



September 22, 2011

IRS Proposes "Affordability" Safe Harbor Under Shared Responsibility Provisions

Starting in 2014, applicable large employers may be required to pay a "shared responsibility" penalty (sometimes referred to as the "play or pay" mandate) if they offer "minimum essential coverage" that is unaffordable or does not provide "minimum value." The IRS has released a [press release](#) and [Notice 2011-73](#) giving large employers an opportunity to comment on a new proposed "affordability" safe harbor. Under the proposal, coverage would be considered affordable if an employee's portion of the self-only contribution for the lowest-cost, minimum-value plan doesn't exceed 9.5% of W-2 wages from the employer, rather than using 9.5% of household income as the law currently provides. The IRS is asking employers and other interested parties for comments on this proposed safe harbor. The deadline for public comments is December 13, 2011. This is an example of the IRS having to come up with a fix to a practical problem posed by the healthcare reform legislation.

Under the law and proposed rules for premium tax credits to help individuals buy exchange coverage, employer health benefits are unaffordable if an employee's premium share exceeds 9.5% of his or her household income. Since employers often don't know employees' household incomes, the safe harbor proposes using W-2 wages as a more practical method for employers to determine whether the health coverage they offer is affordable. The proposed safe harbor would only apply for purposes of the employer-shared responsibility provision, and would not affect employees' eligibility for health insurance premium tax credits.

Background. Employers are not required to provide health insurance, but beginning in 2014, certain "large" employers with 50 or more full-time employees may be required to pay a penalty if they don't provide coverage or if they provide coverage that doesn't meet the minimum value test or is unaffordable. To use the "affordability" safe harbor, an employer would need to meet certain requirements, including offering its full-time employees (and dependents) the opportunity to enroll in minimum essential coverage, and providing that the employee portion of the self-only premium for the employer's lowest cost coverage that provides minimum value (the employee contribution) doesn't exceed 9.5% of the employee's W-2 wages. If both requirements are satisfied for a particular employee (as well as any other conditions for the safe harbor), the employer wouldn't be subject to an assessable payment for that particular employee, even if he or she receives a premium tax credit or cost-sharing reduction.

Retrospective determination. Under the proposal, the safe harbor is generally applied at calendar year end and on an employee-by-employee basis. So, for example, an employer will

meet the safe harbor for 2014 if each full-time worker's plan contributions do not exceed 9.5% of his or her 2014 W-2 wages. An employer satisfying the safe harbor will be treated as offering affordable coverage for shared-responsibility purposes, although penalties could still apply if a full-time worker receives a premium tax credit for a health insurance exchange plan.

Prospective determination. An employer could also use the safe harbor prospectively, at the start of a calendar year, by structuring its plan and operations to set the employee contribution at a level so that the employee contribution for each employee would not exceed 9.5% of his W-2 wages for that year. Employers could, on a consistent basis, make reasonable and necessary adjustments for pay periods so that the employee contribution does not exceed the 9.5% threshold. Although employers usually don't change employee contributions midway through a plan year, a prospective approach would give employers flexibility to manage contribution rates to reduce the risk of shared responsibility penalties.

Comments requested. The IRS is seeking input on specific issues, such as applying the safe harbor to part-year employees, employees moving between full-time and part-time status, or non-calendar year plans, and coordinating this safe harbor with the one on identifying full-time employees.

Employers may want to review the notice as it describes a safe harbor which could be incorporated in future proposed regulations. Should you have questions about this or any aspect of federal health insurance reform, contact your Conner Strong & Buckelew account representative toll free at 1-877-861-3220. For a complete list of Legislative Updates issued by Conner Strong & Buckelew, visit our online [Resource Center](#).



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