FREQUENTLY ASKED QUESTIONS ("FAQs")
FOR USE BY INFINITI HR SOLUTIONS, INC.
WITH EMPLOYEES AND CUSTOMERS

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The Patient Protection and Affordable Care Act ("ACA") was enacted over **11** years ago. However, employers and human resource professionals continue to raise questions regarding the fundamental provisions of ACA. Employers and HR professionals also are dealing with IRS enforcement effort to ensure that proper coverage is being offered to employees. In many cases the initial IRS penalty notices are significant, since basic errors are made in the ACA reporting obligations. The purpose of this Summary is to review the basic ACA requirements and to respond to common questions received by Palmieri & Eisenberg ("P&E") from our clients.

1. **What obligation does an employer have to offer health insurance to employees?**

   ACA was enacted in March, 2010 and made sweeping changes to the health care system. ACA generally requires **"large employers"** to offer full-time employees the opportunity to enroll in meaningful, affordable health coverage under an employer-sponsored health plan or risk paying a penalty. The rules are often referred to as the employer mandate or the "pay-or-play" requirement.

2. **What is a "large" employer?**

   The mandate to offer meaningful, affordable coverage applies only to employers with an average of at least **50** full-time employees ("FTEs"), based on the prior year's data. This is referred to in the rules as an "Applicable Large Employer" or "ALE." The calculation of FTEs takes into account both full-time employees and full-time "equivalent" employees, a number based on part-time employees' hours. The regulations contain guidance to determine the number of full-time equivalent employees. For example, periods of paid leave are treated as hours worked, and seasonal workers are taken into account, but are subject to special rules.

3. **Are employees of affiliated employers required to be taken into account?**

   To determine whether the threshold of **50** full-time employees is met, employees of affiliated employers within a controlled group of entities will be counted as if they were employed by a **"single employer."** Part-time employees are converted to full-time equivalent employees and foreign employees are also counted. If the threshold is reached, the rules will then apply separately to each separate entity within the group.

4. **What does it mean for coverage to be "affordable"?**

The coverage offered by a large employer is deemed affordable if an employee's contribution for individual coverage does not exceed **9.5%** (as adjusted for inflation) of modified adjusted gross income ("MAGI") of the employee's household. Because employers generally do not have access to household income information, the ACA guidance provides **3 safe harbors** for determining affordability based on information that employers do have. A health plan is deemed affordable if any one of the conditions below is satisfied for "individual" coverage under the lowest-cost plan the employer offers that meets the **"minimum value"** ("MV") standard.

- **W-2 Safe Harbor:** The employee's annual contribution does not exceed **9.5%** (as adjusted for inflation) of the employee's wages, as reported in Box 1 of the W-2. However, remember that for the Form W-2, Box 1, Gross Income is "reduced" for Section 401(k) and Section 125 contributions. Therefore, some employers do not wish to use the Form W-2 option.

- **Rate of Pay Safe Harbor:** The employee's monthly contribution does not exceed **9.5%** (as adjusted for inflation) of the employee's hourly rate of pay multiplied by **130** or, for a salaried employee, the employee's monthly base salary. To rely upon this safe harbor, the rate of pay may not be reduced during the period under consideration. For example, an employee making **$15** per hour cannot be charged more than **$185.25** per month (i.e., **$15** x **130** hours x **9.5%**) Many employers use this method to provide certainty in setting a contribution level during the open enrollment period for health coverage for the following year that will be **deemed to be** affordable.

- **Federal Poverty Limit ("FPL") Safe Harbor:** The employee's annual contribution does not exceed **9.5%** (as adjusted for inflation) of the FPL in effect during the plan year or at some point during the **6** months prior to the beginning of the plan year. For calendar year plans, this allows for using either the **current year** FPL or the **prior year** FPL to determine affordability under the FPL safe harbor, which is useful because the current year FPL is rarely known at the time employee contributions are being determined for the Plan Year.

Example: The 2020 FPL for the lower **48** states is **$12,760**. The "affordability" percentage for 2021, as indexed for inflation is **9.83%**. For the 2021 plan year for a health plan that is using the prior year FPL to determine affordability, the maximum contribution for the year is equal to **$1,254.31** (**$12,760 x 9.83%**), and the maximum contribution per month is equal to **$104.53** per month **($1,254.31 ÷ 12**).

As long as the cost of a health plan does not exceed **$104.53** per month in 2021, using the prior year FPL, the affordability requirement is satisfied.

The employer selects the methodology it wishes to use to compute if health coverage is "affordable". For certainty most clients of P&E rely on the FPL safe harbor.

5. **Can you identify the Federal Poverty Level and the Affordability Percentage for the last few calendar years?**

Yes. Recent percentages are as follows:

Calendar Year	Prior Year's Federal Poverty Level (Since Current Year is Never Known in Time)	Affordability Percentage (Current Year)	Maximum Monthly Contribution – Prior Year Method (Self Only Coverage)
2021	**$12,760** (2020 FPL)	**9.83%**	**$104.53**
2020	**$12,490** (2019 FPL)	**9.78%**	**$101.79**
2019	**$12,140** (2018 FPL)	**9.86%**	**$99.75**
2018	**$12,060** (2017 FPL)	**9.56%**	**$96.08**
2017	**$11,880** (2016 FPL)	**9.69%**	**$95.93**
2016	**$11,770** (2015 FPL)	**9.66%**	**$94.75**
2015	**$11,670** (2014 FPL)	**9.56%**	**$92.97**

6. **How does a plan meet the "Minimum Essential Coverage" ("MEC") standard?**

A health plan is considered to provide **"minimum essential coverage"** if it provides group health benefits that are **not limited to "excepted benefits."** A traditional major medical plan and a typical health reimbursement arrangement ("HRA") are examples of health plans that generally provide "minimum essential coverage." Plans providing **only dental** or **vision** benefits, or Health Flexible Spending Accounts ("FSAs") under a Flexible Benefits Plan (a "Flex Plan"), are examples of plans that generally **do not provide** "minimum essential coverage" because they only provided "excepted benefits."

7. **How does a Health Plan meet the "minimum value" standard?**

Health plans must satisfy the **"minimum value"** standard by covering at least **60%** of the total allowed cost of health care, as determined on an actuarial basis. For this purpose, the Department of Health and Human Services ("HHS") and the IRS have made a **"Minimum Value Calculator"** available. The Minimum Value Calculator uses assumptions based on a standard population of participants typical of self-funded employer plans. It is anticipated that most standard insured or self-insured health plans will satisfy the Minimum Value requirements. The Summary of Benefits and Coverage ("SBC") for a health plan will indicate whether a health plan meets the minimum value standard.

8. **What penalties can be imposed if a large employer fails to offer the required health plan coverage?**

ACA provides potential penalties for failure to meet the shared responsibility requirement as follows:

- **Section 4980H(a) – The "A" Penalty.** For an employer that does not offer its full-time employees (and their dependents) minimum essential coverage ("MEC"), the **penalty** is **$166.67** per month, or **$2,000** annually (as indexed) for each full-time employee. The indexed penalty amount for 2021 is **$2,700** annually (**$225** per month). This penalty applies only if at least **1** full-time employee is certified as obtaining **subsidized coverage** through an Exchange. The first **30** employees will not be counted in the penalty calculation. However, for "controlled groups" the exclusion for the first **30** employees must be allocated amongst all related employers pro-rata, based upon the number of full-time employees employed by each employer.

  In order to avoid this penalty, employers must offer coverage to at least **95%** of all full-time employees.

  Employers may also offer coverage to part-time employees with no employer subsidy.

- **Section 4980H(b) – The "B" Penalty.** For an employer that offers "minimum essential coverage" to FTEs and their dependents but provides those FTEs (and their dependents) with health coverage that is **not affordable** or does not satisfy the **"minimum value"** requirement, the penalty is **$250** per month, or **$3,000** annually (as indexed) for each employee who is certified as having enrolled in subsidized coverage through an Exchange. The indexed penalty amount for 2021 is **$4,060** annually (**$338.33** per month). This penalty applies only for employees who receive the subsidy, not dependents.

Inflation adjusted penalty amounts under Section 4980H(a) and 4980H(b) for prior years are as follows:

Calendar Year	4980H(a) Penalty (Annual)	4980H(a) Penalty (Monthly)	4980H(b) Penalty (Annual)	4980H(b) Penalty (Monthly)
2021	**$2,700.00**	**$225.00**	**$4,060.00**	**$338.33**
2020	**$2,570.00**	**$214.17**	**$3,860.00**	**$321.67**
2019	**$2,500.00**	**$208.33**	**$3,750.00**	**$312.50**
2018	**$2,320.00**	**$193.33**	**$3,480.00**	**$290.00**
2017	**$2,260.00**	**$188.33**	**$3,390.00**	**$282.50**
2016	**$2,160.00**	**$180.00**	**$3,240.00**	**$270.00**
2015	**$2,080.00**	**$173.33**	**$3,120.00**	**$260.00**

9. **How can these penalties be avoided?**

To avoid penalties, a large employer must extend **minimum value, affordable health coverage** to employees and their dependents. An employee is defined under common-law rules, which generally examine the employer's level of control over how the employee performs his or her job. Leased employees, sole proprietors, partners, and **2%** shareholders in an S corporation are **not employees** for this purpose.

The following actions are recommended:

- **Evaluate** which employees are **eligible for coverage** under existing group health plans.
- **Track** hours for any **"excluded" employees**.
- **Monitor** the **income of lower paid full-time employees** receiving coverage, in relation to their premium costs for "single" (not family) coverage.
- **Confirm** each health plan **offers adequate coverage** ("minimum essential coverage" that provides "minimum value").

10. **How can a large employer monitor the full-time status of its employees?**

Although the full-time equivalency of part-time workers affects whether an employer is subject to the shared responsibility rules, only "full-time employees" must be offered coverage under the requirement. A full-time employee is defined as an individual who works at least **30** hours per week. Applicable regulations detail how to determine whether an employee meets that standard. In particular, a large employer may monitor the hours of **"variable-hour," "part-time,"** and **"seasonal"** employees over a **3** to **12** month **"measurement"** or **"look-back"** period to determine if an employee **averaged 30** or more hours per week during that period. The employer may then rely on those results for purposes of determining whether coverage should be offered to that employee during a subsequent **6** to **12** month **"stability/coverage period"** to avoid penalties.

The regulations include the concept of an **"administrative period" between a "measurement/look-back period"** and its corresponding **"stability/coverage period"** to allow employers to enroll employees determined to be full-time based on the prior measurement period. The administrative period may not exceed **90** days.

The regulations distinguish new employees from ongoing employees and include numerous examples that illustrate how an employee's full-time status is determined. If a large employer provides health coverage to all employees working over **30** hours per week, and brings employees into the health plans **when they change** from part-time to full-time status, most of the complicated rules contained in the measurement period rules need not be taken into consideration.

11. **Are any notice requirements applicable to employers under the ACA?**

Employers are required to issue a Notice under the Fair Labor Standards Act ("FLSA") explaining certain provisions of ACA to employees. A Model Notice was issued by the DOL, HHS and the IRS that may be tailored to the needs of each employer. The Notice must be provided to each employee, regardless of part-time or full-time status, and whether or not they are enrolled in a health plan. An employer is not required to provide a separate Notice to dependents, spouses or other parties eligible for coverage who are not employees. The Model Notice is old from 2011, but is still in use by employers. **[See attached – confirm.]**

The primary focus of the Notice is to:

- **Inform** employees of the existence of Exchanges, including a description of the services provided by Exchanges and the manner in which employees may contact Exchanges to request assistance.

- **Inform** employees if the employer is paying **less than 60%** of the total cost of benefits. This information is important to determine if an employee will be eligible for the **premium tax credits** if an employee purchased health coverage through an Exchange.

- **Notify** employees that if they purchase health coverage through an Exchange, the employee may lose the employer's contribution for health coverage, which is generally excluded from income for Federal income tax purposes.

The Notice was required to be given to all current employees prior to October 1, 2013. New employees hired on or after October 1, 2013 should receive the Notice within **14** days of their start date (even though the Notice is out of date).

The Notice may be mailed to employees. Alternatively, the general DOL electronic disclosure rules may be followed. Thus, if employees have **agreed to accept electronic** notifications, the Notice may be issued electronically.

12. **Are any information reporting requirements applicable to employers under the ACA?**

Yes. The ACA added Sections 6055 and 6056 to the Internal Revenue Code, which impose information reporting requirements on certain employers (as well as insurers that provide minimum essential coverage). Reporting is made using Forms 1094/1095-B and 1094/1095-C.

For applicable large employers, annual reporting on Forms 1094/1095-C is required. Form 1095-C is required to be issued to each individual who was a full-time employee at any time during the calendar year. In the case of an employer providing minimum

essential coverage through a self-insured health plan, Form 1095-C is also required to be issued to each employee who received coverage under the health plan for one or more months during the year. The Form 1095-Cs that are issued to employees are required to be filed with the IRS, along with Form 1094-C. The deadline for issuing Form 1095-C to employees is generally January 31 following the calendar year to which the Forms relate. The deadline for filing Form 1094-C and Form 1095-C with the IRS is generally February 28 following the calendar year to which the Forms relate (March 31 when filing electronically).

For employers that are not applicable large employers but that provide minimum essential coverage through a self-insured health plan, Form 1095-B is required to be issued to each individual who received coverage under the health plan for one or more months during the year. Insurers providing minimum essential coverage under fully insured plans are separately required to issue a Form 1095-B to each individual who received coverage under the fully insured plan for one or more months during the calendar year. The Form 1095-Bs that are issued to individuals are required to be filed with the IRS, along with Form 1094-B. The deadline for issuing Form 1095-B to individuals is generally January 31 following the calendar year to which the Forms relate. The deadline for filing Form 1094-B and Form 1095-B with the IRS is generally February 28 following the year to which the Forms relate (March 31 when filing electronically).

13. **Is the IRS issuing penalty notices to employers for noncompliance?**

Yes. The IRS is reviewing Forms 1094-C and 1095-C that are required to be filed under ACA. If errors or deficiencies are identified, the process with the IRS is as follows:

- IRS Letter 226J is issued to an employer usually identifying a significant penalty which is often in the million dollar range.

- An employer usually has a **30** day period of time to respond, which is generally extended upon request.

- If an employer does not respond, a second IRS Letter 226J is often issued. Alternatively, the IRS may issue Notice CP-220J, formally assessing the penalties.

  Proposed penalty assessments are often the result of erroneous information and/or Codes included on the Forms 1094-C and 1095-C that were originally filed with the IRS. Common problems include the following:

- Form 1094-C says "No" in Column a. of Part III for one or more months when it should say "Yes." Saying "No" indicates the employer **did not offer** minimum essential coverage to at least **95%** of its full-time employees (and their dependents) for the month, thereby triggering exposure to the Section 4980H(a) penalty. This problem is often identified in the IRS Letter 226J by reviewing the "ESRP Summary Table." If the information reported on the Form 1094-C (and reflected in the ESRP

Summary Table) was incorrect, **it can generally be corrected** by providing the IRS with a revised ESRP Summary Table showing the correct information.

- Form 1095-C fails to include a "safe harbor" Code in Line 16 for one or more months. For example, a full-time employee may have been offered affordable, minimum value coverage but declined to enroll for a month. In that case, Line 16 should reflect the applicable safe harbor Code based on the affordability safe harbor relied upon by the employer (e.g., Code 2H for an employer using the "rate of pay" safe harbor). Failure to include a Code may trigger exposure to the Section 4980H(b) penalty. This problem is often identified in the IRS Letter 226J by reviewing the Form 14765 included with the Letter 226J. If the information reported on Form 14765 is incorrect, **it can be corrected** by providing the IRS with the correct Line 14 and Line 16 Codes in an updated Form 14765.

If Infiniti HR has any questions regarding any of the above FAQs, please contact Frank Palmieri at fpalmieri@p-ebenefitslaw.com or Jason Lacey at jlacey@p-ebenefitslaw.com.

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