JULY 5, 2016

Action May Be Required

Marketplace Subsidy Notice: What Employers Need to Know

In late June, the U.S. Department of Health and Human Services (HHS) reportedly mailed out several hundred thousand notices to employers, dated June 21, 2016, informing them that one or more of their employees have been certified as eligible for a premium subsidy through a federal Health Insurance Marketplace. Employers in states with state-run Marketplaces may have received similar notices since 2015; however, HHS has just begun sending notices from the federal Marketplaces this June. A list of states and whether their Marketplace is state-based or federally-facilitated can be found here.

The notice informs the employer that the individual indicated that he or she worked for the employer and either: (i) didn’t have an offer of health care coverage from the employer; (ii) did have an offer of health care coverage, but it wasn’t affordable or did not provide minimum value; or (iii) was in a waiting period and unable to enroll in health care coverage.

This alert describes the appeal process and provides recommendations for employers who have received a notice and are considering whether to appeal.

Foremost, receipt of a Marketplace subsidy notification does not mean that the employer is necessarily liable for a penalty under the ACA’s “pay-or-play” employer mandate. The notices that are being sent from HHS are part of the verification process established to ensure that individuals awarded subsidies are eligible to receive them. Employers who receive a subsidy notification and believe one was awarded to an employee in error have the option to appeal the award. Not doing so may open the employer up to pay-or-play penalties that are assessed by the IRS, if the employer is an applicable large employer (ALE) and the employee works full-time. Generally, an ALE is an employer that employed at least 50 full-time equivalent employees on average during the prior calendar year.

Should an Employer Appeal?
In general, employers should consider appealing if they believe the employee’s receipt of a subsidy is in error. For example, if the employer believes that the employee was offered affordable, minimum value coverage, or the employee is actually enrolled in the employer’s plan and thus, in either case, is ineligible for a subsidy.

Even small employers (non-ALEs) should consider appealing a subsidy that they believe was awarded in error, as filing an appeal could help reduce the employee’s potential tax liability. Allowing an employee to receive a subsidy while ineligible may result in ramifications for the employee. The IRS will attempt to recover all or a portion of an employee’s subsidy if the employee is later determined to be ineligible.

Employers do not need to appeal subsidy notifications received for part-time employees (unless the notice inaccurately identifies them as full-time employees), employees who terminated while in a waiting period for coverage, or notifications naming spouses or family members as recipients of a subsidy (which we’ve seen happen). Likewise, employers who have not offered affordable coverage to certain full-time employees will not have a basis for appealing such employees’ receipt of a subsidy.
**The Appeal Process**

Notifications are sent via regular mail to the address the employee provided when they completed their application for Marketplace coverage. Employers will have 90 days to respond if they wish to appeal a subsidy award to an employee. Employers will need to submit the following with their appeal:

- Original subsidy award notice mailed to the employer by HHS
- Completed **Employer Appeal Request Form**. This notice is also being used by 8 state Marketplaces (approximately half of the state Marketplaces) in addition to federal facilitated Marketplaces.
- Copies of all documentation showing offers of coverage, offers of affordable coverage or other certifications that a subsidy should not be awarded to the individual listed on the award notice.

The appeal will be submitted via regular mail or fax and a decision will be communicated in writing by HHS to the employer and individual. The decision made by HHS will be final for the employer; however, the individual will have the right to a second appeal. Any decision made by HHS after the second appeal is filed will be final. Inclusive of a second appeal, the entire process can take up to 300 days.

**Best Practices**

There are best practices an employer can establish to be prepared to handle any subsidy award notices they receive.

- Develop a process for managing appeals – determine who is going to be responsible for responding to appeal notifications and ensure that they are able to access the information needed to address coverage offers, affordability of health coverage and employment records. To avoid conflicts of interest, persons responsible for managing appeals should not have the ability to discipline employees.
- Inform remote locations how they should manage any subsidy award notices that arrive at their site(s). Subsidy award notices will be mailed to the employee’s work location, as indicated by the employee on their subsidy application. This may not be the preferred location for the employer. It will be important to let other locations know what to do with any subsidy award notices that arrive at other business sites so they are handled properly and any appeals are filed in the appropriate timeframe.
- Review all subsidy award notices carefully in order to identify the employee. In addition to the employee name, a month and day of birth and possibly a truncated Social Security number may be provided.
- Only appeal when there is a reason to do so. If, after a review of an employee’s information, the award of a subsidy is substantiated, there is no reason to file an appeal. In some cases, the rewarding of a subsidy will not trigger any penalties on part of the employer, for example, if the employee is a part time employee or the employer is not an ALE. If there is any penalty that an employer may be liable for, that notification will come from the IRS at a later date.

As discussed above, the receipt of a Marketplace subsidy notification from HHS does not mean that the employer will be subject to a pay-or-play penalty; however, ALEs who wish to avoid potential penalties should appeal subsidies granted to full-time employees that they believe were in error. The IRS has not released much information on when it will begin sending assessable payment letters, but timely appealing erroneous subsidies received by full-time employees will put one more layer in between the employer and the IRS once that process gets underway. Now that ACA reporting for 2015 is over (aside from correcting name/TIN mismatch issues), we can expect the IRS to begin their enforcement shortly.

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