



New Taxes and Fees under the Affordable Care Act More Headaches for Employers

PRACTICE AREAS

Benefits & Compensation

Payroll Tax & Fringe Benefits

April 5, 2013

Employers need to start preparing for three new sets of taxes and fees under the Affordable Care Act - the shared responsibility penalties that have generated so much attention, and temporary fees that will fund the Patient-Centered Outcomes Research Institute ("PCORI") and a Transitional Reinsurance Program ("TRP") for insurers that participate in the new health insurance exchanges. All three will become payable over the next year or so. The purpose of this client alert is to describe some of the basic details regarding these taxes and fees, and identify some of the more complicated questions that employers will need to address.

Shared Responsibility Taxes

The shared responsibility penalties must be paid by "applicable large employers" who fail to offer minimum essential coverage to their employees, or who offer coverage that is not affordable or does not provide minimum value. An applicable large employer is an employer with at least 50 full-time employees. The taxes apply to plan years beginning on or after January 1, 2014.

The tax is \$166.67 per month (\$2,000 divided by 12) for each full-time employee, if the employer fails to offer minimum essential coverage ("MEC") to substantially all of its full-time employees and their dependent children and at least one full-time employee receives subsidized coverage through an exchange. The penalty is calculated based on the total number of full-time employees, even if MEC is offered to some employees. A full-time employee generally is an employee who works 30 or more hours per week - this service threshold will require employers to track not only their employee headcount, but also the number of hours worked by their employees.



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If the employer provides MEC, the tax is \$250 per month (\$3,000 divided by 12) for each full-time employee whose coverage is not affordable or does not provide minimum value, and who receives subsidized coverage through an exchange. Unlike the penalty for failing to offer MEC, this penalty applies only to those employees (if any) whose coverage is not affordable or does not provide minimum value. The total tax may not exceed the tax for failing to offer MEC.

The tax will be payable upon notice from the IRS, which will be provided after the end of each calendar year. Employers also will need to report health insurance coverage information to the IRS and covered individuals. The IRS has not yet released the reporting forms.

Patient-Centered Outcomes Research Institute ("PCORI") Fee

The PCORI fee is an annual fee that will fund a federal program for comparative effectiveness research. The fee applies to plan years ending on or after October 1, 2012 and before October 1, 2019 (2012 to 2018 for calendar year plans).

The PCORI fee is calculated based on the number of "covered lives" in certain insured and self-insured health plans. The definition of covered lives includes both the primary insured employee and non-employee beneficiaries such as spouses and dependents. The fee is \$1 for each covered life for the 2012 plan year, increases to \$2 per covered life for 2013, and is indexed for inflation for future years.

The fee must be reported and paid on IRS Form 720 by July 31 after the end of each plan year. For calendar year plans, the payment for the 2012 plan year is due July 31, 2013.

Transitional Reinsurance Program ("TRP") Contribution

The TRP contribution is an annual fee intended to raise revenue for a transitional reinsurance program for insurers that participate in the health insurance exchanges that take effect in 2014. The contribution applies for 2014, 2015 and 2016.

The TRP contribution also is calculated based on "covered lives" in certain insured and self-insured health plans. As with the PCORI fee, the definition of covered lives includes both the insured employee and non-employee beneficiaries. The contribution amounts have not yet been finalized, but the estimated contribution for the 2014 calendar year is \$63 per covered life. The contribution per covered life is expected to be smaller for 2015 and 2016.



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The number of covered lives must be reported to the Department of Health and Human Services ("HHS") by November 15 of each calendar year for which the contribution is paid. HHS will then provide a notice of contribution liability, and the contribution will be paid directly to HHS.

States also are authorized to impose additional fees on certain plans. These fees would be in addition to the HHS contribution, although ERISA may preempt these state fees for certain plans.

Key Questions

Employers will need to answer the following questions to calculate the shared responsibility taxes

- How many employees does the employer have?
- How many employees work sufficient hours to be considered "full-time" employees?
- Is the employer an "applicable large employer" that is subject to the tax?
- Does the employer offer "minimum essential coverage?"
 - Is coverage affordable?
 - Does the coverage provide minimum value?

... and the following questions to calculate the PCORI and TRP fees:

- Which plans are covered by each fee?
- How many "covered lives" are in each covered plan?
- To what extent may plans be aggregated to prevent double counting?

Key Facts

Shared Responsibility Taxes

PCORI Fee

TRP Contribution

Applicable years

Take effect at the start of the 2014 plan year (no expiration date)



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2012-2018 plan years

2014-2016 calendar years

Government agency administering the fee

Treasury/IRS

Treasury/IRS

HHS

Fee due date

Payable upon notice from the IRS at the end of each year

July 31 of **following** plan year

Reporting is due November 15 of **same** calendar year

Payable from plan assets

No

No

Yes

Tax deductible

No

Unclear

Yes

Penalty for late payment



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Internal Revenue Code interest and penalties

Internal Revenue Code interest and penalties

\$100 per participant per day

Employers will need to track their employee headcounts for all three fees, but the headcounts will be determined differently in each case. For the shared responsibility taxes, employers will need to determine their full-time employees for each month, but proposed regulations would allow employers to use lookback/stability period safe harbors, with special rules for seasonal, variable hour, and high turnover employees.

For the PCORI and TRP fees, the number of covered lives may be calculated based on daily headcounts, quarterly snapshots, or participants reported on the Form 5500. The PCORI fee is based on the number of covered lives for the entire plan year, while the TRP contribution is based on the number of covered lives for the first nine months of the calendar year.

Because the PCORI and TRP fees are based on the number of covered lives in different types of plans, certain aggregation rules would prevent double counting, and/or prevent employers from disaggregating their plans to reduce the headcount. Also, the PCORI fee applies to more plans than the TRP contribution. For example, all FSAs are disregarded for purposes of the TRP contribution, but certain stand-alone FSAs are taken into account when calculating the PCORI fee.

These are just a few of the many complexities that employers will need to address. Feel free to contact the Ivins, Phillips & Barker employee benefits team to discuss these new rules.