Common Health Reform Questions: Employer Mandate

What employers are subject to the employer mandate in 2014? When are they subject to any penalties? What are these penalties?

In general:

Beginning in 2014, certain large employers may be subject to a penalty tax (also called an "assessable payment") for failing to offer health care coverage for all full-time employees (and their dependents), offering minimum essential coverage that is unaffordable, or offering minimum essential coverage under which the plan's share of the total allowed cost of benefits is not at least 60% (referred to as "minimum value"). The penalty tax is due if any full-time employee is certified to the employer as having purchased health insurance through an Exchange with respect to which a tax credit or cost-sharing reduction is allowed or paid to the employee, as provided in Code section 4980H.

What is a large employer for purposes of the employer mandate?

The penalty tax (or assessable payment) applies to "applicable large employers." An applicable large employer for a calendar year is an employer who employed an average of at least 50 "full-time employees" on business days during the preceding calendar year, as provided in Code Section 4980H(c)(2)(A).

What factors are used to determine whether an employer is an "applicable large employer"?

For purposes of determining whether an employer is an applicable large employer, an employer must include not only its full-time employees but also a full-time equivalent for employees who work part-time. To do so, the employer must add up all the hours of service in a month for employees who are not full-time and divide that aggregate number by 120. The result of that calculation is then added to the number of full-time employees during that month. Then, if the average number of employees for the year is 50 or more, the employer is an applicable large employer, as provided in Code Section 4980H(c)(2)(E).

Under Code Section 4980H(c)(2)(C)(i), all entities treated as a single employer under the employer aggregation rules will be treated as one employer.

Are seasonal employees counted in determined whether an employer is an "applicable large employer?

Under Code Section 4980H(c)(2)(B)(i), a special rule enables an employer that has more than 50 full-time employees solely as a result of seasonal employment to avoid being treated as an applicable employer. Under this rule, an employer will not be considered to employ more than 50 full-time employees if (a) the employer's workforce only exceeds 50 full-time employees for 120 days, or fewer, during the calendar year; and (b) the employees in excess of 50 who were employed during that 120-day (or fewer) period were seasonal workers.*"Seasonal worker" means a worker who performs labor or services on a seasonal basis as defined by the DOL, including agricultural workers covered by 29 CFR § 500.20(s)(1) and retail workers employed exclusively during holiday seasons , as provided in Code Section 4980H(c)(2)(B)(ii).

Which employees are considered "full-time" for the employer mandate?

Under Code Section 4980H(c)(4)(A), a "full-time employee" for any month is an employee who is employed for an average of at least 30 hours of service per week.

What is the penalty if an applicable large employer does not offer minimum essential coverage to its employees?

Beginning in 2014, Code Section 4980H(a) provides that an applicable large employer will pay a penalty tax (i.e. make an assessable payment) for any month that—

(1) the employer fails to offer its full-time employees (and their dependents) the opportunity to enroll in "minimum essential coverage" under an "eligible employer-sponsored plan" for that month; and

(2) at least one full-time employee has been certified to the employer as having enrolled for that month in a QHP for which health coverage assistance is allowed or paid.

What is the amount of assessable payment (penalty tax)?

Code Section 4980H(a) provides that the penalty tax (assessable payment) is equal to the product of the "applicable payment amount" and the number of individuals employed by the employer (less the 30-employee reduction) as full-time employees during the month. The "applicable payment amount" for 2014 is $166.67 with respect to any month (that is, 1/12 of $2,000). The amount will be adjusted for inflation after 2014.

What is "minimum essential coverage"?

Under Code Section 5000A(f)(1), the term "minimum essential coverage" means coverage under any of the following: (a) a government-sponsored program, including coverage under Medicare Part A, Medicaid, the CHIP program, and TRICARE; (b) an "eligible employer-sponsored plan;" (c) a health plan offered in the individual market; (d) a grandfathered health plan; or (e) other health benefits coverage (such as a State health benefits risk pool) as HHS recognizes.

What is an "eligible employer-sponsored plan"?

Under Code Section 5000A(f)(2), it means a group health plan or group health insurance coverage offered by an employer to an employee that is (a) a governmental plan, or (b) any other plan or coverage offered in a state's small or large group market

Under what circumstances will an applicable large employer be subject to the penalty tax if it offers its employees minimum essential coverage?

Beginning in 2014, Code Section 4980H(b)(1) provides that an applicable large employer will pay a penalty tax (i.e., make an assessable payment) for any month that—

(1) the employer offers to its full-time employees (and their dependents) the opportunity to enroll in "minimum essential coverage" under an eligible employer-sponsored plan for that month; and

(2) at least one full-time employee of the employer has been certified to the employer as having enrolled for that month in a QHP for which a premium tax credit or cost-sharing reduction is allowed or paid.

If an employee is offered affordable minimum essential coverage under an employer-sponsored plan, then the individual generally is ineligible for a premium tax credit and cost-sharing reductions for health insurance purchased through an Exchange.

When would employees offered minimum essential coverage by an employer be eligible for a premium tax credit and cost-sharing reductions for health insurance purchased through the Exchange?

Under Code Section 36B(c)(2)(C), employees covered by an employer-sponsored plan will be eligible for the premium tax credit if the plan's share of the total allowed costs of benefits provided under the plan is less than 60% of those costs (that is, the plan does not provide "minimum value"), or the premium exceeds 9.5% of the employee's household income. The employee must seek an affordability waiver from the Exchange. The penalty tax applies for employees receiving an affordability waiver. In order to get the premium tax credit and cost-sharing reduction, however, an employee must decline to enroll in the coverage and purchase coverage through the Exchange instead, as provided under Code Section 36B(c)(2)(C)..

When would the penalty tax be assessed?

To be considered minimum essential coverage, the coverage will need to meet an affordability requirement (which compares cost to income and provide minimum value (i.e., it will need to pay at least 60% of the total allowed cost of benefits. The penalty tax is due if any full-time employee is certified to the employer as having purchased health insurance through an Exchange with respect to which a premium tax credit or cost-sharing reduction is allowed or paid to the employee. Employers who provide coverage under an eligible employer-sponsored plan that does not meet the affordability and minimum value requirements may nevertheless avoid the tax to the extent employees actually participate in the plan, as provided under Code Section 36B(c)(2)(C)(iii).

What is the amount of the assessable payment (penalty tax?)

Code Section 4980H(b)(1) provides that the penalty tax (assessable payment) is equal to $250 (1/12 of $3,000, adjusted for inflation after 2014) times the number of full-time employees for any month who receive premium tax credits or cost-sharing assistance (this number is not reduced by 30). This penalty tax (assessable payment) is capped at an overall limitation equal to the "applicable payment amount" (1/12 of $2,000, adjusted for inflation after 2014) times the employer's total number of full-time employees, reduced by 30, as provided in Code Section 4980H(b)(2).

How will the minimum value for an employer-sponsored plan be determined?

In IRS Notice 2012-31, the IRS requested comments on several approaches to the minimum value determination, including evaluating plan designs that will cover part or all of 2014 and suggestions for transitional relief for plan years that start before and end in 2014. This determination of minimum value for employer plans will be consistent with previous HHS guidance on "actuarial value," which is relevant for determining coverage levels for QHPs offered through the Exchanges.

In IRS Notice 2012-31, the IRS described three potential approaches, for determining minimum value. They include:

- Minimum Value Calculator: The IRS will develop a MV calculator for use by self-insured plans and insured large group plans. Under this approach, plans with certain standard cost-sharing features (e.g., deductibles, co-insurance, and maximum out-of-pocket costs) will be able to enter information about four core categories of benefits (physician and mid-level practitioner care, hospital and emergency room services, pharmacy benefits, and laboratory and imaging services) into the calculator based on claims data of typical self-insured employer plans. The calculator would also take into consideration the annual employer contributions to an HSA or amounts made available under an HRA, if applicable. Comments are specifically requested on how to adjust for other benefits (e.g., wellness benefits) provided under a plan using the calculator.

-Design-Based Safe Harbor Checklists: As an alternative, an array of safe harbor checklists would be provided so plans may compare to their own coverage. The safe harbor checklists would be used to make minimum value determinations for plans that cover all of the four core categories of benefits and services (physician and mid-level practitioner care, hospital and emergency room services, pharmacy benefits, and laboratory and imaging services) and have specified cost-sharing amounts. Each safe harbor checklist would describe the cost-sharing attributes of a plan (e.g., deductibles, co-payments, co-insurance, and maximum out-of-pocket costs) that apply to the four core categories of benefits and services.

-Actuarial Certification: The last approach would be available for plans with "nonstandard" features (such as quantitative limits on any of the four categories of benefits, including, for example, a limit on the number of physician visits or covered days in a hospital) since these plans would not be able to use a calculator or the safe harbor checklists. Plans would be able to generate an initial value using a calculator and then engage a certified actuary to make appropriate adjustments that take into consideration the nonstandard features. Plans with nonstandard features of a certain type and magnitude would also have the option of engaging a certified actuary to determine the plan's actuarial value without the use of a calculator.

How can employer determine whether its coverage is affordable when it will not know the employee's household income?

In finalized regulations to implement the premium tax credit through the Exchange, the IRS indicated that it was their intention to issue proposed regulations or other guidance that would allow employers to use an employee's Form W-2 earnings (instead of household income) in assessing affordability.