Part-time employees are counted as full-time equivalent employees for purposes of determining whether an employer is a large employer subject to these penalties. However, part-time employees are not counted for purposes of calculating the actual penalty amount. An employer will not pay a penalty for any part-time employee, even if that employee receives subsidized coverage through an Exchange.

**How do you determine Minimum Essential Coverage?**

The IRS released three possible methods for determining whether employer coverage meets the 60% actuarial value threshold. The three methods are:

1. Actuarial Value (AV) or Minimum Value (MV) Calculator – HHS would develop an AV calculator to determine a plan's value for the individual and small group insurance markets. HHS and Treasury would develop an MV calculator that would be similar to the AV calculator that insured large group or self-funded plans could use to determine whether the plan provides the minimum 60% value.
2. Design Based Safe Harbors - The IRS would develop an array of design-based safe harbors in the form of checklists that would provide a simple, straightforward way for plan sponsors – without the need of actuarial expertise or performing calculations. If your self-funded plan's terms are consistent with or more generous than any one of the safe harbor checklists, your plan would be treated as providing minimum value.
3. Actuarial Certification - Plans with nonstandard features that are not able to use the AV or MV calculator or the safe harbor checklists would have to obtain appropriate certification of the plan's value by an actuary

**How do you determine Affordability?**

The "affordability" test (for purposes of the tax credit) will be calculated by determining whether the premium contribution for self-only coverage (as opposed to family or other coverage) exceeds 9.5 percent of the taxpayer's household income. This means employers can avoid the play or pay penalty by charging a self-only premium that is less than 9.5% of an employee's household income (even if the family premium exceeds 9.5% of household income). Employers who follow this safe harbor will not be assessed a penalty even if an employee receives a Subsidy through the exchanges.

If the employee's contribution exceeds 9.5% of the employee's W-2 wages, but the premium is still less than 9.5% of the employee's household income, the employer will still be deemed to have offered affordable coverage. Each employer can determine whether it has met the safe harbor after the end of the calendar year by comparing each employee's W-2 wages to that employee's premium for the year. In addition, an employer could also use the safe harbor prospectively by structuring its plan so that the each employee's contribution would not exceed 9.5 percent of wages.

Note: An employer in required to offer dependents the opportunity to purchase coverage, but not pay for any portion of the dependent coverage. In addition, a dependent if defined as a child, not a spouse, meaning that technically employers are not required to offer employee' spouses the opportunity to enroll in coverage. Lastly, employers who currently do not offer dependents the opportunity to enroll in coverage are being given a 12 month "grace" period in order to come into compliance. While there other safe harbor provisions for determining affordability, using W2 wages is the most common approach.

**Verification of Employer-Sponsored Insurance: Proposed Regulations (as of 1/14/13)**

The rule proposes a way for the Exchange to verify whether an employee is enrolled in an eligible employer-sponsored plan, as well as a method to determine whether the employee is eligible to enroll in that plan.

- If the Exchange does not have access to information needed to make a determination, or if an applicant's information is inconsistent, the Exchange must conduct a statistically significant random sampling of applicants (and their household members) to verify employment. This will also include "reasonable" outreach to employers.
- The Exchange must notify the applicant that it will be contacting any employer identified on the application to verify enrollment/determine eligibility.
- The Exchange must also ensure that individuals receiving advance premium tax payments or cost-sharing reductions are aware that any payments are subject to verification.
- The Exchange can also decide to rely on verification performed by HHS.

**Employer Appeal Process: Proposed Regulations (as of 1/14/13)**

If an employee applies for coverage through the Exchange and indicates that his/her employer does not offer a minimum value plan and/or that the coverage offered is not affordable, the rules propose that an employer may appeal to the Exchange for the following determinations:

- Its potential tax penalty liability
- A conclusion that it does not provide minimum value coverage and/or
- That the employer does provide such coverage but it is not affordable coverage for the employee referenced in the notice.

If an Exchange has not implemented an employer appeal process, then HHS will provide an employer appeal process. The appeal offers the opportunity for the employer to correct any information the Exchange received from an employee's application about the employer's coverage. This employer appeal process is separate and distinct from the IRS process to determine whether an employer is liable for a tax penalty.

**Timing of Appeals:**

An Exchange must allow an employer to request an appeal within 90 days from the date notice is sent that the employee is eligible for a premium tax credit or cost sharing reduction. Then, it must allow an employer to submit relevant evidence to support its request for an appeal, such as whether coverage is offered by the employer, whether the employee has selected coverage, etc.

PPACA does not require employer appeals to be reviewed by a federal officer, therefore, an employer will not have the right to elevate an appeal decision made by a state-based Exchange to HHS.