



July 8, 2016

Be Prepared to Receive Federal Exchange Notices

Many employers have started receiving [notices](#) from a Health Insurance Marketplace (Exchange) indicating that one or more employees are receiving an advance premium tax credit (APTC) subsidy when purchasing individual health insurance coverage through the public Exchange. The Exchange notice alerts the employer that an employer shared responsibility (ESR) penalty payment may be assessed by the IRS and that the employer has a right to appeal to the Exchange. Efficient review and processing of these notices is a key element of successful employee benefit management. This Update addresses possible approaches an employer may consider in response to receiving one of these notices.

In summary, we advise as follows:

- Employers should understand that providing a response/appeal to any Exchange notice is *completely voluntary*.
- The appeal process is *not required* upon receiving an Exchange notice.
- If an employer receives an Exchange notice, the employer has an option to appeal but should consider doing so **only if** the employer is of the opinion that the employee should not have received a APTC because the employer met the offer of coverage standards. Even then there is arguably no reason to appeal because if the employer made a qualified offer of coverage, the employer should not be liable for the ESR penalty.
- Responding to an appeal, even where the employer met the offer of coverage standard to the employee named in the notice, does not automatically grant the employer amnesty from the IRS process of determining if an ESR penalty is due. The IRS, independently making this determination, will use a reconciliation process based on the information provided on Forms 1094/1095 to assess whether an ESR penalty may be due and notify employers accordingly. Employers receiving notice from the IRS (likely later in the tax year) of a potential ESR penalty will still need to respond to the IRS to address inconsistencies, regardless of whether the employer appealed an Exchange notice.
- Appealing an Exchange notice can result in a vast amount of research and paperwork for the employer and potentially opens the employer plan up to review.
- As an alternative to the appeal route, employers might want to reach out to a full-time employee (FTE) who the employer has been notified was granted a APTC and explain to the employee that the employer has a right to appeal to the Exchange. The employer could explain that rather than appealing the notice they are letting the employee know that the government will likely require that the employee make a repayment to the IRS for the APTC

if they find that the employee was not eligible (because the employee got a qualified coverage offer). Presumably next step may be for the employee to voluntarily alert the Marketplace to the error and rectify it (which would happen anyway if the employer's appeal was submitted and approved).

- In any event, we advise that employers have a process/system to be able to easily pull the historical coverage offer (tracked) data, and they should also have a process in place to keep track of notices received and appeals/responses sent (if any). Our understanding is that some reporting vendors will offer an Exchange notice appeals process service for a fee.

Below we expand on our understanding of these Exchange notices, the appeal process, a proposed alternative and a suggested step-by-step approach to handling the Exchange notices.

Understand Background, APTCs, and ESR Penalties

Beginning in 2016, all Exchanges operating on HealthCare.gov (including federally facilitated Marketplaces (FFMs) and state-based Exchanges using the federal platform) will start to notify certain employers if one or more of their employees has applied for Exchange coverage and has received a cost sharing reduction or an advance premium tax credit (APTC). A full-time employee (FTE) actually receiving this help can trigger ESR penalties (also known as employer mandate or pay or play penalties) for his or her applicable large employer (ALE) unless the ALE has offered adequate coverage to its FTEs (and dependents). The Exchange notice alerts an employer that an ESR payment may be assessed by the IRS and that the employer has a right to appeal to the Exchange. Recently issued [guidance](#) describes the notice process.

Beginning in 2015, certain large employers may be subject to the ESR penalty taxes for failing to offer minimum essential coverage (MEC) to FTEs, or for offering MEC that is unaffordable or doesn't meet minimum value (MV). Under the Affordable Care Act (ACA), an employee is eligible for the APTC beginning in 2014 if they meet certain income requirements and if they are not able to get affordable coverage through an eligible employer plan that provides MV. The ESR penalty tax is due if any FTE is certified as having purchased health insurance through an Exchange with respect to which an APTC is properly provided to the employee. But if a FTE eligible for affordable MV coverage receives an APTC, the employee could get the wrong tax credit and the employee will have a tax lien against them eventually. See this [IRS webpage](#) for a summary of the rules for how an individual gets an APTC. To reduce the number of individuals incorrectly receiving an APTC, Exchanges must notify some employers when employees receive APTCs. Employers may choose to appeal the Exchange notice, which may in turn encourage employees who do not qualify for an APTC to correct the information filed with the Exchange to avoid future tax liability. Employers may also consider using an alternative to the appeals process, as explained in more detail below.

Phased in Exchange Notice Approach

Exchanges are required to have a process for notifying some employers when employees receive APTCs and actually enroll in Exchange coverage. For 2016, the FFM and some state-based Exchanges will notify employers only with respect to employees who applied for Exchange coverage and received APTCs through HealthCare.gov. The FFM will begin sending notices to certain employers in 2016, and will expand to more employers in later years. The FFM will send notices in batches, with the first batch due in spring 2016 and additional batches to be sent throughout the year. Starting in 2016, the FFM will phase in the employer notice program by first sending notices to employers with employees who received APTC for at least one month in 2016

and for whom the employee provided a complete employer mailing address on his or her application for Exchange coverage. Employers will not receive notices for employees who received APTCs through the FFM but failed to provide an employer address or employees who received APTCs through the FFM in 2014 or 2015. Many employers will not receive these Exchange notices and will therefore not be able to address potential errors until after the tax year is over, when the IRS gets involved.

Exchange Notice Content

The notice will identify the specific employee, include a statement that the employee has enrolled in Exchange coverage with an APTC for at least one month in 2016, indicate that the specific employee was employed by the employer and that the employer may be liable for an ESR payment. The notice will not provide the exact reason for eligibility and will not contain the employee's personal health information or federal tax information. The notice will also inform employers of their right to appeal a determination of an employee's APTC eligibility.

IRS Assesses Penalty not HHS

If an employer receives an Exchange notice, this *does not* mean the employer owes an ESR penalty payment. Such penalties are assessed by the IRS after reconciliation of the ALE reporting process (via Forms 1094/1095). Thus, it is the IRS that independently determines whether an employer is liable for ESR payments for 2015 and all years going forward without regard to whether the Exchange issued a notice or the employer engaged in any appeals process. If the IRS sends the ALE a payment notice following this reconciliation, it will be at that point that the ALE will have an opportunity to appeal any assessment of ESR payments with the IRS. Full details of the IRS appeals process will be available at a later date.

The Exchange notice comes from the Department of Health and Human Services (HHS) and states specifically that it is only a notification that the employer *may* have to pay an ESR penalty. It also states that only the IRS, not the Marketplace/Exchange (where the notice is from), can determine whether an ALE will owe an ESR payment. Thus, it is clear that the IRS, not HHS, is responsible for assessing and collecting ESR payments. The IRS will begin notifying ALEs later in 2016 if they face possible ESR penalties for 2015. At that time, ALEs can respond and appeal directly to the IRS before it assesses an ESR penalty. Appealing to HHS is not the same thing as appealing to the IRS. It is also not clear that the IRS will even be notified of an employer Exchange notice appeal or the outcome of such an appeal.

Some Exchange Appeals May Not be Necessary

Receiving a notice that an employee received an APTC does not necessarily mean that the employer owes an ESR payment. Exchanges have the authority to decide who is eligible for an APTC and whether employers are providing appropriate coverage, but the information available might not always be accurate or up to date. This is because the rules permit individuals to self report to the Exchange whether they are covered through their employer. Before an employee can receive an APTC, the employee must attest that he/she is neither enrolled in employer-sponsored coverage nor eligible for employer-sponsored coverage that is affordable and provides MV. However, Exchanges do not verify in real time whether these attestations are correct. This means that an employee may receive an APTC—thereby triggering a notice to the employer—even if the employer offered MV affordable coverage and therefore does not owe any ESR payments for that employee. The Exchanges will also be sending notices for employees who may be part-time or other employees who are not eligible for coverage (e.g., because they are in a waiting period or look-back period) and would not make the ALE liable for an ESR penalty. For example, the named

individual may be a part-time employee not eligible for employer-sponsored coverage. Alternatively, the employee may have been in a waiting period or look-back period before employer-sponsored coverage became effective. In either case, the employer would not be at risk of an ESR penalty from the IRS. An ESR penalty is only triggered if the individual was a FTE of an ALE and not offered affordable MV coverage before the fourth full month of employment.

Appeal Process is Voluntary

Employers should understand that providing a response/appeal to any Exchange notice is *completely voluntary*. The appeal process is *not required* upon receiving an Exchange notice. If an employer receives an Exchange notice, the employer has an option to appeal but should consider doing so **only if** the employer is of the opinion that the employee should not have received a APTC because the employer met the ACA MV and affordability standards. Even then there is arguably no reason to appeal because if the employer made the offer of MV coverage and it was affordable, the employer should not be liable for the ESR penalty.

Appealing an Exchange Notice

An employer may receive an Exchange notice but believe the employee at issue was not entitled to an APTC because the employer offered MV affordable coverage or perhaps because the employee enrolled in employer-sponsored coverage. In that case, the employer may decide to appeal. The appeal must be completed in writing within 90 days of receiving the notice, and the employer will need to complete the appeal paperwork and provide supporting documentation. An employer appeal request form is available at <https://www.healthcare.gov/downloads/marketplace-employer-appeal-form.pdf>. An employer can request an appeal by submitting this form or mailing in a letter that includes the information requested on this form. Some state-based Exchanges have their own appeals processes and may also choose to use a paper-based process.

Employers should also understand that if they do decide to respond/appeal, HHS will notify the employee of the employers decision to appeal. So if the employer appeals because the employee was FT and they believe they offered MV coverage that was affordable, they then might carefully consider if and how they should communicate this to the employee (if the appeal is successful, the employee may need to repay the IRS for APTCs already received.) Also in some cases, appealing an Exchange notice can result in a vast amount of research and paperwork for the employer and potentially opens the employer plan up to review by the agency. For example, as part of the appeal, the employer may be expected to show it complied with all the requirements of the ACA with respect to the employees in question.

If the employer appeal is successful, the Marketplace will send a notice to the employee encouraging the employee to update his or her Exchange application to reflect that he or she has access to, or is enrolled in, other coverage. The individual may have to pay back any APTC received when a correction is made.

Consider Alternative to the Appeal Process

Given all of this, one option as an alternative to the appeal route, might be to reach out to a FTE who the employer has been notified was granted a government-paid APTC to help pay for Marketplace insurance. (Of course, any employee communications on these tax issues should be finalized with the advice of tax and legal counsel.) For any FTE that they did in fact offer affordable MV health insurance for 2016, they could attach a copy of the Exchange notice and explain to the employee that the employer has a right to appeal to the Exchange (because if the government believes the employer did not offer FTEs affordable MV health coverage, the IRS

could charge the employer large fines). The employer could explain that rather than appealing the Exchange notice they are letting the employee know that the government will likely require that the employee make a repayment to the IRS for the APTC if they find that the employee was not eligible (e.g., because the employee got an offer of affordable MV coverage). Presumably the next step may be for the employee to voluntarily alert the Marketplace to the error and rectify it (which would happen anyway if the employer's appeal was submitted and approved). See <https://www.irs.gov/affordable-care-act/individuals-and-families/its-time-for-a-ptc-checkup-for-your-2016-health-insurance-marketplace-coverage>. For questions on how the premium tax credits and cost-sharing subsidies are credited or repaid, employees could be directed to questions 20 through 25 on the [IRS Questions and Answers on the Premium Tax Credit webpage](#), or HealthCare.gov's [premium tax credit page](#) or [questions and answers section](#).

Suggested Step by Step Approach

1. The ALE should first determine if any of the information contained in the notice is incorrect.
2. Next verify whether the ALE might be determined liable for an ESR payment for the individual. Only then would an appeal even make sense (although an appeal is still not required).
3. Consider an alternative to the appeal route as noted above.
4. Consider an appeal in any event **only if** the notice is for an employee who was FT for at least one month of the year and where the FTE was offered but waived or is/was enrolled in affordable MV employer-sponsored group health plan coverage. In either case the individual would not have been eligible for a APTC.
5. If filing an appeal, be sure to provide only the information necessary to demonstrate the information contained in the notice is incorrect. For example, you may want to provide proof of enrollment in the employer-sponsored MEC. Or, in the case of a FTE who waived coverage, proof of offer of affordable MV coverage. Finally, in the case of an individual no longer employed, provide the date of termination.
6. If filing an appeal, do not include personally sensitive information. The notice contains only the name, month and day of birth (not year), and the last four digits of the individual's social security number (SSN). Any information submitted in support of the appeal should similarly protect sensitive information (do not provide individual's full SSN, full date of birth, or address, and do not provide payroll reports that may contain banking or other sensitive information).
7. Have a well-defined process for managing these notices. Employers will only have 90 days from the date of a notice to appeal an Exchange's determination. Copies of the notice, the decision making process used to determine if an appeal is necessary, and of course, the appeal if one is submitted, should all be saved in a secure location. Procedures should be set up immediately, including:
 - Developing a process for handling Exchange notifications, including a process for appealing any incorrect determinations.
 - Keeping track of any notices received in order to verify liability for ESR payments, if any, and appeal if necessary.
 - Keeping track of appeals/responses sent (if any).
 - Identifying key employees who will be responsible for timely analyzing and responding to Exchange notices and questions, or alternatively, determine if the employer's ACA reporting and recordkeeping provider has an appeal process/service they offer.
 - Communicating with all locations and establishing a process to ensure the notices

are circulated to the correct team to respond (Exchanges will send the notice to whatever address the employee provides).

- Ensuring systems are programmed for the ability to pull the required (tracked) data and respond to notices.
- Making employer plan information readily available to employees so that accurate APTC eligibility determinations may be made by the Exchanges. Exchange applicants can use the [Employer Coverage Tool](#) to provide information about the coverage available under an employer's plan.

Dealing with these Exchange notices will be critical starting in 2016 and employers are advised to consult with their tax and legal advisors for assistance with specific issues/complexities regarding ESR penalties and the reporting rules and appeal rights and process. As regulators continue to develop regulations and provide needed guidance, employers should continue to monitor these rules and develop appropriate administrative procedures. Please contact your Conner Strong & Buckelew account representative toll free at 1-877-861-3220 with any questions. For a complete list of Legislative Updates issued by Conner Strong & Buckelew, visit our online [Resource Center](#).



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