

# The Patient Protection and Affordable Care Act

**The Patient Protection and Affordable Care Act**, approved March 23 2010, is the single most important piece of legislation ratified by the United States in recent years, created with the intention of offering medical coverage to millions of people of modest resources and it attempts to restructure the way medical services are offered to the general population. The law requires all residents and their families buy a medical insurance policy and if they can not afford it, the government will pay part of the cost. Non compliance will result in financial penalties. Beginning in 2016 when the full force of the law goes into effect, individual and family penalties will be up to 2.5% of household income and for business with 50 or more employees as much as \$2,000.00 per employee per year. In short order both individuals and businesses have experienced a dramatic increase in their health insurance premiums, and health benefits have been reduced due to high deductible plans. The new law has made it difficult to juggle between complying with regulations and the need to obtain cost effective health coverage.

## Individual and Business Mandates

### **The individual Mandate:**

#### **The fee you pay if you don't have health coverage**

If you can afford health insurance but choose not to buy it, you must have a health coverage exemption or pay a fee. (The fee is sometimes called the "penalty," "fine," "individual responsibility payment," or "individual mandate.")

#### **The fee for not having coverage after 2016**

**If you don't have coverage in 2016, you'll pay the higher of these two amounts:**

- **2.5% of your yearly household income**
- **\$695 per person (\$347.50 per child under 18)**

In future years, the fee will be adjusted for inflation.

**The ObamaCare Employer Mandate / Employer Penalty**, originally set to begin in 2014, was delayed until 2015 / 2016. ObamaCare's "employer mandate" is a requirement that all businesses with 50 or more full-time equivalent employees (FTE) provide health insurance to at least 95% of their full-time employees and dependents up to age 26, or pay a fee.

The employer mandate is officially part of the Employer Shared Responsibility Provision. Under the Affordable Care Act, the federal government, state governments, insurers, employers, and individuals are given shared responsibility to reform and improve the availability, quality, and affordability of Health Insurance Coverage in the United States.

**IMPORTANT:** If an employer owes the fee because they didn't cover workers, it's a flat \$2,000 per full-time employee (excluding first 30 employees). If only a few end up with unaffordable coverage or if that

coverage doesn't meet minimum value standards, it's \$3,000 per full-time employee who got cost assistance (but, never more than \$2,000 per full-time employee). The fee is always per-month, so it's always 1/12 of those annual totals for each month.

### How the Employer Mandate Works

Firms with 100 or more full-time equivalent employees (FTE) will need to insure at least 70% of their full-time workers by 2015 and 95% by 2016. Small businesses with 50-99 FTE will need to start insuring full-time workers by 2016. The mandate does not apply to employers with 49 or less FTE.

Employers with less than 25 FTE with average annual wages of less than \$50,000 qualify for employer tax credits. Those with 10 or less FTE with average annual wages of less than \$20,000 qualify for the full credit of up to 50% of their share of employer premiums. To be eligible for a tax credit, the employer must contribute at least 50% of the total premium cost or 50% of a benchmark premium (second lowest cost Silver Plan in your state's Marketplace).

If an employer doesn't provide coverage, provides coverage that doesn't offer minimum value, or provides coverage that is unaffordable, then they must make a per-employee, per-month "Employer Shared Responsibility Payment". The IRS will provide the employer with a notice about the payment. Employers will not be required to include the Employer Shared Responsibility payment on any tax return that they file.

- The employer mandate is based on full-time equivalent employees, not just full-time employees.
- The fee is based on whether you offer Affordable Health Insurance to your employees that provides minimum value (explained below).
- Employers have to offer coverage to "substantially all" (95%) of their full-time employees.
- Coverage must be offered to dependents up to age 26. Once a dependent turns 26, coverage no longer needs to be offered.
- Spouses do not count as dependents; coverage does not have to be offered to spouses.
- Employers must offer coverage, but employees don't have to take it. That being said, they can't get marketplace subsidies if coverage meets affordability and minimum-value guidelines. Since the employee was offered qualifying coverage, the employer doesn't owe the fee.
- **Employees who work at least 30 hours per week or whose service hours equal at least 130 hours a month for more than 120 days in a year are considered full-time.**
- Employers use measurement periods and look-back periods of 3 – 12 months to find out if they have to comply with the mandate or if an employee is full-time.
- **Coverage offered to employees must be considered affordable (can't cost more than 9.5% of employee household income) and must provide minimum value (must have an average cost sharing of 60%).**
- **For employers who don't provide coverage, the fee is \$2,000 per full-time employee (minus first 30 full-time employees).**
- For employers who do provide coverage but don't provide coverage meeting minimum-value and affordability requirements, the fee is **the lesser of**: \$3,000 per full-time employee receiving subsidies, or \$2,000 per full-time employee (minus the first 30).
- For plan years beginning in 2015 only, the penalty is \$2,000 for each full-time employee minus **the first 80 employees**. For plan years beginning in 2016 and beyond, employers can exclude 30 full-time employees from the penalty calculation.
- In general, the fee is only "triggered" if at least one employee shops on the marketplace, **and is eligible for a federal premium subsidy**.
- The fee does not apply if a dependent shops on the marketplace and receives a subsidy. Rules only apply to employee-only coverage.
- Employers with over 200 FTE must auto-enroll full-time new-hires and provide an opt-out.
- A part of the law that required employers to pay a fee for enacting a health insurance waiting period was removed before it took effect. As long as an employer has a waiting period of 90 days or less they are abiding by the law and don't have to pay a fee. The old rule worked like this:

Employers with over 50 full-time equivalent employees will pay \$400 for any full-time employee in a 30-60 day waiting period and \$600 for any full-time employee in a 60-90 day waiting period.

- Employers must offer at least a 30 day Special Enrollment Period for employees or qualifying employee family members losing coverage from another source. This means an employee must be given 30 days to enroll in an employer plan after losing non-employer minimum essential coverage for any reason other than non-payment.
- The fee is a per-month fee. So it's always 1/12 of the total fee for full-time workers for each month.
- To clarify, Full-time Equivalent Employee's (FTE) is used to determine if an employer must comply with the mandate. However, fees are based on full-time workers and not FTE.
- FTE is calculated by averaging part-time and full-time hours worked (see below for more details).
- A proposed fix to the mandate, called the Save American Workers Act, would increase the part-time requirement to 40 hours a week.

See below for details on the employer mandate fee, how full-time hours are calculated, how to get cost assistance on employee coverage, what type of coverage must be provided, and more.

**FACT:** Approximately 96 percent of employers are small businesses and have fewer than 50 FTE workers and are exempt from the employer responsibility provisions (Treasury.gov). Of those who do have to comply with the mandate, only a fraction doesn't already offer qualifying coverage to full-time employees.

### **Advice for Employees with Unaffordable Options**

If employer-sponsored coverage is unaffordable (costs more than 9.5% of employee-only income) or doesn't provide minimum value, you may be eligible for marketplace subsidies. If employer-sponsored health insurance (for self-only coverage for you or a family member) costs more than 8% of your household Modified Adjusted Gross Income, you may be exempt from the fee as well. You are not required to take the coverage that your employer offers. Learn more about affordable employer-sponsored coverage and what forms you need to fill out if coverage is unaffordable.

If you have access to Medicaid, you can reject employer-based coverage to go on Medicaid, and your employer will not have to pay the fee. The fee only pertains to Marketplace coverage. Thus, you may be eligible for free or low-cost family coverage even if employer-based coverage is unaffordable for you, but due to Medicaid expansion, not technically considered unaffordable.

### **The Employer Mandate Fee / Employer Shared Responsibility Payment**

The employer mandate fee (officially called an Employer Shared Responsibility Payment) is a per-month, per-employee fee for employers who have more than 50 full-time equivalent employees and don't offer health coverage to the required amount of full-time employees (as well as their dependents up to age 26).

#### **Generally an employer will owe the fee if:**

(a) The employer does not offer health coverage or offers coverage to fewer than 95% of its full-time employees and the dependents of those employees, and at least one of the full-time employees receives a premium tax credit to help pay for coverage on a Marketplace;

OR

(b) The employer offers health coverage to all or at least 95% of its full-time employees, but at least one full-time employee receives a premium tax credit to help pay for coverage on a Marketplace, which may occur because the employer did not offer coverage to that employee or because the coverage the

employer offered that employee was either unaffordable to the employee or did not provide minimum value.

### **What is Minimum Value?**

Minimum value means that a plan provides the minimum essential coverage and cost sharing in line with a Bronze plan on the marketplace and has a minimum average cost sharing amount (actuarial value) of 60%. All marketplace coverage is minimum essential coverage. We suggest using the Small Business Health Options Program (SHOP) to cover employees. This helps ensure that your plan complies with the law. More information on minimum value can be found below.

### **What is Affordable Employee Health Insurance?**

Affordable means that a plan costs no more than 9.5% of employee's household income for employee-only coverage. As a safe harbor, employers can simply make sure the plan costs no more than 9.5% of employee-only income. More information on safe harbors and affordability can be found below. See our page on affordable employer-sponsored insurance for an in-depth look at affordability.

### **How much is the Employer Shared Responsibility Fee?**

The Employer Shared Responsibility is generally \$2,000 a year, per employee, 1/12 of which is owed for each month. If the employee got marketplace cost assistance, the fee is \$3,000 per employee. However, there are some important details that affect what an employer will actually owe.

- The annual fee is \$2,000 per employee if insurance isn't offered at all (the first 30 full-time employees are exempt). This helps lower the fee for smaller firms who are still required to pay the fee.
- If at least one full-time employee receives a premium tax credit due to coverage either being unaffordable or failing to provide minimum value, the employer must pay **the lesser of** \$3,000 for each of those employees receiving a credit or \$2,000 (minus the first 30) for each of their full-time employees.
- Employers who pay the \$3,000 per-employee fee don't subtract the first 30 employees. An employer would only pay the \$3000 if few enough employees weren't adequately covered to make it the cheapest payment option.
- For 2015, the first 80 full-time employees are exempt from the fee – not just the first 30.
- The fee is a per-month fee due annually starting in 2015 for small businesses with 100 or more full-time equivalent employees (2016 for those with 50-99). So, the per-month fee is 1/12 of the \$2,000 or \$3,000 per employee.
- Unlike employer contributions to employee premiums, the Employer Shared Responsibility Payment is **not** tax deductible.
- Health care tax credits have been retroactively available to small businesses with 25 or less full-time equivalent employees since 2010.
- Transition relief is available to small businesses and large businesses transitioning into compliance with the new mandate. Please see the official IRS rules regarding transition relief [here](#).

## I.R.S. RULES

### Employer Shared Responsibility / Source: IRS

- **1. What are the Employer Shared Responsibility provisions?**
- For 2015 and after, employers employing at least a certain number of employees (generally 50 full-time employees or a combination of full-time and part-time employees that is equivalent to 50 full-time employees) will be subject to the Employer Shared Responsibility provisions under section 4980H of the Internal Revenue Code (added to the Code by the Affordable Care Act). As defined by the statute, a full-time employee is an individual employed on average at least 30 hours of service per week. An employer that meets the 50 full-time employee threshold is referred to as an applicable large employer.
- **Under the Employer Shared Responsibility provisions, if these employers do not offer affordable health coverage that provides a minimum level of coverage to their full-time employees (and their dependents), the employer may be subject to an Employer Shared Responsibility payment if at least one of its full-time employees receives a premium tax credit for purchasing individual coverage on one of the new Affordable Insurance Exchanges, also called a Health Insurance Marketplace (Marketplace).**
- **2. When do the Employer Shared Responsibility provisions go into effect?**
- The Employer Shared Responsibility provisions generally are not effective until Jan. 1, 2015, meaning that no Employer Shared Responsibility payments will be assessed for 2014. See [Notice 2013-45](#). Employers will use information about the number of employees they employ and their hours of service during 2014 to determine whether they employ enough employees to be an applicable large employer for 2015.
- **3. Is more detailed information available about the Employer Shared Responsibility provisions?**
- Yes. Treasury and the IRS have issued [final regulations](#) on the Employer Shared Responsibility provisions. Treasury and the IRS also have issued [proposed regulations](#) on the related Information Reporting by Applicable Large Employers on Health Insurance Coverage Offered under Employer-Sponsored Plans.
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- **Which Employers Are Subject to the Employer Shared Responsibility Provisions?**
- **4. I understand that the Employer Shared Responsibility provisions apply only to employers employing at least a certain number of employees. How many employees must an employer have to be subject to the Employer Shared Responsibility provisions?**
- To be subject to the Employer Shared Responsibility provisions for a calendar year, an employer must have employed during the previous calendar year at least 50 full-time employees or a combination of full-time and part-time employees that equals at least 50. **For example, an employer that employs 40 full-time employees (that is, employees employed 30 or more hours per week on average) and 20 employees employed 15 hours per week on average has the**

**equivalent of 50 full-time employees, and would be an applicable large employer.**

- Seasonal workers are taken into account in determining the number of full-time employees. However, if an employer's workforce exceeds 50 full-time employees (including full-time equivalents) for 120 days or fewer during a calendar year, and the employees in excess of 50 who were employed during that period of no more than 120 days were seasonal workers, the employer is not considered an applicable large employer. Seasonal workers are workers who perform labor or services on a seasonal basis as defined by the Secretary of Labor, and retail workers employed exclusively during holiday seasons. For this purpose, employers may apply a reasonable, good faith interpretation of the term "seasonal worker."
- Employers will determine each year, based on their current number of employees, whether they will be considered an applicable large employer for the next year. For example, if an employer has at least 50 full-time employees (including full-time equivalents) for 2014, it will be considered an applicable large employer for 2015. Note that because employers will be performing this calculation for the first time to determine their status for 2015, there is a transition rule intended to make this first calculation easier. See question 31 for a discussion of this transition rule for 2015 determination of applicable large employer status.
- Employers average their number of employees across the months in the year to see whether they will be an applicable large employer for the next year. This averaging can take account of fluctuations that many employers may experience in their work force across the year. The final regulations provide additional information about how to determine the average number of employees for a year, including information about how to take account of salaried employees who may not clock their hours.

**5. Do the Employer Shared Responsibility provisions apply only to large employers that are for-profit businesses or to other large employers as well?**

All employers that are applicable large employers are subject to the Employer Shared Responsibility provisions, including for-profit, non-profit, and government entity employers

**Identification of Full-Time Employees**

**6. How does an employer identify its full-time employees for purposes of the Employer Shared Responsibility provisions?**

An employer's number of full-time employees matters both for purposes of whether the Employer Shared Responsibility provisions apply to an employer and whether an Employer Shared Responsibility payment is owed by an employer (and the amount of that payment). An employer identifies its full-time employees based on each employee's hours of service. For purposes of the Employer Shared Responsibility provisions, an employee is a full-time employee for a calendar month if he or she averages at least 30 hours of service per week. Under the final regulations, for purposes of determining full-time employee status, 130 hours of service in a calendar month is treated as the monthly equivalent of at least 30 hours of service per week.

The final regulations provide two measurement methods for determining whether an employee has sufficient hours of service to be a full-time employee. One method is the monthly measurement method under which an employer determines each employee's status as a full-time employee by counting the employee's hours of service for each month. The other method

is the look-back measurement method under which an employer may determine the status of an employee as a full-time employee during a future period (referred to as the stability period), based upon the hours of service of the employee in a prior period (referred to as the measurement period). The look-back measurement method for identifying full-time employees is available only for purposes of determining and computing liability for an Employer Shared Responsibility payment, and not for purposes of determining if the employer is an applicable large employer. The final regulations describe approaches that can be used for various circumstances, such as for employees who work variable hour schedules, seasonal employees, and employees of educational organizations.

These methods prescribe minimum standards for the identification of full-time employee status. Employers always may make additional employees eligible for coverage, or otherwise offer coverage more expansively than required.

### **Liability for the Employer Shared Responsibility Payment**

#### **7. Under what circumstances will an employer owe an Employer Shared Responsibility payment?**

For 2015 and after, an applicable large employer will be liable for an Employer Shared Responsibility payment only if:

(a) The employer does not offer health coverage or offers coverage to fewer than 95% of its full-time employees and the dependents of those employees, and at least one of the full-time employees receives a premium tax credit to help pay for coverage on a Marketplace;

OR

(b) The employer offers health coverage to all or at least 95% of its full-time employees, but at least one full-time employee receives a premium tax credit to help pay for coverage on a Marketplace, which may occur because the employer did not offer coverage to that employee or because the coverage the employer offered that employee was either unaffordable to the employee (see question 19, below) or did not provide minimum value (see question 20, below).

But see question 33 for transition relief with respect to offers of coverage to dependents for 2015, questions 34 through 36 for 2015 transition relief for certain employers with fewer than 100 full-time employees (including full-time equivalents), and question 37 for 2015 transition relief for all other employers with respect to the percentage of full-time employees to whom coverage must be offered to avoid the payment described in paragraph (a) above.

#### **8. How does an employer know whether the coverage it offers is affordable?**

If an employee's share of the premium for employer-provided coverage would cost the employee more than 9.5% of that employee's annual household income, the coverage is not considered affordable for that employee. Because employers generally will not know their employees' household incomes, employers can take advantage of one or more of the three affordability safe harbors set forth in the final regulations that are based on information the employer will have available, such as the employee's Form W-2 wages or the employee's rate of pay. If an employer meets the requirements of any of these safe harbors, the offer of coverage will be deemed affordable for purposes of the Employer Shared Responsibility

provisions regardless of whether it was affordable to the employee for purposes of the premium tax credit.

The three affordability safe harbors are (1) the Form W-2 wages safe harbor, (2) the rate of pay safe harbor, and (3) the federal poverty line safe harbor. These safe harbors are all optional. An employer may use one or more of the safe harbors only if the employer offers its full-time employees and their dependents the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan that provides minimum value for the self-only coverage offered to the employee. An employer may choose to use one or more of the safe harbors for all of its employees or for any reasonable category of employees, provided it does so on a uniform and consistent basis for all employees in a category. If an employer offers multiple healthcare coverage options, the affordability test applies to the lowest-cost self-only option available to the employee that also meets the minimum value requirement (see question 20, below.)

The Form W-2 wages safe harbor generally is based on the amount of wages paid to the employee that are reported in Box 1 of that employee's Form W-2. The rate of pay safe harbor generally is based on the employee's rate of pay at the beginning of the coverage period, with adjustments permitted, for an hourly employee, if the rate of pay is decreased (but not if the rate of pay is increased). The federal poverty line safe harbor generally treats coverage as affordable if the employee contribution for the year does not exceed 9.5% of the federal poverty line for a single individual for the applicable calendar year. The final regulations provide additional information on these affordability safe harbors.

#### **9. How does an employer know whether the coverage it offers provides minimum value?**

A plan provides minimum value if it covers at least 60 percent of the total allowed cost of benefits that are expected to be incurred under the plan. The Department of Health and Human Services (HHS) and the IRS have produced a minimum value calculator. By entering certain information about the plan, such as deductibles and co-pays, into the calculator employers can get a determination as to whether the plan provides minimum value. Additionally, on May 3, 2013, Treasury and the IRS issued proposed regulations regarding the other methods available to determine minimum value.

#### **Calculation of the Employer Shared Responsibility Payment**

#### **10. If an employer that does not offer coverage or that offers coverage to fewer than 95% of its full-time employees (and their dependents) owes an Employer Shared Responsibility payment, how is the amount of the payment calculated?**

If an applicable large employer does not offer coverage or offers coverage to fewer than 95% of its full-time employees (and their dependents), it owes an Employer Shared Responsibility payment equal to the number of full-time employees the employer employed for the year (minus up to 30) multiplied by \$2,000, as long as at least one full-time employee receives the premium tax credit. (Note that for purposes of this calculation, a full-time employee does not include a full-time equivalent). Also, see question 33 for transition relief for offers of coverage to dependents for 2015.

For an employer that offers coverage for some months but not others during the calendar year, the payment is computed separately for each month for which coverage was not offered. The amount of the payment for the month equals the number of full-time employees the employer employed for the month (minus up to 30) multiplied by 1/12 of \$2,000. If the employer is related to other employers (see question 6 above), then the 30-employee exclusion is allocated among



all the related employers in proportion to each employer's number of full-time employees. See questions 38 and 39 for information about 2015 transition relief for calculating the payment.

### **Basics for Small Employers**

#### **11. I am a small employer with 30 employees. How do the Employer Shared Responsibility provisions (Code section 4980H) affect me?**

They don't. Employers that employ fewer than 50 full-time employees (including full-time equivalents) in their businesses are not subject to the Employer Shared Responsibility provisions. The vast majority of businesses fall below this threshold.

In addition, the preamble to the final regulations for the Employer Shared Responsibility provisions provides transition relief for 2015. Employers with at least 50 but fewer than 100 full-time employees (including full-time equivalents) in 2014 that meet conditions described in the preamble to the final regulations will not be subject to any Employer Shared Responsibility payments for 2015 (or for the 2015 plan year in the case of an employer with a non-calendar-year health plan).

#### **12. If I hire additional employees, including some part-time employees, how do I determine if I have become large enough to be subject to the Employer Shared Responsibility provisions?**

An employer determines if it is subject to these provisions for a current year by counting how many full-time employees and full-time equivalents it employed during the prior calendar year.

First, for each month of the prior year, the employer counts its employees working an average of 30 or more hours per week as full-time employees and, if it has employees working less than that, adds the number of full-time equivalents (determined by simply adding up the hours that are worked by these less-than-full-time employees for the month, but no more than 120 hours per employee, and then dividing by 120).

Second, the resulting totals for each month in the prior year are added together and then divided by 12 to get an average for the prior year. If the result is less than 50, the employer is not subject to these rules for the current year and need not take any other action.

(If the result is 50 or more but some of the employees are seasonal workers, certain adjustments may still bring the average down to less than 50.)

Two transition rules apply in 2015 that are particularly relevant for small employers close to the 50 full-time employee (including full-time equivalents) threshold. First, employers with at least 50 but fewer than 100 full-time employees (including full-time equivalents) in 2014 that meet conditions described in the preamble to the final regulations will not be subject to any Employer Shared Responsibility payments for 2015 (or for the 2015 plan year in the case of an employer with a non-calendar-year health plan). These employers determine if they have 100 or more employees in the same manner as described above. And, second, rather than being required to use the full twelve months of 2014 to measure if it has 100 full-time employees (including full-time equivalents), an employer may measure during any consecutive six-month period (as chosen by the employer) during 2014. For example, an employer could use a period of at least six months through August 2014 to determine its applicable large employer status and, if it is an applicable large employer, the period from September through December 2014 to make any needed adjustments to its plan (or to establish a plan). See question 36 on 2015 transition relief.