

Publications

Labor and Employment Alert: Back to Basics – Why I am getting this Marketplace Notice?

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At the end of June, the federally-facilitated health insurance exchanges (also known as the Marketplace) sent out the first batch of Marketplace Notices to employers.

If you got a Marketplace Notice, it is because the named individual:

1. purchased individual health insurance through a Marketplace (www.healthcare.gov);
2. is getting (or is asking to get) federal premium assistance to reduce monthly premiums for that health insurance;
3. named your company as his or her employer; and
4. told the Marketplace that he or she did not receive an offer of affordable, minimum value health coverage from your company or any other employer.

Note: The Marketplace is using employment information provided by the individual. That employment information may be old (resulting in Marketplace Notices for individuals who terminated employment before January 1, 2016) and/or may be addressed to a local workplace (resulting in Marketplace Notices going to locations not prepared to respond to them).

Am I required to appeal a Marketplace Notice?

You are not required to appeal a Marketplace Notice, even if your company offered affordable, minimum value coverage to the named individual for one or more months in 2016. It is your choice.

Should I appeal a Marketplace Notice?

Consider appealing a Marketplace Notice if you made an offer of affordable, minimum value coverage to the individual named in the Marketplace Notice for one or more months in 2016. Why?

1. It may help the employee avoid a tax bill. When you file the 2016 Form 1095-Cs, the IRS will see that your company offered the employee affordable, minimum value health coverage. If the IRS determines that the employee was not entitled to premium assistance, the IRS will ask the employee to repay part (or, in some cases, all) of the premium assistance. This repayment obligation can be a substantial, avoidable burden on the employee. Better to get the facts out now!
2. It may help avoid a later IRS appeal process related to the employer penalty. If the Marketplace and the employee find out that the employee is not entitled to premium assistance and the employee does not in fact get premium assistance, the IRS won't have any reason to contact you about that employee after year end. See below for more information about the IRS appeal process.

The Marketplace Notice appeal process is run by the Department of Health and Human Services (HHS). The Marketplace Notice appeal process is intended to determine whether the named individual is or is not entitled to premium assistance to purchase health insurance in the current year. The Marketplace is interested in facts that would show that the named individual is not eligible for premium assistance in 2016. Specifically, the Marketplace wants to know if you offered the named individual affordable, minimum value health coverage. If yes, the named individual is not eligible for premium assistance. Your appeal should identify the months that the individual elected coverage or could have elected coverage (even if the individual waived coverage). An appeal form and additional information is available at <https://www.healthcare.gov/marketplace-appeals/employer-appeals/>. Please contact us if you want assistance with completing the appeals form or identifying documents to include with the appeal.

If you want to submit appeals, you may want to alert all workplaces to forward Marketplace Notices to the office that will be responsible for handling the appeal.

When shouldn't I appeal a Marketplace Notice?

There is no use in appealing a Marketplace Notice for an individual who was not offered affordable, minimum value health coverage in 2016. The Marketplace is not interested in reasons why your company is not liable for a pay or play penalty. Nothing you tell the Marketplace about that will impact whether the IRS will assess an unaffordable/inadequate coverage penalty. Let's say an individual named in a Marketplace Notice terminated employment in 2015. There is no reason to submit an appeal to the Marketplace explaining that your company did not offer coverage to the individual in 2016 because he was not employed by your company in 2016. That fact explains why your company could not possibly be liable for an unaffordable/inadequate coverage penalty for the named individual in 2016 but would not be a reason for the Marketplace to stop the individual's premium assistance in 2016.

What if I hear from the IRS?

The IRS will administer a separate notice and appeals process before assessing the employer pay or play penalty under Code Section 4980H(b). A notice from the IRS regarding potential pay or play penalties always merits attention.

In contrast to the Marketplace Notice appeal process that seeks to determine an individual's eligibility for premium assistance in the current year, the IRS notice and appeal process seeks to determine whether your company is liable for unaffordable/inadequate coverage penalties for the prior year. The IRS will

compare information on 2015 Form 1095-Cs with information individuals submitted with their 2015 tax returns. Expect the IRS to start sending notices later this year regarding potential pay or play penalties for insufficient offers during 2015.

Employer Pay or Play Penalties under IRC §4980H(b)

The unaffordable/inadequate coverage “pay or play” penalty under IRC §4980H(b) is imposed when an employer offers health coverage that is unaffordable or inadequate (i.e., doesn’t provide minimum value) and a full-time employee buys health insurance through the Marketplace with premium assistance. The unaffordable/inadequate coverage penalty is \$260 for each month that the full-time employee got premium assistance in 2015. (The penalty has been indexed to \$270 for months in 2016 but the IRS won’t attempt to assess 2016 penalties until 2017, after 2016 Form 1095-Cs and 2016 Form 1040s have been filed.)

- A health plan is “**affordable**” if the employee contribution for single coverage does not exceed 9.56% (in 2015) or 9.66% (in 2016) of an employee’s household income. Since the employer will not know the employee’s household income, the IRS provided three affordability safe harbors (Federal Poverty Line, Rate of Pay and Form W-2). If an employee was eligible for but waived affordable, adequate coverage in 2015, Line 16 of his or her Form 1095-C should have a code for the applicable safe harbor.
- A health plan provides “**minimum value**” if: (a) it is designed to pay at least 60% of the total cost of medical services for a standard population; and (b) it provides substantial coverage of physician services and in-patient hospitalizations. This is generally equivalent to a bronze level plan sold in the Marketplace.

HHS Marketplace Notice

IRS Notice

Purpose of the appeals process:

The Marketplace wants to determine whether the named individual is eligible for 2016 premium assistance.

The IRS wants to determine whether the employer is liable for a 2015 pay or play penalty for failing to offer affordable, minimum value coverage to an individual who was a FT employee in 2015.

Timing:

Expect to get additional Marketplace Notices throughout the year (when an individual applying for premium assistance names your company as his or her employer).

IRS notices are expected later this year.

Notice will be sent to:



Address provided by the individual.

Address listed in 2015 Form 1094-C.

Reasons to appeal:

The employer offered affordable, minimum value coverage to the individual for one or more months in 2016.

The employer believes it is not liable for 2015 unaffordable/inadequate coverage penalty. Reasons include:

- Individual was not employed in the months in question.
- Individual was not a FT employee in the months in question.
- Individual was enrolled in the employer's coverage in the months in question.
- The employer offered affordable, minimum value coverage for the months in question.