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Employer Exchange Subsidy Notices – Appeal or Not?

INTRODUCTION

Employers are starting to receive notices from public Exchanges indicating that one or more employees are receiving a subsidy when purchasing individual health insurance coverage through a public Exchange. This could potentially trigger employer penalties under §4980H. If an employer receives such a notice, the employer has a right, but is not required, to appeal when they feel an employee should not be receiving a subsidy because the employer offers minimum value, affordable coverage.

BACKGROUND

The Affordable Care Act (ACA) requires all public Exchanges (Marketplaces) to notify employers when an employee receives a subsidy (tax credits and cost-sharing reductions) for individual health insurance purchased through a public Exchange, and provide an opportunity for employers to appeal. Final rules published in August 2013 set forth the requirements for an employer to appeal. The particulars of the process, however, are managed by each Exchange separately. So long as the requirements in the final rules are met, each state Exchange is allowed to set up its own process and procedures. Information about how to file an appeal is usually included in the notice, but it may be necessary to check with the applicable Exchange to find out exactly how to handle the appeals process.

Some states began sending these notices in 2015, but HHS announced that all federally facilitated Exchanges will begin sending notices in 2016.

APPEAL FORM AND PROCESS

The form being used by federally facilitated Exchanges as well as by 8 other states may be found here (approximately half of the states are currently using this form and process). In Washington State, the employer request for hearing is found here. The forms and processes for all other states may be found by visiting the state's Exchange site. The process generally involves filing a paper appeal, providing documentation, and in some cases participating in a hearing.

SHOULD EMPLOYERS APPEAL? MAYBE...

SMALL EMPLOYERS (LESS THAN 50 FTES)

Small employers have no penalty exposure under §4980H. The only reason such an employer may want to appeal would be to prevent an employee from incorrectly receiving a subsidy through a public Exchange that may have to be paid back at the end of the year via personal tax return (employee relations). However, perhaps it would be easier simply to have a conversation directly with the employee rather than working through the appeal process.

APPLICABLE LARGE EMPLOYERS (50 OR MORE FTES)

Just because the employer receives a notice, it does not mean the employer will actually owe a penalty payment under §4980H. Such penalties/payments are assessed by the IRS after reconciliation of the employer reporting. And if the IRS sends a payment notice, the employer will have a chance to appeal with the IRS at that time.

For part-time employees, the employer is not under any obligation to offer any type of coverage under §4980H, so going through the appeal process probably isn't necessary. As mentioned above for small employers, the only reason an employer may want to appeal a notice on a part-time employee would be to prevent an employee from incorrectly receiving a subsidy through a public Exchange that may have to be paid back at the end of the year via personal tax return (employee relations).

For full-time employees,

- If the employee was not offered minimum value, affordable coverage, there is nothing to appeal; rather, it serves as an indication that the employer will likely owe a penalty under §4980H for at least some months of the year.
- If the employee was offered minimum value, affordable coverage, the employer really has three options:
    1. Appeal as outlined in the notice and provide proof that the coverage offered provides minimum value and is affordable; or
    2. Reconcile this with the IRS early the following year when the employer reporting is submitted via Forms 1094-C and 1095-C.
    3. Talk to the employee about the coverage offered, how the IRS determines affordability and whether the employee should amend the information they submitted to the Exchange

Bottom line, the employer does not have to appeal to avoid a penalty under §4980H. Rather, penalties will not apply until after the employer reporting (via Forms 1094-C and 1095-C) is reconciled. There is some speculation that it might be better to appeal with the Exchange rather than waiting to appeal later with the IRS. The appeal process with the Exchange may be more streamlined and provide for a longer appeal window, especially since the IRS has yet to release any specific guidance as to its appeal process.

SUMMARY

This is a fairly new process, so the best approach for employers is unclear at this point. It may make sense to clear things up sooner rather than later by filing an appeal to avoid hassling with the IRS, and also to prevent the individual from receiving a subsidy for which they are actually ineligible. The appeals process doesn't appear to be very difficult and may only need to be done for a handful of employees. But it's possible that it could all be cleared up more quickly by simply communicating to the employee that they may be receiving the subsidy in error. So is it worthwhile to appeal, or potentially even pay a vendor to handle it on the employer's behalf? Maybe… or maybe not…. We will know more after this first year of employer reporting and have a better understanding of the reconciliation process with the IRS. But regardless of whether an employer decides to appeal through a public Exchange prior to reporting to the IRS via Forms 1094-C and 1095-C, ultimately any penalties that may apply will be reconciled with the IRS.

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