
COMPLIANCE ALERT



EMPLOYEE BENEFITS | October 18, 2022

IRS Releases Final Rule to Fix ACA's Family "Glitch"

On October 13, 2022, the [IRS finalized regulations](#) (the "Final Rule") intended to revise the method of determining affordability under the Affordable Care Act (ACA) for an employee's family members by considering whether the coverage offered by the employer to the employee and their family members is affordable. The final regulations are effective on December 12, 2022.

In addition, the IRS released [Notice 2022-41](#) (the "Notice"), which is effective for cafeteria plan elections effective on or after January 1, 2023, and facilitates the changes under the Final Rule by permitting plans to update their change in status rules to allow employees to prospectively revoke their election under a group health plan (excluding health FSAs) for their family members who have enrolled or intend to enroll in Marketplace coverage. Most notably, for applicable large employers, the requirement to offer "affordable" coverage to full-time employees remains tied to the cost of employee-only coverage. The rule does not require employers to make family coverage "affordable."

The details of the Final Rule and Notice are discussed in more detail below.

Background

The ACA provides for a premium tax credit (PTC) for coverage purchased in the Marketplace if individuals do not have affordable, minimum value coverage available to them under an employer-sponsored group health plan. After the ACA was enacted, the IRS interpreted the law to require affordability to be determined based on the lowest cost, self-only coverage

offered to the employee by the employer. In other words, an employer's offer of family coverage was "affordable" if the employee's cost for self-only coverage did not exceed 9.5% (as indexed) of the employee's income. Therefore, if self-only coverage offered to the employee was affordable, the employee's family members would not be eligible for a PTC if they purchased coverage in the Marketplace even if the cost of family coverage was not affordable.

Over the years, this caused significant hardship to many families as the cost of family coverage offered by employers is often significantly higher than that of self-only coverage, and many family members were denied access to PTCs if the employee declined the employer's offer of coverage for his or her family members because the coverage was cost prohibitive. Advocacy groups routinely reached out to the Executive Branch regarding their concerns about the interpretation of the law.

On January 28, 2021, President Biden issued Executive Order 14009 which directed the IRS to, among other things, review existing regulations and agency actions to determine whether the regulations or actions were inconsistent with "the policy to protect and strengthen the ACA" and to examine policies or practices that may reduce the affordability of coverage or financial assistance for coverage, including for dependents. Accordingly, the IRS began to reevaluate the prior interpretation of the law, and, in April 2022, the IRS released proposed regulations intending to address affordability of coverage for family members. Based on a renewed interpretation of the law, the proposed regulations provided

that, for purposes of determining eligibility for PTCs, affordability of employer coverage for family members (referred to as "individuals eligible to enroll in the coverage because of their relationship to an employee of the employer" or "related individuals") would be determined based on the cost of covering the employee and those family members. Therefore, the portion of the annual premium the employee must pay for coverage of the employee and eligible family members would be used to determine whether the employee's family members would be eligible for a PTC.

After the ACA was enacted, the IRS released Notice 2014-55 which was intended to address, among other things, the ability of employees to prospectively revoke their election in an employer's group health plan to enroll in Marketplace plans during the Marketplace's open enrollment or the employee is eligible for a special enrollment in the Marketplace. In this situation, if the employee was not eligible for Marketplace coverage, they could not revoke coverage for their family members to enroll in the Marketplace and would have to wait until the employer's next open enrollment period.

Final Rule and Notice 2022-41

Final Rule Related to Affordability and Eligibility for Premium Tax Credits

Under the final rule, for purposes of determining eligibility for a PTC, affordability of employer coverage for eligible family members is determined based on the employee's share of the cost of covering the employee and those family members. In the preamble to the rule, the IRS explains that they believe the new reading represents a better reading of the relevant statutes and is consistent with Congress's overall goal of expanding access to affordable health care coverage when enacting the ACA.

Additionally, the final regulations include, among other things, amendments to the rules relating to the determination of whether employer coverage provides minimum value.

Notice 2022-41

Consistent with the changes in determining affordability for family members' coverage, effective for plan years beginning in

2023, Notice 2022-41 expands current election change rules by allowing for elections for family members' coverage under an employer's non-calendar year cafeteria plan, to be prospectively revoked if the following conditions are met:

- One or more related individuals are eligible for a special enrollment period to enroll in Marketplace coverage pursuant to guidance issued by HHS and any other applicable guidance during the Marketplace's annual open enrollment period; and
- The revocation of the election of coverage under the group health plan corresponds to the intended enrollment of the related individual or related individuals in new Marketplace coverage that is effective immediately following termination of coverage under the group plan.

If adopted by the employer's cafeteria plan, this new permitted election change does not apply to employee-only coverage. Employees would still have to meet the eligibility specified in IRS Notice 2014-55 to revoke their own election under the employer's plan, which requires the employee to be eligible for Marketplace open enrollment or special enrollment. If the employee's family members qualify for a special enrollment period under the Marketplace (or enroll in Marketplace coverage during the Marketplace open enrollment), the employee would be permitted to revoke their coverage and either enroll in self-only coverage offered by the employer or Marketplace coverage, if enrolling during a Marketplace open enrollment or special enrollment period.

The employer can rely on the reasonable representation of the employee that the employee's family members have enrolled or intend to enroll in Marketplace coverage for new coverage that is effective immediately following termination of group health plan coverage.

If an employer intends to adopt this new permitted election change, then the employer must amend their cafeteria plan to permit these changes and adopt this amendment no later than the last day of the plan year that begins in 2024. The amendment can be retroactive/effective as of the first day of the 2023 plan year as long as the cafeteria plan operated in accordance with the changes within the 2023 plan year and

notified employees of the changes for the 2023 plan year; however, the plan cannot be operated in a manner to allow revocation of coverage retroactively.

Next Steps for Employers

Employers do not need to make any changes to the way they determine affordability of coverage offered to employees, as affordability for purposes of the ACA's employer shared responsibility provision (ESRP) has not changed. Whether coverage offered by the employer is "affordable" for ESRP purposes will still be determined using the lowest cost, self-only coverage offered by the employer. Employers are not penalized for failing to offer coverage that is affordable for an employee's spouses or dependents.

Additionally, if for the 2023 plan year, the employer intends to allow mid-year election changes pursuant to IRS Notice 2022-41, employers must communicate the change to employees effective not later than the beginning of the 2023 plan year and operate the plan in accordance with this change. Further, the employer must adopt an amendment to the plan no later than the last day of the plan year that begins in 2024.

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