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Prepare to Receive Federal Exchange Notices in 2016

Employers should be prepared to start receiving notices from Exchanges operating on HealthCare.gov following the close of the upcoming 2016 open enrollment period. The Affordable Care Act (ACA) requires that each Health Insurance Marketplace (Exchange) notify any employer whose employee was determined eligible for advance premium tax credits (APTC) and cost sharing reductions (CSRs) 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. Recently issued [guidance](#) describes the notice process.

Background. Beginning in 2016, all Exchanges operating on Healthcare.gov (including federally facilitated Exchanges (FFE) 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 an APTC or CSR. A full-time employee (FTE) actually receiving this help can trigger employer shared responsibility (ESR) penalties (also known as employer mandate or pay or play penalties) for his or her employer unless the employer has offered adequate coverage to its FTEs (and dependents). The notice from the Exchange will alert the employer that an ESR payment may be assessed by the IRS and that the employer has a right to appeal to the Exchange and provide information to the IRS.

Subsidies and employer penalties. Beginning in 2015, certain large employers may be subject to 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). The penalty tax is due if any FTE is certified as having purchased health insurance through an Exchange with respect to which an APTC or CSR is allowed or paid to the employee. Under the 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. See this [IRS webpage](#) for a summary of the rules for how an individual gets an APTC. The IRS 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. In addition to the FFM's appeal process, an employer 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.

Phased in approach. For 2016, the FFM will notify employers only with respect to employees who applied for Exchange coverage and received APTCs through HealthCare.gov (see below for information on state-based Exchanges). The FFM will begin sending notices to certain employers

in 2016, and will expand to more employers in later years. 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. 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. The FFM will send notices in batches. The first batch of notices will be sent in spring 2016, and additional batches will be sent throughout the year. For 2016, the FFM will send notices to the mailing address of the employer provided by the employee on his or her application for Exchange coverage.

State-based Exchanges. State-based Exchanges not on the federal platform also have the option to phase in the notice process and they have the option to refer employer appeals to the HHS appeals entity. Therefore, employers may not receive notices about employees who received APTCs through state-based Exchanges not on the federal platform, which currently operate in California, Colorado, Connecticut, the District of Columbia, Hawaii, Idaho, Kentucky, Maryland, Massachusetts, Minnesota, New York, Rhode Island, Vermont, and Washington. These state-based Exchanges may have their own procedures for providing employer notices.

Exchange Notice Content. The notice will identify the specific employee, include a statement that the employee is enrolled in Exchange coverage with an APTC, and indicate that the employer may be liable for an ESR payment. The notice is not expected to provide the exact reason for eligibility, or to 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.

Appealing an Exchange Notice. An employer may receive a notice from the FFM but believe the employee at issue was not entitled to an APTC because the employer offered MV, affordable coverage or because the employee enrolled in employer-sponsored coverage. In that case, the employer can appeal in writing within 90 days of receiving the notice and will need to complete the appeal paperwork and provide supporting documentation. The guidance provides that an employer appeal request form will soon be available on Healthcare.gov. If the employer is successful, the FFM 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 notice will also explain that failure to update the application may result in a tax liability to the employee.

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. Even though the employer may not be subject to a penalty, the employer could still appeal, although the employer is not required to respond to the notice. A successful appeal by the employer could head off potential ESR penalty notices.

The Exchanges will also be sending notices for employees who may be part-time or other employees who are not eligible for coverage and would not make the employer liable for an ESR penalty. But if a FTE eligible for affordable MV coverage receives an APTC, and the employer receives a notice and doesn't appeal, the employee could get the wrong tax credit and the employee will have a tax lien against them eventually.

Prepare for the Exchange notification process. Employers will need to be prepared to start receiving these Exchange notices in 2016 and beyond. Employers will only have 90 days from the date of a notice to appeal an Exchange's determination of eligibility for the APTC. If a FTE receives an APTC, the employer may be liable for ESR payments, so 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. Applicants can use the [Employer Coverage Tool](#) to provide information about the coverage available under an employer's plan.

In order to remain compliant, employers must be prepared to interact with Exchanges quite frequently, including receiving notifications about employees seeking Exchange coverage, appealing determinations as needed, and fulfilling new reporting requirements. Dealing with these Exchange notices will be critical starting in 2016. As regulators continue to develop regulations and provide needed guidance, employers should continue to monitor these rules and develop appropriate administrative procedures.

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