

# EMPLOYEE BENEFITS COMPLIANCE UPDATE

OCTOBER 2022

## IRS Issues Final Rules for Family Coverage Affordability Determination

The IRS has issued final regulations (<https://public-inspection.federalregister.gov/2022-22184.pdf>) that change the way employer-sponsored plan affordability is calculated when determining if a family is eligible for a premium tax credit (PTC) when purchasing individual health insurance through a public Exchange.

In fixing what is commonly referred to as the “family glitch,” affordability for family members will be based on the employee’s cost to cover the entire family rather than the cost of employee-only coverage. The change will allow more spouses and dependents to qualify for PTCs applied toward the cost of individual health coverage purchased through a public Exchange.

More information regarding the background of the “family glitch” can be found at <https://imacorp.com/benefits/news/irs-issues-proposed-rules-to-fix-the-affordability-family-glitch/> where IMA previously posted when proposed rules on this matter were issued back in April.

### NEW RULE

Effective January 1, 2023, employer plan affordability for family members will be based on the required cost for the entire family to participate in the employer-sponsored plan. Affordability for the employee will still be based on the employee’s cost for single (employee-only) coverage.

**Important note:** Employer contributions to determine ACA affordability remain unchanged.

Depending on an employer’s contribution arrangement, this could create a situation where family members are

eligible for the PTC purchasing individual coverage on the exchange, while the employee remains ineligible based on the cost of single coverage.

### Determining the Cost of Employer-Sponsored Coverage

To determine the cost of coverage for purposes of affordability for family members, the entire employee contribution for family coverage is considered. For example, if an employer charges employees \$150/month to participate in single employee-only coverage and \$600/month for the employee to enroll in family coverage, you would compare the \$600 to the employee’s household income to determine affordability for the family members and compare \$150 to the employee’s household income to determine affordability for the employee.

**Practical insight:** While this does not directly impact employers, we anticipate that some employers will adjust its dependent contributions to help lower wage earner family members qualify for the PTC when purchasing individual coverage on the exchange.

### Minimum Value

To affect an individual’s eligibility for a PTC, an employer-sponsored plan must also provide benefits that meet the definition of minimum value (MV). In addition to providing 60% or better actuarial value, previous guidance indicated that plan benefits must also include substantial coverage of inpatient hospital services and physician services. This was previously set forth in proposed rules by the IRS, but not finalized. The IRS has formalized this requirement in the final rules.

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*Tip: this is unrelated to the family glitch, but the IRS took this opportunity to finalize rules. Most employers were already operating under this assumption.*

## EMPLOYEE ELECTION CHANGES – JUST IN TIME FOR EXCHANGE OPEN ENROLLMENT

For employer benefits provided through a Section 125 cafeteria plan, employees are generally not allowed to make changes to their elections midyear unless they experience an allowable election change event as defined by the Section 125 rules.

To address situations where an employee may want to drop family members from coverage on the employer-sponsored plan so those individuals can purchase subsidized individual health insurance, the IRS has also issued Notice 2022-41 (<https://www.irs.gov/pub/irs-drop/n-22-41.pdf>) which creates a new election change event for non-calendar year plans under Section 125 rules, effective for election changes starting 1/1/23.

According to this new Section 125 rule, a non-calendar year cafeteria plan may allow an employee to prospectively remove family members from coverage under a group health plan provided the following conditions are satisfied:

- A “related individual” is eligible for a special enrollment period to enroll in a qualified health plan (QHP) through an Exchange, or an already-covered related individual seeks to enroll in a QHP during the Exchange’s annual open enrollment period; and
- The revocation of the election of coverage under the group health plan corresponds to the intended enrollment of the related individual or related individuals in a QHP through an Exchange for new coverage that is effective beginning no later than the day immediately following the last day of the original employer coverage that is revoked.

Employers may rely on the employee or related individual’s representation that they plan to enroll in Exchange coverage when revoking the employer coverage.

To allow the new permitted election change, the employer must amend their Section 125 plan and adopt on or before the last day of the plan year in which the elections are allowed (however, the IRS is specifically allowing an extra year in this case: “an employer may amend a cafeteria plan to adopt the new permitted election changes for a plan year that begins in 2023 at any time on or before the last day of the plan year that begins in 2024”). The IRS also requires the employer to inform participants of this change as soon as it’s available, even if the written amendment comes later.

## EMPLOYER CONSIDERATIONS

This change in affordability determination may lead to confusion with regards to direct impact to employers.

- **No employer penalties for unaffordable family coverage** – Applicable large employers (those with at least 50 FTEs) can be liable for penalties under section §4980H if the employer plan is unaffordable for full-time employees. This rule remains unchanged, and employer penalties are based only on the cost of single or employee-only coverage. Employers are not required to provide affordable family coverage and will not be penalized in cases where family members receive the PTC when purchasing individual health insurance.
- **No change to employer reporting requirements** – Form 1094 and 1095 reporting requirements are not changed in any way.
- **No specific employee notice or disclosure requirements** – The rules do not impose any new employee disclosure or notice requirements. However, language in the “Exchange Notice” that employers provide to all new hires will need to be updated. Some employers may want to voluntarily communicate these changes to employees to help them understand their options regarding the employee’s family’s participation in the employer-sponsored plan versus purchasing subsidized individual coverage.

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## SUMMARY

Note that the American Rescue Plan Act extended increased PTCs available when purchasing individual coverage to the public Exchange through 2025.

The combination of the increased subsidies with the ability for family members to qualify based on the family cost of the employer plan means that, depending on employer contribution policies and an employee's household income, a significant number of employees may find that coverage for family members is more affordable through a public Exchange than what is currently offered under their employer's plan.

The new rules are going into effect just in time for the open enrollment period that starts November 1 for coverage to begin January 1, 2023, in the [Healthcare.gov](https://www.healthcare.gov) federal Exchange (state-based Exchanges may have different annual open enrollment periods).

This means that employees may want to reconsider elections that they are currently in the process of making for employer-based calendar year plans. Employers will need to understand how this may affect some employees' enrollment decisions.

Let your PS&F Benefits team know if you have any questions. We review affordability every year with our applicable large employer (ALE) clients and are happy to assist as you strategize for your upcoming plan year.

PS&F will continue to monitor regulator guidance and offer meaningful, practical, timely information.

This material should not be considered as a substitute for legal, tax and/or actuarial advice. Contact the appropriate professional counsel for such matters. These materials are not exhaustive and are subject to possible changes in applicable laws, rules, and regulations and their interpretations.

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