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Employer Shared Responsibility Provisions under the Affordable Care Act

By: Xuan Hong, *MST Student*

In the United States, about 55.4% of the population receives health insurance through employment.¹ On March 23, 2010, President Obama signed and enacted the Patient Protection and Affordable Care Act, also called the Affordable Care Act (“ACA”), with the goal to provide more people with affordable and valuable health insurance coverage and an overall better healthcare system. The ACA added IRC Section 4980H which states certain employers have responsibilities to provide their full-time employees and their dependents (“full-time employees”) with minimum essential health coverage (under the employer Shared Responsibility provisions, dependent generally refers to employee’s children under the age of 26). This requirement is often referred to as the Employer Shared Responsibility provisions (ESRP). On February 10, 2014, relevant and final Treasury regulations were issued. Starting in 2015 the ESRP went into effect with certain employers then required to begin to comply with the new insurance coverage requirements.

Overview of the ACA

If certain employers do not provide minimum essential coverage (MEC) to 95% of their full-time employees and at least one full-time employee receives the premium tax credit (PTC), the employers may have to make the Employer Shared Responsibility payments to the IRS. However, even if employers provide MEC to 95% of their full-time employees, the employers may still be subject to the Employer Shared Responsibility payments if the coverage is not affordable or does not provide a specified, minimum level of value and at least one full-time employee receives the PTC (the PTC is discussed later).

Which Employers Are Subject to the New ACA ESRP Rules?

The ESRP are only applicable to certain large employers. The only determining factor of whether an employer is an Applicable Large Employer (ALE) is the number of its full-time and full-time *equivalent* employees.² This is true regardless of the entity type of the employer. An ALE is an employer, regardless of a corporation, a government entity, a non-profit employer or even an Indian tribal government entity, which has an average of 50 or more full-time employees (including full-time *equivalent* employees) in the year. Normally, the current year ALE status depends on the number of full-time employees in the previous year. To determine the ALE status, full-time employees are employees who work an average of at least 30 hours in a week or 130 hours in a month. The number of full-time *equivalent* employees can be calculated by summing the work hours per month of all non-full-time employees (but not in excess of 120 hours) and then dividing by 120. For example, an employer has total 20 non-full-time employees, and they each work 90 hours in one month. We multiply 20 employees by 90 hours and then divide by 120 hours. Therefore, the number of full-time *equivalent* employees of the employer is 15.

¹ Health Insurance Coverage in the United States: 2014, page 5, US Census Bureau, Issued Sep. 16, 2015.

<https://www.census.gov/content/dam/Census/library/publications/2015/demo/p60-253.pdf>

² Employer Shared Responsibility Provisions, IRS.gov.

<https://www.irs.gov/Affordable-Care-Act/Employers/Employer-Shared-Responsibility-Provisions>

Exceptions and special rules include:

1. Based on the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015, in terms of determining whether an employer is an ALE, if an employee has medical care through the military including Tricare or Veterans' coverage, the employee is not counted into the 50 full-time employee threshold calculation.³
2. The work hours for Non-US source income, such as certain overseas work, are not counted into the full-time calculation.
3. Volunteer work hours for a government or tax-exempt employer are not counted into the full-time calculation.
4. If an employer had 50 or more full-time employees for no more than 120 days in the prior year and the full-time employees in excess of 50 were seasonal workers, the employer would not be classified as an ALE.⁴

What are the Responsibilities of ALEs under the ACA?

Under the ESRP, ALEs have two main responsibilities. First, ALEs must generally provide qualified health insurance coverage to their full-time employees. If ALEs fail to do this, normally they must pay to the IRS Employer Shared Responsibility payments, provided at least one full-time employee claims the PTC. Second, ALEs have information reporting responsibilities. They must report health insurance coverage information to both the IRS and the full-time employees.

What is an Employer Shared Responsibility Payment?

The Employer Shared Responsibility payment is not a self-assessed payment but is calculated by the IRS based on the employer's information reporting and employees' tax returns. An employer does not report or send the payment unless is requested by the IRS. There are two types of Employer Shared Responsibility payments:

➤ First type:

If an employer did not provide MEC to at least 95% of its full-time employees and their dependents up to age 26 for any month and at least one full-time employee requested and received the PTC, the employer would have to pay this first type of Employer Shared Responsibility payment to the IRS. The annual payment is equal to \$2,000 multiplied by the number of full-time employees. The number of full-time employees is the actual full-time employees minus 30. This \$2,000 annualized payment is determined on a monthly basis (i.e., \$166.67 per applicable month) and is indexed for inflation starting in 2015.⁵

➤ Second type:

³ Public Law 114-41, Surface Transportation and Veterans Health Care Choice Improvement Act of 2015, Sec. 4007(a)(1), added subpara. (c)(2)(F), Exemption the exemption for health coverage under Tricare or the Veterans administration, to IRC 4980H, effective for months beginning after 12/31/2013.

⁴ Seasonal workers, different from seasonal employees which are relevant for determining full-time employees, are "workers who perform labor or services on a seasonal basis, as defined by the Secretary of Labor, and include retail workers employed exclusively during holiday seasons." Q&A #54.

<https://www.irs.gov/affordable-care-act/employers/questions-and-answers-on-employer-shared-responsibility-provisions-under-the-affordable-care-act>

⁵ In 2015, the adjusted \$2,000 amount is \$2,080 and it increases to \$2,160 in 2016.

If an employer did provide MEC to at least 95% of its full-time employees but the coverage is not affordable or providing a specified, minimum level of value and one or more full-time employee received, in any month, the PTC by purchasing their insurance through the ACA-created health insurance Marketplace, the employer would have to pay the second type Employer Shared Responsibility payment to the IRS. The payment is equal to \$3,000 multiplied by the number of full-time employees who received the premium tax credit. For any employer, it is, at most, subject to only one type of payment, and the dollar amount of the second type cannot exceed that of the first type. Like the first type mentioned above, this \$3,000 payment is the annual figure (i.e., the payment is \$250 per applicable month) and is indexed for inflation starting in 2015.⁶

What is Minimum Essential Coverage under the ACA?

The minimum essential coverage (MEC) requirement is relevant to the first type of the Employer Shared Responsibility payment. IRC §5000A(f) provides that MEC includes eligible employer-sponsored plan which is “a group health plan or group health insurance coverage offered by an employer to the employee which is a governmental plan, or any other plan or coverage offered in the small or large group market within a State.”⁷

What is Affordable and Minimum Value Requirements under the ACA?

The ESRP require an ALE to provide MEC that is affordable and provides a specified, minimum level of value to their employees, otherwise the ALE may be subject to the second type of the Employer Shared Responsibility payment.

➤ Affordable:

Normally, an insurance premium is affordable if an employee’s contribution does not exceed 9.5% (as adjusted annually) of his/her household income.⁸ However, it is not easy for an employer to clarify all employees’ household income. Therefore, for purpose of the ESRP, an employer can use three safe harbors to determine if its health insurance coverage is affordable for its employees.

Three Safe Harbors:

1. **Form W-2 Safe Harbor.** An employer sponsored health insurance coverage is generally considered affordable if a full-time employee’s contribution for the lowest cost MEC does not exceed 9.5% (as adjusted annually) of his/her Form W-2 wages from that employer.
2. **Rate of Pay Safe Harbor.** An employer sponsored health insurance coverage is affordable if an employee’s monthly contribution does not exceed 9.5% (as adjusted annually) of his/her monthly salary or, in the case of an hourly pay employee, his/her wages for 130 hours.
3. **Federal Poverty Line Safe Harbor.** An employer sponsored health insurance coverage is affordable if an employee’s contributions for the year do not exceed 9.5% (as adjusted annually) of the Federal single individual poverty line for a single individual, which is currently \$11,880.⁹

⁶ In 2015, the adjusted \$3,000 amount is \$3,120 and increases to \$3,240 in 2016.

⁷ IRC § 5000A(f)(2).

⁸ As IRC § 36B(c)(2)(C)(iv) requires, this percentage is updated annually for inflation. The percentage is 9.56% for 2015 and 9.66% for 2016. See Notice 2015-87.

https://www.irs.gov/irb/2015-52_IRB/ar11.html

⁹ Federal Poverty Level (FPL), HealthCare.gov, the U.S. Centers for Medicare & Medicaid Services.

➤ **Minimum Value:**

Generally, if an employer sponsored health insurance coverage could cover 60% or more expected health care expenses, it generally meets the minimum value requirement. The minimum value calculator developed by U.S. Department of Health and Human Services can help employers to determine if their health insurance has minimum value for their employees.

What is the Premium Tax Credit under the ACA?

As we can see, no matter what type of payment is applicable, one trigger is the premium tax credit (PTC). Generally, employee who purchased health insurance through the Health Insurance Marketplace, such as Covered California, is qualified for the PTC if an employer does not provide health insurance coverage or the provided coverage is not affordable or does not provide a specified, minimum level of value to their employees. In fact, an employer does not know if any full-time employee claimed the PTC. Therefore, starting in 2016, health insurance marketplaces need to notify certain employers if their employees are eligible for the PTC since the employees claim that the employer-based insurance is not affordable or providing minimum value. This is called Federally-Facilitated Marketplace's (FFM) 2016 Employer Notice Program.¹⁰

What is the Information Reporting Responsibility under the ACA?

The ACA also added IRC Section 6056 which states that an ALE has the information reporting responsibility no matter whether or not it provides qualified health insurance to its employees. Normally, for each full-time employee, an ALE must send Form 1095-C, *Employer-Provided Health Insurance Offer and Coverage*, along with Form 1094-C, *Employer-Provided Health Insurance Offer and Coverage*, to the IRS by February 28 (or March 31 if the ALE files returns electronically) of the following year and also send a copy of Form 1095-C to its full-time employee by January 31 of the following year.

Reg. §301.6056-1 states the required information on the return:

1. The ALE's name, address and employer identification number.
2. The name and contact information of the ALE's contact person.
3. The health insurance coverage information: the covered period and the employee's lowest cost monthly premium.
4. The number of full-time employees and the name, address and taxpayer identification number of employees covered under the health plan.
5. A certification of whether the ALE provided an opportunity to its full-time employees to enroll in an affordable and minimum value health insurance plan.

Because the information reporting provisions went into effect in 2015 and 2016 is the first year for qualified employers to fulfill this requirement, there is transition relief for this provision. Specifically, an employer is required to provide Form 1095-C to its employees by March 31, 2016 and file information returns to the IRS by May 31, 2016 (or June 30, 2016 if the employer files

<https://www.healthcare.gov/glossary/federal-poverty-level-FPL/>

¹⁰ Frequently Asked Questions Regarding The Federally-Facilitated Marketplace's 1 (FFM) 2016 Employer Notice Program.

<https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/Employer-Notice-FAQ-9-18-15.pdf>

returns electronically). If an employer fails to file on time, it may be subject to \$250 penalty per form (adjusted annually for inflation).

To sum up, an employer who has 50 or more full-time employees (or full-time equivalent employees) must generally either provides qualified MEC to its full-time employees or pay Employer Shared Responsibility payments to the IRS. Additionally, the employer is also responsible to file information returns to both the IRS and its employees.