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## Compliance Connection

### August Part II 2022

#### Federal Compliance Update

##### Pay or Play Affordability Percentage Decreased for 2023

On Aug. 1, 2022, the IRS issued [Revenue Procedure \(Rev. Proc.\) 2022-34](#) to index the contribution percentages in 2023 for determining the affordability of an employer's plan under the Affordable Care Act (ACA).

Under the ACA's Employer Shared Responsibility provision (Play or Pay), large employers (those with an average of 50 full-time employees—including full-time equivalent employees— during the prior year) must either:

- Offer most full-time employees, and their children, minimum essential, minimum value coverage that is affordable at the employee-only level of coverage; or
- Make an employer shared responsibility payment to the IRS if at least one of their fulltime employees purchases coverage on a Health Insurance Marketplace and receives a premium tax credit because their employer did not offer qualifying coverage.

For plan years beginning in 2023, employer-sponsored coverage will be considered affordable if the employee's required contribution for self-only coverage does not exceed:

- 9.12% of the employee's household income for the year for purposes of both the pay or play rules and premium tax credit eligibility. **This is the most substantial decrease in this percentage since these rules were implemented** (down from 9.61% in 2022). It is the lowest that this percentage has ever been set, at 0.38% below the statutory affordability percentage of 9.5%.
- 8.17% of the employee's household income for the year for purposes of an individual mandate exemption (adjusted under [separate guidance](#)). This is a slight increase from 2022, which was set at 8.09%. Although this penalty was reduced to zero in 2019, some individuals may need to claim an exemption for other purposes.

##### Action Steps

The updated affordability percentages are effective for taxable years and plan years beginning Jan. 1, 2023. **As a result, many employers may have to substantially lower the amount they require employees to contribute for 2023 to meet the adjusted percentage.** The affordability percentage for the individual mandate exemption increased slightly from 2022.

## ACA Pay or Play Penalties Will Increase for 2023

On Aug. 16, 2022, the IRS updated its [frequently asked questions \(FAQs\)](#) on the employer shared responsibility (pay or play) rules under the Affordable Care Act (ACA) to include updated penalty amounts for 2023. For calendar year 2023, the adjusted \$2,000 penalty amount is **\$2,880** and the adjusted \$3,000 penalty amount is **\$4,320**.

### Pay or Play Penalty Calculations

Under the pay or play rules, an applicable large employer (ALE) is only liable for a penalty if at least one full-time employee receives a subsidy for Exchange coverage. Employees who are offered affordable, minimum value (MV) coverage are generally not eligible for these Exchange subsidies.

Depending on the circumstances, one of two penalties may apply under the pay or play rules—the **4980H(a) penalty** or the **4980H(b) penalty**.

Under Section 4980H(a), an ALE will be subject to a penalty if it does not offer coverage to “substantially all” (generally, at least 95%) of its full-time employees (and dependents) and any one of its full-time employees receives a subsidy toward his or her Exchange plan. The monthly penalty assessed on ALEs that do not offer coverage to substantially all full-time employees and their dependents is equal to **the ALE’s number of full-time employees (minus 30) multiplied by 1/12 of \$2,000 (as adjusted), for any applicable month**.

Under Section 4980H(b), ALEs that offer coverage to substantially all full-time employees (and dependents) may still be subject to a penalty if at least one full-time employee obtains a subsidy through an Exchange because the ALE did not offer coverage to all full-time employees, or the ALE’s coverage is unaffordable or does not provide MV. The monthly penalty assessed on an ALE for each full-time employee who receives a subsidy is **1/12 of \$3,000 (as adjusted) for any applicable month**. However, the total penalty for an ALE is limited to the 4980H(a) penalty amount.

## DOL Releases New Model Employer CHIP Notice

The Department of Labor (DOL), through its Employee Benefits Security Administration (EBSA), has released a [new model Employer CHIP Notice](#) with information current as of **July 31, 2022**.

As a reminder, the Children’s Health Insurance Program Reauthorization Act of 2009 (CHIPRA) imposes an **annual notice requirement** on employers that maintain group health plans in states that provide premium assistance subsidies under a Medicaid plan or a Children’s Health Insurance Plan (CHIP). An employer can choose to provide the notice on its own or concurrent with the furnishing of:

- Materials notifying the employee of health plan eligibility;
- Materials provided to the employee in connection with an open season or election process conducted under the plan; or
- The summary plan description (SPD).

### Covered Employers

An employer is subject to this annual notice requirement if its group health plan covers participants who reside in a state that provides a premium assistance subsidy, regardless of the employer’s location. The DOL’s model notice, which employers may use for this disclosure, is updated periodically to reflect changes in the states that offer premium assistance subsidies. **The DOL’s model Employer CHIP Notice includes information current as of July 31, 2022**. Employers could also choose to prepare their own notices or modify the model notice. Employers should be sure to include at least the minimum relevant state contact information for any employee residing in a state with premium assistance.

## State Compliance Update

Nothing new for this month...

## Compliance Calendar

### September

9/30 – VETS-4212 Filing Deadline (federal contractors)

### October

10/14 – Medicare Part D Creditable/Non-creditable Coverage Notice

10/30 – Form 941 Filing Deadline (third quarter)

### November

Nothing to report...

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