

LEGAL UPDATES AND NEWS

Obamacare Survives and the Employer Mandate Remains in Place

On June 25, 2015, the Affordable Care Act (the “ACA”), also known as “Obamacare,” survived its latest legal challenge when the United States Supreme Court ruled in *King v. Burwell* that federal tax credits or subsidies (“federal subsidies”) are available for lower income individuals who purchase health insurance not only in states that operate their own health insurance exchange or marketplace, but also in states (currently 34) in which the federal government operates the health insurance exchange. While a different outcome would have directly eliminated the availability of federal subsidies to those who purchase health insurance on a federal exchange, it also would have effectively eliminated the employer mandate under ACA (the “Employer Mandate”) in states with federal exchanges.

The “Employer Mandate” requires that covered employers must either offer health insurance that is affordable and provides minimum value to their full-time employees and dependents or potentially pay a penalty of up to \$3,000 for each full-time employee, per year. The penalties are only triggered if one or more full-time employees of a covered employer receives a federal subsidy for purchasing health insurance on an exchange. A different result in *King v. Burwell* would have allowed employers to drop health insurance coverage without penalties for employees located in states with federal exchanges as they would no longer qualify for a federal subsidy.

With no significant legal challenges remaining, the Employer Mandate will continue to remain in place without change. As a result, community banks and credit unions are strongly encouraged to develop a strategy for complying with the Employer Mandate, including identifying their employees who are required to be offered health coverage and collecting data needed to comply with applicable IRS reporting requirements.

Who is subject to the Employer Mandate?

The Employer Mandate applies to an employer with at least 50 or more “full-time employees” and full-time equivalents (“FTEs”) in the preceding calendar year. “Full-time employees” are considered employees who average at least 30 hours of service per week. FTEs (i.e., employees who work fewer than 30 hours per week) are counted as a fraction of a full-time employee based on their total hours of service per month. All employees are counted for this determination, regardless of whether they are eligible to participate in the employer’s health plan. Related employers that are part of a controlled group (such as a subsidiary) are combined when determining whether they are subject to the Employer Mandate. For example, if an employer has 40 full-time employees and its wholly-owned subsidiary has 20 full-time employees in 2015, then each entity would be subject to the Employer Mandate in 2016 because their combined number of full-time employees exceeded the 50 threshold level during the prior calendar year.

The Employer Mandate became effective on January 1, 2015. However, the IRS has postponed the effective date of the Employer Mandate for certain employers, based on their size, as follows:

Employer Size	2015 Plan Year Does Employer Mandate Apply?	2016 Plan Year and Beyond Does Employer Mandate Apply?
1-49 full-time employees and FTEs	No	No
50-99 full-time employees and FTEs	No*	Yes
100 or more full-time employees and FTEs	Yes	Yes

*Employer Mandate does not apply as long as the employer did not reduce size of its workforce in 2014 to under 100 full-time employees to avoid the Employer Mandate.

What are the Employer Mandate requirements?

To avoid penalties, an employer subject to the Employer Mandate must “offer” coverage that is both “affordable” and provides “minimum value” to its full-time employees and their dependents. “Dependents” include children and step children up to age 26, but surprisingly not spouses.

The requirements below only apply to full-time employees and their dependents. While part-time employees are counted in determining whether an employer is subject to the Employer Mandate, those part-time employees are not required to be offered coverage or provided coverage that is both affordable and provides minimum value.

Requirement	2015	2016 and Beyond
Offer Coverage	An employer is considered to “offer” coverage if it offers coverage to at least 70% of its full-time employees and dependents	An employer is considered to “offer” coverage if it offers coverage to at least 95% of its full-time employees and dependents.
Affordability*	Coverage is considered “affordable” if the employee’s contribution for employee only coverage under the employer’s health plan does not exceed 9.5% of the employee’s household income.	Same as 2015
Minimum Value**	Coverage provides minimum value if the plan offered by the employer pays at least 60% of the total allowed costs of benefits (taking into account deductibles and co-pays paid by the employee).	Same as 2015

* Because employers generally do not know their employees’ household income, the IRS has provided three safe harbors for determining affordability: (1) 9.5% of the employee’s W-2 wages; (2) 9.5% of the employee’s monthly salary or hourly rate x 130 hours; or (3) 9.5% of the Federal Poverty Line for a single individual.

** The Department of Health and Human Services has created a minimum value calculator that can be used to determine if a health plan provides minimum value.

How does an employer identify its full-time employees for purposes of the Employer Mandate?

An employer’s “full-time employees” matters for purposes of determining: (1) whether the Employer Mandate applies to the employer; and (2) if the Employer Mandate applies, whether a penalty is owed for failure to comply with the requirements above (and the amount of the penalty payment). An employer identifies its full-time employees based on each employee’s hours of service. If the employee averages at least 30 hours of service per week, he or she is considered “full-time.” The IRS provides two measurement methods for determining whether an employee qualifies as 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 on a month-by-month basis.

The other method is the “look-back measurement method,” which is a safe harbor that permits an employer to determine each employee’s status as a full-time employee during a pre-determined period (referred to as the stability period), based upon the hours of service of the employee in the prior look-back period (referred to as a measurement period). Unlike the monthly measurement method, the look-back measurement method provides an employer with certainty for a specific stability period (up to 12 months) as to which of its employees will be classified as “full-time” for that period, regardless of their actual hours of service during the stability period. As a result, the employer avoids having to identify its full-time employees on a monthly basis. The look-back measurement method for identifying full-time employees is only available for purposes of determining and computing the penalty under the Employer Mandate, and not for purposes of determining whether the Employer Mandate applies to an employer.

Special rules, which are beyond the scope of this bulletin, apply to employees who are newly hired or whose employment status changes (e.g., from part-time to full-time or vice-versa).

What are the penalties for failure to comply with the Employer Mandate?

The Employer Mandate penalty amount varies depending on whether the employer fails to “offer” coverage to any of its full-time employees or whether the coverage it offers is either not “affordable” or fails to provide “minimum value.” In either circumstance, the penalty is only triggered if an employee receives a federal subsidy for purchasing health insurance on an exchange (which would be unavailable if an employer offers health coverage that is affordable and provides minimum value). If the employer is a part of a controlled group of corporations, the penalties below are calculated separately for each member of the group.

Penalty	Penalty Trigger	Penalty Amount
Failure to offer coverage	Employer fails to “offer” coverage AND at least one employee receives a federal subsidy for purchasing health insurance on an exchange.	\$2,000 per year for each full-time employee, minus 30 employees*
Coverage is not affordable and/or does not provide minimum value.	Employer offers coverage, but coverage is <u>not</u> “affordable” and/or does <u>not</u> provide “minimum value” AND at least one employee receives a federal subsidy for purchasing health insurance on an exchange.	Lesser of: (1) \$2,000 per year for each full-time employee, minus 30 employees* OR \$3,000 per full-time employee receiving a federal subsidy for purchasing health insurance on an exchange.

* For 2015, the penalty is \$2,000 per year for each full-time employee minus 80 employees. For 2016 and beyond, employers can only exclude 30 employees from the penalty calculation.

Example of the employer penalties:

Example	Penalty Amount
In 2016, employer has 300 full-time employees. No coverage is offered. One employee receives a subsidy for purchasing health insurance on an exchange.	300 – 30 = 270 employees 270 x \$2,000 per employee = \$540,000 penalty
In 2016, employer has 300 full-time employees. Coverage <u>is</u> offered, but it is <u>not</u> affordable and/or does <u>not</u> provide minimum value. 10 employees receive subsidies for purchasing health insurance on an exchange.	300 – 30 = 270 employees 270 x \$2,000 per employee = \$540,000 penalty OR 10 employees who received a subsidy x \$3,000 = \$30,000 penalty (lesser penalty applies)

How will an employer know that it owes a penalty under the Employer Mandate?

The IRS will contact an employer regarding its potential liability and provide the employer with an opportunity to respond before any liability is assessed or notice and demand for payment is made. The contact from the IRS will not occur until after individual tax returns and employer information reports on coverage are due. Penalties assessed under the Employer Mandate are not tax deductible by the employer.

What are the reporting requirements related to the Employer Mandate?

Employers subject to the Employer Mandate are required to file an annual report to the IRS to ensure compliance with the Employer Mandate. This reporting must be completed on Forms 1094-C and 1095-C. The Form 1095-C is an individualized form per employee used to report whether the employee was “full-time” and the type of health coverage that was offered by the employer on a month-by-month basis. The Form 1094-C must accompany the set of Forms 1095-C when filing with the IRS and will provide an aggregate summary of the information set forth on the Forms 1095-C. Employers (regardless of whether they are subject to the Employer Mandate) that sponsor self-insurance group health plans may have additional filing requirements with the IRS that generally apply to insurance companies.

The Forms 1094-C and 1095-C must be filed with the IRS by February 28 (March 31 if filing electronically) following the applicable calendar year. **For calendar year 2015, these reports are due by February 29, 2016 (or March 31, 2016, if filing electronically).** Copies of the Forms 1095-C must also be provided by the employer to their full-time employees by January 31 following the applicable calendar year. **For calendar year 2015, the Forms 1095-C are due to employees by February 1, 2016.** Failure to submit the Forms 1094-C and 1095-C or to furnish a statement to a full-time employee may be subject to a penalty up to \$250 per return.

The Employer Mandate is complex, and the penalties for non-compliance can be substantial. Employers are strongly encouraged to work with their third-party administrators and legal counsel to ensure that they are in compliance with these rules.

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