



Health Care Reform

LEGISLATIVE BRIEF

Brought to you by JRG Advisors, LLC

Certifications of Employee Eligibility for Subsidies

The Affordable Care Act (ACA) requires health insurance Exchanges to send a notice to employers regarding employees who purchase coverage through an Exchange and qualify for a health insurance subsidy. These notices are also called “**Section 1411 Certifications**” because the notice requirement is contained in Section 1411 of the ACA.

The Section 1411 Certification is part of the process established by the Department of Health and Human Services (HHS) for verifying that only eligible individuals receive health insurance subsidies. Both state-run and federally facilitated Exchanges are required to send these certifications to employers. For 2015, it is expected that HHS will issue the certifications in batches, beginning in spring 2015.

These certifications are not directly related to the ACA's shared responsibility rules for applicable large employers (ALEs). Starting in 2016, the Internal Revenue Service (IRS) will contact ALEs to inform them of their potential liability for a shared responsibility penalty for 2015, and it will provide them with an opportunity to respond. Employers that receive certifications may appeal a subsidy determination to help ensure, as much as possible, that employees are not mistakenly receiving subsidies. Appealing subsidy determinations may also help limit an ALE's potential liability for a shared responsibility penalty.

AFFECTED EMPLOYERS

The Exchanges are required to provide the certifications to **all employers** with employees who purchase coverage through an Exchange and qualify for a health insurance subsidy. This includes ALEs that are subject to the ACA's shared responsibility rules and small employers that do not qualify as ALEs. Also, for efficiency reasons, Exchanges can either send the certifications on an employee-by-employee basis as subsidy determinations are made, or the Exchanges can send the certifications to employers for a group of employees.

HEALTH INSURANCE SUBSIDIES

There are two federal health insurance subsidies available for coverage purchased through an Exchange—premium tax credits and cost-sharing reductions. Both of these subsidies vary in amount based on the taxpayer's household income, and they both reduce the out-of-pocket costs of health insurance for the insured.

- **Premium tax credits** are available for people with somewhat higher incomes (up to 400 percent of the federal poverty level), and they reduce out-of-pocket premium costs for the taxpayer.
- **Reduced cost-sharing** is available for individuals who qualify to receive the premium tax credit and have lower incomes (up to 250 percent of the federal poverty level). Through cost-sharing reductions, these individuals have lower out-of-pocket costs at the point of service (for example, lower deductibles and copayments).

To be eligible for a health insurance subsidy, a taxpayer:

- Must have a household income for the year between 100 percent and 400 percent of the federal poverty level for the taxpayer's family size;
- May not be claimed as a tax dependent of another taxpayer;

Certifications of Employee Eligibility for Subsidies

- Must file a joint return, if married; and
- **Cannot be eligible for minimum essential coverage** (such as coverage under a government-sponsored program or an eligible employer-sponsored plan).

An employee who may enroll in an employer-sponsored plan, and individuals who may enroll in the plan because of a relationship with the employee, are generally considered eligible for minimum essential coverage if the plan is **affordable** and provides **minimum value**.

The requirements of affordability and minimum value do not apply if an employee **actually enrolls** in any employer-sponsored minimum essential coverage, including coverage provided through a cafeteria plan, a health FSA or an HRA, but only if the coverage does not consist solely of excepted benefits. Thus, if an employee enrolls in any employer-sponsored minimum essential coverage, the employee is ineligible for a subsidy.

Key Point: Employees who are eligible for employer-sponsored coverage that is affordable and provides minimum value are not eligible for a subsidy. This is significant because the ACA's shared responsibility penalty for ALEs is triggered when a full-time employee receives a subsidy for coverage under an Exchange. An employee who is not eligible for a subsidy may still be eligible to enroll in a health plan through an Exchange. However, this would not result in a shared responsibility penalty for the employer.

SECTION 1411 CERTIFICATION

The ACA directed HHS to establish a program for verifying whether an individual meets the eligibility standards for receiving an Exchange subsidy. As part of this verification process, an Exchange must notify the employer when it determines that an employee is eligible for subsidized coverage.

[Final regulations](#) issued by HHS on March 27, 2012, specify the content requirements for the Section 1411 Certifications.

Section 1411 Certifications must:

- Identify the employee;
- Provide that the employee has been determined to be eligible for advance payments of a health insurance subsidy;
- Indicate that, if the employer has 50 or more full-time employees, the employer may be liable for a penalty under Code Section 4980H; and
- Describe the employer's appeal rights.

APPEAL RIGHTS

When an employer receives a certification regarding an employee's eligibility for an Exchange subsidy, the employer may appeal the determination to correct any information about the health coverage it offers to employees. The appeals process can help:

- **Minimize the employee's potential liability** to repay advance payments of the subsidy that he or she was not eligible to receive; and

This Legislative Brief is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. Readers should contact legal counsel for legal advice.

Certifications of Employee Eligibility for Subsidies

- **Protect the employer** from being incorrectly assessed with a tax penalty under the shared responsibility rules (if the employer is an ALE). If the appeal is successful and the employee does not receive an Exchange subsidy, the employee cannot trigger penalties for an ALE under the shared responsibility rules.

[Final regulations](#) issued by HHS on Aug. 30, 2013, established general parameters for the employer appeal process. A state-run Exchange may have its own appeals process or it may follow the federal appeals process established by HHS. In either case, the Exchange must:

- Give employers at least **90 days** from the date of the Exchange notice to request an appeal;
- Allow employers to submit relevant information to support the appeal;
- Not limit or interfere with an employer's right to make an appeal request; and
- Accept appeal requests made by telephone, by mail, via the Internet or in person (if the Exchange is capable of receiving in-person appeal requests) and provide assistance in making the appeal request if this assistance is needed.

The appeals entity must provide written notice of the appeal decision within 90 days of the date the appeal request is received, if administratively feasible.

Key Point: HHS' final regulations clarify that an appeals decision in favor of the employee's eligibility for a subsidy does not foreclose any appeal rights the employer may have for a penalty assessment under Code Section 4980H. Thus, while ALEs that receive certifications may appeal a subsidy determination to help ensure, as much as possible, that employees are not mistakenly receiving subsidies, they are not required to appeal a subsidy determination to preserve their rights to appeal an IRS assessment of a penalty tax.

Also, employers may develop policies to allow an employee to enroll in employer-sponsored coverage outside an open enrollment period when the employee is determined to be ineligible for Exchange subsidies as a result of an employer appeal decision.

OTHER EMPLOYER CONSIDERATIONS

To help avoid incorrect subsidy determinations, HHS encourages employers to educate their employees about the details of employer-sponsored health coverage. This includes information on whether their plans are affordable and provide minimum value. Employees enrolling in Exchange coverage will generally complete an [Employer Coverage Tool](#) that gathers information about the employers' group health plans. HHS encourages employers to assist employees with their Exchange applications by providing information regarding the employer-sponsored coverage through the Employer Coverage Tool.

In addition, employers should remember that the ACA amended the Fair Labor Standards Act (FLSA) to include whistleblower protections for employees. Employees are protected from retaliation for reporting alleged violations of the ACA. Employees are also protected from retaliation for receiving a subsidy when enrolling in an Exchange plan. If an employer violates the ACA's whistleblower protections, it may be required to reinstate the employee, as well as provide back pay (with interest), compensatory damages and attorney fees.

This Legislative Brief is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. Readers should contact legal counsel for legal advice.