

EMPLOYER APPEALS OF EXCHANGE SUBSIDY NOTICES

July 8, 2015



OVERVIEW

Beginning in spring 2016, employers will receive notices from the Exchange if any of their employees are deemed eligible for health insurance subsidies through an Exchange. Employers that receive these notices will have 90 days to file an appeal if they feel the eligibility determination was made in error.

Department of Health and Human Services (HHS) regulations require appeals to be accepted online, by phone, by mail and in person, although Exchanges have been permitted to delay implementation of an electronic appeals process. Guidance issued in March 2016 further delays the Exchanges' deadline to implement electronic appeals processes, until 2017.

ACTION STEPS

Employers—especially applicable large employers (ALEs)—should prepare to appeal any incorrect Exchange subsidy eligibility determinations. To prepare, employers should:

- *Become familiar with the appeals process; and*
- *Maintain complete and accurate records regarding the health insurance coverage they offered to employees.*

BACKGROUND

Under the ACA, ALEs may be subject to employer shared responsibility (or pay or play) penalties if they do not offer affordable, minimum value health coverage to their full-time employees. The Internal Revenue Service (IRS) will assess these penalties if any full-time employee receives subsidies to help pay for the cost of health insurance coverage purchased through an Exchange.

Each Exchange will determine whether an individual is eligible for subsidies when he or she applies for coverage. This determination does not establish whether the individual's employer is liable for an employer shared responsibility penalty, but it may provide a basis for the IRS to assess penalties against an ALE.

For this reason, as well as to help ensure that individuals do not mistakenly receive health insurance subsidies, employers have the right to appeal Exchange eligibility determinations. An appeal will allow an employer to correct any inaccurate information the Exchange may have received about the health coverage it offered to an employee who was deemed eligible for a subsidy.

EXCHANGE CERTIFICATIONS

Each Exchange is required to send a notice to employers regarding any employees who receive subsidies to purchase Exchange coverage. In September 2015, HHS issued FAQs indicating that all Exchanges using the federal www.HealthCare.gov platform would begin sending the first batches of employer notices regarding employee eligibility for subsidies in the spring of 2016.

These notices—called Section 1411 Certifications—will be sent to all employers with employees who receive a subsidy to purchase coverage through an Exchange (including ALEs and non-ALEs). This certification must:

- *Identify the employee;*
- *Indicate that the employee has been determined to be eligible for a subsidy;*
- *Indicate that, if the employer has 50 or more full-time employees, the employer may be liable for an employer shared responsibility penalty; and*
- *Inform the employer of the right to appeal the determination.*

Exchanges can either send the certifications on an employee-by-employee basis as subsidy determinations are made, or for a group of employees all at one time. This employer notification program will be phased-in for 2016, with notices first being sent only to employers for whom the employee provided a complete employer mailing address. HHS intends to evaluate the program phase-in for 2016 and then determine the best means of expanding and improving the process in subsequent years.

APPEALS GUIDANCE

On Aug. 28, 2013, HHS issued a final rule establishing the processes for both individual and employer appeals of the Exchange eligibility determinations. Both processes require Exchanges (or a separate appeals entity or HHS, if applicable) to accept appeal requests from employers or individuals in any of the following ways:

- *By telephone*
- *By mail*
- *In person (if the entity is capable of in-person acceptance)*
- *Via the internet*

The final rule also requires Exchanges to transmit employee eligibility records through a secure electronic interface. However, to allow time for appeals entities to implement appropriate systems, HHS granted Exchanges the flexibility to use paper-based processes for the first year, and then later extended the flexibility for a second year. HHS' guidance from March 22, 2016, extends that flexibility again, through Dec. 31, 2016. Therefore, employers and individuals may be required to file their appeals on paper only, until Jan. 1, 2017.

EMPLOYER APPEALS PROCESS

If the employer wishes to appeal a subsidy eligibility determination after receiving an Exchange certification, it must file an appeal request within 90 days from the date the notice was sent. Information on how to file an appeal request in the federally-facilitated Exchanges, as well as some state-based Exchanges, is available at <https://www.healthcare.gov/marketplace-appeals/employer-appeals/>.

Exchanges and any other appeals entities must provide assistance if an employer asks for help with the filing. Employers may include evidence supporting their appeal along with the initial request, but they will also have an opportunity to present this after filing the request as well.

When the Exchange or other appeals entity receives a request for an appeal, it will send an acknowledgment of the appeal and an explanation of the appeals process to both the employer and the employee. If the entity determines that an appeal request is not valid, it must send written notification to the employer and include instructions for curing the defects.

During the appeals process, the appeals entity must give the employer an opportunity to review the information that the Exchange used to make the eligibility determination. This information will not include the employee's tax return information.

An appeals entity must make, and send written notice of, an appeal decision within 90 days after the date it received the appeal request.

If the appeals decision affects the employee's eligibility, the Exchange must promptly make a redetermination. Employees and their household members, if applicable, will have the right to appeal an Exchange redetermination that occurs as a result of an appeals decision.

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